



**Njogu v City Council of Nairobi & 2 others (Environment and Land Case
Civil Suit 527 of 2007) [2023] KEELC 18329 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 527 OF 2007**

**LN MBUGUA, J
JUNE 22, 2023**

BETWEEN

ALEX NJOGU PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

FRANKLINE MUTHOMI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Judgement was entered ex-parte in plaintiff's favour by this court on May 7, 2019. The said judgement was thereafter set aside by a ruling dated March 2, 2021.
2. Subsequently, the suit was fixed for hearing on January 27, 2022. However, on that day, neither the Plaintiff nor his counsel appeared in court, thus the suit was dismissed for want of prosecution. The Plaintiff then filled the instant Notice of Motion application dated November 28, 2022, seeking orders to set aside the aforementioned dismissal orders of January 27, 2022.
3. The application is based on grounds on its face and on the plaintiff's & his counsel's, Desmond M Kibuna's supporting affidavits sworn on November 28, 2022. Mr. Kibuna deposes that on the morning of January 27, 2022, he fell ill and was unable to secure an advocate to hold his brief but he advised the Plaintiff that he could not be able to attend court. The Plaintiff confirms these averments.
4. Mr. Kibuna also avers that prior to the dismissal orders issued herein, they had already filed an appeal against this court's ruling of March 2, 2021 through which the hearing date of January 27, 2021 was set, hence they had the intention to seek orders of stay of this court's proceedings pending hearing and determination of the said appeal by the Court of Appeal.



5. Vide his submissions dated May 17, 2023, the plaintiff cites the case of *Richard Nchapi Leiyangu v. IEBC & 2 others*, Civil Appeal No. 18 of 2013 to submit that the Kenyan constitution has consistently upheld and safeguarded the right to a fair hearing which stands as a fundamental pillar of the rule of law. He also relies on the case of *Belinda Murai & 6 others v Amos Wainaina* [1978] KLR to submit that a party should not be held responsible for mistakes of his counsel.
6. The application is opposed by the 2nd defendant vide the replying affidavit sworn on February 7, 2023 by his advocate, one David Njeru Nyaga. He avers that no good reasons have been given as to why the plaintiff and his counsel failed to attend court for hearing on January 27, 2022. He also argues that there is unexplained delay in filing this application which is a sign that the Plaintiff is not keen on prosecuting the matter.
7. The submissions of the 2nd defendant are dated May 30, 2023. He contends that it is over 1 year since this court dismissed the plaintiff's suit and that such delay is inordinate and will prejudice the 2nd defendant's case. He relies on the case of *Shadrak Mwirigi Baariu v Marania Limited* [2018] eKLR as well as the case of *Richard Murigu Wamai v Attorney General & another* [2018] eKLR.
8. The issue for determination is whether this suit should be reinstated having been dismissed on January 27, 2022. The Court has discretion to decide on whether to allow or disallow an application for reinstatement of a suit. In the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR, the court stated that;

“..... For the court to exercise its discretion in favour of the applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.”
9. Has the plaintiff established sufficient cause to warrant reinstating the suit?. Firstly, the plaintiff's counsel told the court that he fell ill on the morning of January 27, 2022 and called the plaintiff to inform him of the same. Both did not table evidence to that effect; for instance, printed call logs for that date.
10. Secondly, the plaintiff's counsel claimed that he could not find anyone to hold his brief; He was however able to communicate with his client. On the same breadth, he could have relayed his predicament to the opposing counsel, but he didn't. Thus he treated these proceedings with laxity.
11. Finally, I find that the matter was initially called out in the virtual platform in the morning of January 27, 2022, and thereafter, the court proceeded in open court. In both instances, the plaintiff was absent and no plausible explanation has been advanced for his absence.
12. The provisions of section 1A (3) of the *Civil procedure Act* implore parties and their advocates to assist the court in achieving the overriding objectives of the said statute set out therein. In the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR, the Court stated that;

“....I must say that the courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously...”.
13. The facts detailed herein do not warrant the court to review the orders of January 27, 2022. Thus the application dated November 28, 2022 is found to have no merits, the same is hereby dismissed with costs to the 2nd respondent.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maina for Applicant

Njeru for 2nd Respondent

