



**Mutinda v Ogal & another (Environment & Land Case
809 of 2017) [2023] KEELC 18115 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 809 OF 2017**

**BM EBOSO, J
JUNE 20, 2023**

BETWEEN

JOYCE MUKONYO MUTINDA PLAINTIFF

AND

FREDRICK OUMA OGAL 1ST DEFENDANT

DISTRICT LAND REGISTRAR 2ND DEFENDANT

RULING

1. This suit came up for hearing on February 16, 2023. The plaintiff was not present to prosecute her claim. Consequently, her claim was dismissed and the 1st defendant's counterclaim was heard. The court subsequently reserved the matter for judgment on March 14, 2023. In the intervening period, the plaintiff brought a notice of motion dated March 8, 2023 through which she sought orders reinstating her suit and re-opening the trial. The said application is the subject of this ruling.
2. The application was brought under the cover of a certificate of urgency dated March 8, 2023 and was considered *ex parte* on March 10, 2023. The court listed the application for directions on March 14, 2023. To facilitate prior disposal of the application, on March 14, 2023, the court vacated the order that had reserved the matter for judgment and issued directions on prior disposal of the application.
3. The application was supported by an affidavit sworn on March 8, 2023 by the plaintiff's advocate, Mr John Muturi Njoroge. It was canvassed through brief written submissions dated March 30, 2023, filed by M/s Muturi Njoroge & Company Advocates.
4. The case of the plaintiff is that her advocates mis-diarized the case and the error in entering the case in the advocates diary is what led to their non-attendance on November 11, 2023. Her advocates have exhibited an excerpt of their diary relating to February 16, 2023. The excerpt does not reflect this particular case. The plaintiff urged the court to find that the omission to diarize the case for February



- 16, 2023 was inadvertent and exercise discretion in her favour by reinstating her suit and re-opening the trial.
5. The 1st defendant opposed the application through his replying affidavit sworn on March 15, 2023. His case is that the explanation tendered by the plaintiff is far-fetched and if not, a lie, because she has failed to exhibit evidence of the mis-diarized entry relating to this suit. He contends that the plaintiff has in the past lied to the court about service of summons upon him. He urges the court to reject the application. Lastly, it is the 1st defendant's plea that should this court be inclined to grant the plaintiff's application, the plaintiff should be made to pay his advocates' costs and his travelling expenses.
 6. I have considered the application; the response to the application; and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key question that falls for determination in the application. The single question which falls for determination in the application is whether the applicant has demonstrated a proper basis upon which this court may exercise the discretionary jurisdiction to reinstate her suit and re-open the trial.
 7. The court outlined in *Shah v Mbogo* [1969] EA 116 the broad principles that guide our courts when exercising jurisdiction similar to what this court is invited to exercise. The discretion of the court is wide and unlimited. It should, however, be exercised judiciously. Thirdly, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
 8. The plaintiff has come to court waving an excerpt from the office diary of her advocates relating to February 16, 2023, the date when her suit was dismissed for non-attendance and the 1st defendant's counterclaim heard ex-parte. She has explained through an affidavit sworn by her advocate that her non-attendance was occasioned by inadvertence on part of her advocate in diarizing the case. Not much has been demonstrated to controvert the explanation that the plaintiff has tendered.
 9. In the circumstances, the court will exercise discretion and reinstate the suit. The court will also re-open the trial. The plaintiff will, however, indemnify the 1st defendant by way of paying costs of the aborted trial, assessed at Kshs 25,000, payable within 30 days.
 10. In the end, the plaintiff's notice of motion dated March 8, 2023 is disposed in the following terms:
 - a. The plaintiff's suit is hereby reinstated.
 - b. Trial in this suit is re-opened.
 - c. The plaintiff shall pay the 1st defendant throw-away costs of Kshs 25,000 within 30 days. In default, the above orders shall stand vacated and the plaintiff's suit shall stand dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF JUNE 2023

B M EBOSO

JUDGE

Ms Odhiambo for the Defendant

Court Assistants: Hinga/Osodo

