



Mutinda & another v Kasaa (Sued as the Legal Administrator of the Estate of Mangondu Kingoto Musyimi) (Environment & Land Case 363 of 2017) [2023] KEELC 18174 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18174 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 363 OF 2017

TW MURIGI, J

JUNE 14, 2023

BETWEEN

TERESIA WANJIKU MUTINDA 1ST PLAINTIFF

PHILIP MUTINDA NGUMBI 2ND PLAINTIFF

AND

RICHARD BEN KASAA (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MANGONDU KINGOTO MUSYIMI) DEFENDANT

RULING

1. Before me for determination is the Motion of Motion dated 25th October, 2022 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Orders 51 and 12 Rule 7 of the *Civil Procedure Rules* in which the Plaintiffs/Applicants seek the following orders: -
 - 1) That this Court's orders dismissing the Plaintiff's application dated 3rd August, 2022 on 17/10/2022 be reviewed and/or set aside and the suit be reinstated.
 - 2) That costs of and incidental to this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Teresa Wanjiku Mutinda of even date.

The Plaintiff's Case

3. The Applicant averred that when this matter came up for mention for directions on 17/10/2022, her Advocate had challenges logging in to the virtual Court platform.
4. It was further averred that Counsel for the Defendant/Respondent was aware of the presence of the Plaintiffs' Counsel within the Court precincts and ought to have placed the file aside as is standard



practice. She further averred that her Advocate had filed and served the application dated 03/08/2022 when the said application was dismissed on 17/10/2022 for want of prosecution.

5. The Applicant further averred that her Advocate was attending to three other matters before the High Court as he was waiting to be admitted to the virtual Court platform. The Applicant averred that on the same date, she had a criminal matter before Hon. Sagero SRM where she has been charged in Criminal Case No. E186 of 2022 with assault and causing grievous bodily harm to the Defendant's wife.
6. The Applicant further averred that by the time her Advocate was being admitted onto the virtual Court platform, the matter had already been dismissed. The Applicant contended that it is unjust to dismiss the Plaintiffs' application due to network challenges facing her Advocate. She argued that the mistakes of an Advocate should not be visited upon the client. Finally, the Applicant averred that she is still desirous of prosecuting the application dated 03/08/2022 and urged the court to allow the application.

The Respondent's Case

7. Opposing the application, the Defendant vide his replying Affidavit sworn on 31st January, 2023 averred that the application is fatally defective and an abuse of the Court process. He further averred this matter was by consent of the parties herein, scheduled for mention on 17/10/2022, to confirm filing of the application by the Plaintiffs seeking orders of eviction and exhumation.
8. He contended that a response to the said application could only be filed after confirmation of filing thereof and further directions being issued thereafter. The Defendant further contended that the averment that Counsel for the Plaintiffs had three other matters before the High Court, a Criminal Case before Hon. Sagero SRM and that the Defendant's Advocate was aware of the presence of the Plaintiffs' advocate within Court precincts was not supported by any evidence.
9. He further averred that the Plaintiffs conduct offends the overriding objective of the Civil Procedure Act which calls for the expeditious disposal of civil cases. He urged the Court to dismiss the application with costs to the Respondent.
10. The application was canvassed by way of written submissions.

The Applicants Submissions

11. The Plaintiffs' submissions were filed on 27/02/2023. Counsel for the Applicant contended that jurisprudence on reinstatement of suits has set three major principles for the Court's consideration as follows:-
 - i. Reasonable reasons for the delay;
 - ii. Whether prejudice will be suffered by the Respondent if the application is granted; and
 - iii. Whether there has been delay in bringing the application.
12. On the first consideration, Counsel argued that the matter was set for mention to confirm if a response had been filed to the Plaintiffs' application dated 03/08/2022.
13. Counsel contended that the Defendant ought to have sought time to respond to the application instead of applying for dismissal of the application which they were yet to respond to.



14. On the second consideration, Counsel submitted that the Defendant will not suffer prejudice if the application is reinstated as both parties will have an opportunity to argue their respective cases. Counsel contended that the Plaintiffs will suffer great prejudice if they are denied the opportunity to be heard.
15. On the third consideration, Counsel argued that the instant application was brought within a reasonable time after the previous application was dismissed. In addition, it was submitted that the Plaintiffs are ready to abide by whatever conditions that will be set by this Court. Counsel submitted that the Plaintiffs ought to be given another chance to prosecute their application on the merits so as to prevent a great injustice. Counsel relied on the case of *[John Nahashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)](#)* [2015] eKLR to buttress his submissions.

The Defendant's Submissions

16. The Defendant's submissions were filed on 01/02/2023. Counsel submitted that the only issue for determination is whether the Applicant has met the threshold for the grant of the orders sought. Counsel further submitted that setting aside of an ex parte order is a matter of judicial discretion. It was submitted that the Plaintiffs had failed to substantiate the reasons for the failure on their Advocate's part to attend Court in accordance with Section 112 of the *[Evidence Act](#)*.
17. Lastly, Counsel submitted that the Plaintiffs have failed to establish sufficient cause in their application. Counsel urged the court to dismiss the application with costs to the Defendant. To buttress his submissions, Counsel relied on the case of *[Wachira Karani v Bildad Wachira](#)* [2016] eKLR.

Analysis and Determination

18. Having considered the application, affidavits and the rival submissions, the only issue that arises for determination is whether the court should set aside the order issued on 17/10/2023 dismissing the Plaintiffs application.
19. The overriding objective of this Court under Section 1A of the *[Civil Procedure Act](#)* is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The Plaintiffs have invoked the provisions of Order 12 Rule 7 of the *[Civil Procedure Rules](#)* which provides as follows: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
20. Setting aside an ex parte order is discretionary and the court must exercise such discretion judiciously to ensure that justice is done for both parties.
21. The Court record shows that when this matter came up for mention on 17/10/2022 for directions on the application dated 03/08/2021, Counsel for the Applicant was absent.
22. Counsel for the Respondent was present in Court and in the absence of the Applicant, he urged the court to dismiss the application for want of prosecution. The Applicant averred that her Advocate had challenges in logging in to the virtual platform.
23. In addition, the Applicant averred that her Advocate was attending to other matters listed before the High Court as he was waiting to be admitted in to the virtual platform.
24. The Respondent on the other had argued that the Applicant had not demonstrated that her Advocate had other matters before the High court and Subordinate Court or was within the court precincts.



25. I am satisfied that the Applicants have given reasonable explanation why their Advocate did not attend court on 17/10/2022.
26. The instant application was filed promptly and without delay. It is a clear indicator that the Applicants are desirous of prosecuting the application dated 03/08/2022.
27. In *Essanji & Another v Solanki* [1968] EA 218, the Court observed as follows: -
- “The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”
28. In light of the foregoing, I find that the application is merited.
20. Accordingly, the application dated 25th October, 2022 is allowed in the following terms:-
- i) The application dated 3rd August, 2022 is hereby reinstated.
 - ii) That the order of this Honourable Court made on 17th October, 2022 dismissing the Applicants application is hereby set aside.
 - iii) Each party to bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF JUNE, 2023.

HON. T. MURIGI

JUDGE

In the presence of:-

Court assistant - Mr. Kwemboi.

Hassan for the Plaintiff.

