



REPUBLIC OF KENYA



KENYA LAW
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**Prinja v Rao & another (Environment & Land Case 900 of 2014)
[2023] KEELC 18066 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 900 OF 2014**

**JA MOGENI, J
JUNE 13, 2023**

BETWEEN

RAVI DUTT PRINJA PLAINTIFF

AND

KOTNI RAMASAKARA RAO 1ST DEFENDANT

JASON SAMOKA T/A DOMICILE AUCTIONEER SERVICES 2ND DEFENDANT

RULING

1. Before this Court for determination is the 1st Defendant's Application dated March 28, 2023 brought pursuant to Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#). The Applicant is seeking for the following orders: -
 1. Spent.
 2. All court proceedings on March 8, 2023 be set aside and/or vacated and allow the 1st Defendant Advocate cross examine the Plaintiff.
 3. The Honourable Court be pleased to direct that the hearing of this matter be reopened to allow the 1st Defendant to testify and participate in the proceedings.
 4. Costs of this application be in the cause.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Cohen Amana, on behalf of the 1st Defendant herein sworn on March 28, 2023. I do not need to reproduce the same.
3. The Plaintiff has opposed the application through the Replying Affidavit of Andrew Kahura Mochu, who is the learned counsel appearing for the Plaintiff/Respondent, sworn on May 15, 2023.



4. On 6/06/2023, directions were given on filing of written submissions to the application. The 1st Defendant/Applicant submissions filed his written submissions on June 8, 2023 while the Plaintiff/Respondent's submissions were filed on June 12, 2023.

Issues for Determination

5. I have considered the Applicant's Application, both affidavits (in support and against) and the written submission and I find the main issue for determination to be whether the Application dated March 28, 2023 is merited.
6. Overriding objective in Sections 1A and 1B of the *Civil Procedure Act 2010* enjoins the Court to ensure there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties.
7. In the case of *MWK v JDK* (2020) eKLR, the Court held that:

“The right to be heard is a principle of natural justice, it is also a principle of fair trial and fair trial is one of the rights under the constitution which cannot be limited as provided under article 25 of the Constitution also under article 51 of the Constitution, it is provided; “every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”
8. It is not in dispute that the matter before this court proceeded ex parte as the 1st Defendant and his Counsel did not attend court on 8/03/2023. The reason given for non-attendance was that the 1st Defendant's counsel wrongly misdiarized the matter for March 28, 2023 and not 8/03/2023.
9. The proceedings that the 1st Defendant seeks to be set aside/vacated were for the hearing of the Plaintiff's case and *viva voce* evidence given by the Plaintiff's witness, Ravi Dutt Prinja.
10. The applicant contended that the 1st Defendant has religiously attended court throughout these proceedings as can be demonstrated from the court records. That unless the orders herein are granted the 1st Defendant will be deprived, unprocedurally, the opportunity to effectively defend the suit herein and further that unless this Honourable Court grants the orders sought herein, a miscarriage of justice which this Honourable Court ought to remedy will occur. The 1st Defendant's counsel adduced evidence in support of his contentions which included but not limited to a copy of a page from their diary and a letter dated February 21, 2023 sent to their client informing him that the next hearing would proceed on March 28, 2023.
11. In opposing the present application, the Respondent contended that the virtual hearing of the Plaintiff's case was on 21/2/2023 impeded by poor records, and the Plaintiff was stood down. Then, upon the 1st Defendant's Advocate's suggestion, the Court directed that both parties to prepare and file a joint-trial bundle, and the court set 8/03/2023 as the hearing date by consent of both parties. That on 3/03/2023, at 10.39 am, counsel sent a text message/SMS to the 1st Defendant's Advocate, Amany Cohen, requesting to know whether he was available for preparation of the joint trial bundle at his office then. That further, on 6/03/2023, at 12.49 pm, he sent the 1st Defendant's Advocate another text message requesting to know what time was convenient for him to prepare the joint bundle. That in the message, he suggested that they do that on that day while notifying him about the imminent hearing of the following day, 8/03/2023. The Respondent adduced evidence in support of his contentions; more particularly was the screenshot of the text message informing the 1st Defendant's advocate that the hearing was on 8/03/2023, marked as AKM-4.



12. Njuguna J in *FM v EKW* (2019) eKLR relied on and cited the case of *Kenya Pipeline Company Limited Vs Mafuta Products Limited* (2014) eKLR) and that of *Shah Vs Mbugo* (1967) EA 166 in finding that:

“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

13. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of *Richard Nchapai Leiyanguvs IEBC & 2 others* (2013) eKLR proceeded to state as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

14. It is true that Order 18 rule 10 of the *Civil Procedure Rules* allows the court to recall any witness at any stage of the suit and section 146 (4) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that the court may permit a witness to be recalled either for further evidence-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

15. It is clear from the foregoing provisions of the law that the law allows the recall of (a) witness who had previously testified. However, it is on record that the parties herein were present in Court on February 21, 2023 and the next hearing date was fixed by consent. The same has not been contended. The 1st Defendant’s counsel averred that the 1st Defendant’s absence was as a result of wrongly misdiarizing the matter for March 28, 2023 and not 8/03/2023. From the Plaintiff’s evidence adduced and marked as AKM-4, it is demonstrated that the Plaintiff’s counsel informed the 1st defendant’s counsel that the hearing was on 8/03/2023. If there was any confusion, the 1st Defendant’s counsel was at liberty to contact the Plaintiff’s counsel to clarify the same. But he did not. The Plaintiff proceeded with his case and closed the same, directions were given on filing of written submissions and a Judgment date was subsequently reserved.

16. The pertinent question is whether the Applicant’s explanation for no-attendance of court on 8/03/2023 constituted an excusable mistake, or was meant to deliberately delay the cause of justice, and whether the explanation given for the failure qualifies as sufficient cause.

17. In *Philip Ongom, Capt vs Catherine Nyero Owota* Civil Appeal No 14 of 2001 [2003] UGSC 16 (20 March 2003) the Court stated thus:

“...However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”



18. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* Civil Appeal No 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

“It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”

19. In the instant case, I am of the considered view that the explanation advanced by the Applicant for failing to attend court is one that cannot be entertained. It is my finding that the explanation given does not qualify for a favourable exercise of discretion.

20. In the result, I find the application is bereft of merit. It is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2023.

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MOGENI J

JUDGE

In the virtual presence of:-

Mr Mochu for Plaintiff / Respondent

Mr Cohen for the 1st Defendant/ Applicant

No appearance for the 2nd Defendant

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

