



**Sphikas v Seyanoi (Environment & Land Case 420 of 2014)  
[2023] KEELC 19166 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19166 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 420 OF 2014  
OA ANGOTE, J  
JULY 27, 2023**

**BETWEEN**

**CONSTANTINE GEORGE SPHIKAS ..... PLAINTIFF**

**AND**

**DOROTHY SEYANOI MOSCHION ALIAS FLORENCE SEYANOI  
KIBERA ..... DEFENDANT**

**RULING**

1. In the notice of motion application dated July 8, 2022, the plaintiff/ applicant sought for the following orders:
  - a. That pending hearing and determination of this application, the court reinstates this matter on a priori basis.
  - b. That this court be pleased to issue any such other orders as it deems just and expedient.
2. The application is based on the grounds that this court dismissed this suit without according the Plaintiff an opportunity to be heard; that the Plaintiff has not refused or ignored to testify but is willing to do so upon reinstatement of this suit; that the Plaintiff currently resides in Greece and his witness also resides overseas and that for this reason, they were unable to comply with the court orders to testify in open court.
3. It was deposed by the plaintiff that this court already allowed the plaintiff and another witness to testify by way of teleconference and that the plaintiff has been waiting to be heard by this Honourable Court after a long struggle with the defendant who had been adjourning this matter.



4. The defendant filed grounds of opposition dated October 31, 2022 in which she averred that this suit is fundamentally flawed, defective and is a nullity ab initio as it has been brought under order 40 rules 1 and 3 of the *Civil Procedure Rules*.
5. According to the defendant, this suit was dismissed on July 6, 2022 due to non-attendance of the plaintiff for the hearing of the matter and that the plaintiff has caused inordinate delay which is inexcusable as they have frustrated this court's effort to expeditiously determine the matter.
6. The defendant averred that the dismissal of this suit for non-attendance translates to the final decree of this court and that the plaintiff failed to render to this court a satisfactory reason why he could not attend the hearing of the case, thus warranting the dismissal of the suit. Both parties filed submissions and authorities which I have considered.

### **Analysis and Determination**

7. This court has considered the application, the parties' pleadings and the submissions filed herein. The only issue for determination is whether the court should allow the reinstatement of the suit, which was dismissed on 6<sup>th</sup> July 2022 upon the Plaintiff's failure to appear in court when the matter came up for hearing. The dismissal was in accordance with order 12 rule 3 of the *Civil Procedure Rules* which provides as follows:
  - “(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
  - (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.
  - (3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.”
8. The plaintiff has through this application asked the court to reinstate the suit. Order 12 rule 7 of the *Civil Procedure Rules* grants to this court the jurisdiction to set aside an order of dismissal of a suit due to non-attendance 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.”
9. The authority of a court to set aside an ex-parte judgement or an order of dismissal of a suit is discretionary in nature. This was affirmed by the Court of Appeal in *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede* (1982-1988) KAR, where the court held as follows:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”



10. The exercise of this discretion is to avoid hardship resulting from an accident, or excusable mistake or error. It is not intended to aid a person who deliberately seeks to obstruct justice. This was held by Harris J in *Shah vs Mbogo and another* [1967] EA 116 as follows:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”

11. This court has considered its record. Before the hearing on July 6, 2022, the matter was last in court on February 3, 2022, on which date neither the Plaintiff nor their advocate was in court. On the said date, the defendant’s counsel confirmed that they had been served with a bundle of documents and requested for 14 days to file their bundle. The court gave the defendant 30 days to file her bundle of documents and directed that the hearing to take place on July 6, 2022.

12. From the record of this court, there is no evidence that a hearing notice was served on the Plaintiff. The defendant has failed to adduce any evidence of a return of service by way of filing an affidavit of service.

13. Therefore, although the plaintiff’s counsel entered appearance on July 6, 2022, they had no notice that the matter was coming up for hearing on that day, for them to avail their witnesses, some of them who are out of the country. The court will grant the Plaintiff an opportunity to prosecute his suit.

14. For those reasons, the application dated July 8, 2022, is allowed as follows:

- a. The suit is hereby reinstated unconditionally for hearing.
- b. Each party to bear his/her own costs.

**Dated, signed and delivered virtually in Nairobi this 27<sup>th</sup> day of July, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

Ms Ajwang for Plaintiff/Applicant

Ms Sharamu h/b for Gikonyo for Defendant/Respondent

Court Assistant - Tracy

