



**Ndegwa v Kirui & others (Environment & Land Case
26 of 2019) [2023] KEELC 19038 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 26 OF 2019**

CG MBOGO, J

JULY 26, 2023

BETWEEN

JUAN NDEGWA PLAINTIFF

AND

DANIEL JERUIYOT KIRUI & OTHERS DEFENDANT

RULING

1. Before this court for determination is the Notice of Application dated June 21, 2023 filed in court on June 23, 2023 by the plaintiff/applicant herein and expressed to be brought under Sections 3, 4 and 13 of the *Environment & Land Court Act*, Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 10 Rule 11, Order 36 Rule 10, Order 50 Rule 6 and Order 51 Rule 10 (2) of the *Civil Procedure Rules* seeking the following orders: -
 1. Spent.
 2. This honourable court be pleased to review and set aside the order made on May 24, 2023, in this suit by the Hon Mr Justice Charles G Mbogo, dismissing the plaintiff's/applicant's suit.
 3. The suit herein be reinstated for trial and be heard on merit.
 4. That the costs of this motion abide the cause.
2. The application is premised on the grounds on its face. The application is also supported by the affidavit of the plaintiff/applicant and Edward Kariuki Muthee which are both sworn on even date.
3. The plaintiff/applicant in his supporting affidavit deposed that he is aware that his matter was dismissed for want of prosecution on May 24, 2023 on account of failure of his advocates to attend court for the hearing. Further, he deposed that a consent was entered between the former advocates and the current advocates on June 20, 2023 as is evidenced in the annexure to enable to plaintiff prosecute his case.



4. The plaintiff/applicant further deposed that on the date of the hearing i e May 24, 2023, he could not prosecute his own case with the prescription of the applicable law in the absence of Mr Edward Kariuki Muthee-Advocate who arrived late in court after the matter had already been dismissed. That in light of the above, dismissing the suit prejudices his interest and that Article 159 (2)(d) of the Constitution requires that justice shall be administered without undue regard to technicalities to secure substantive justice for the parties and hear the dispute on merit.
5. The plaintiff/applicant further deposed that this court is entitled to exercise discretion in his favour and that he is eager and desirous to prosecute his claim on merit to its logical conclusion.
6. The application was further supported by the affidavit of Edward Kariuki Muthee-Advocate who previously had the conduct of this matter. The counsel deposed that on the material day, he was set and ready to proceed with the hearing alongside Mrs. Maritim and while on his way to Narok from Nakuru, the public service motor vehicle he was travelling in encountered mechanical challenges, resulting in delay. For this reason, he arrived late in court at 10.35 am only to find that the matter had been dismissed.
7. The counsel further deposed that his failure to arrive in court timeously was completely inadvertent and excusable and ought not to be visited on him. Also, that he knows that as a matter of fact, the plaintiff/applicant is keen on prosecuting the matter to its logical conclusion and it would only be just and fair that the matter is reinstated and heard on merit.
8. The application was opposed by the replying affidavit of Charles Ndungu Wachira, the 43rd defendant/respondent which was sworn on July 5, 2023 and filed in court on July 10, 2023. The defendants/respondents deposed that the application is only meant to serve the selfish and myopic interests of the plaintiff/applicant for the reason that the matter has been previously adjourned on account of the plaintiff/applicant who has not been serious with the prosecution of the suit.
9. The defendants/respondents further deposed that the application can only be allowed if the order for an adjournment made on May 9, 2023 is also set aside as litigation must come to an end and the rights of all the parties herein balanced. Further, that the application seeks to perpetuate the wastage of judicial resources and time and this court has a duty to safeguard the principles of Sections 1A and 3A of the Civil Procedure Act.
10. In conclusion, the defendants/respondents deposed that no prejudice will be occasioned if the application is disallowed as the property in question has been developed and has always been in their possession.
11. The plaintiff/applicant filed a supplementary affidavit in response thereto which was on July 6, 2023. The plaintiff/applicant deposed that the replying affidavit does not oppose his application as the defendants/respondents have not signed the stated authority to act or their names are missing altogether from the said list. Also, that defendants/respondents. 1,2,6,10,11,14,19,20,21,21(a),23,32,35,39,43rd,51 and 53rd have not opposed the instant application and it is clear that not all the defendants/respondents oppose the application.
12. The plaintiff/applicant further deposed that there is nothing misleading in the application and he further contended that the averments contained in paragraphs 6, 7, 8, 9, 10, 11, and 12 of the replying affidavit are generally allusions regarding what transpired in these proceedings prior to and on the day the matter was dismissed. The plaintiff/applicant went on to reiterate the contents of his supporting affidavit that led to the dismissal of the suit and further deposed that he has met all the prerequisites for such relief and no shortfall on any aspect required has been demonstrated by the defendants/respondents as against him.



13. The application was canvassed by way of written submissions. The plaintiff filed his written submissions in court on July 5, 2023. The plaintiff/applicant raised three issues for determination as follows: -
 - a. Whether the plaintiff's application is merited.
 - b. What orders should issue, and
 - c. Who is to bear costs of the application.
14. On the first issue, the plaintiff/applicant submitted that this court is clothed with inherent power to grant orders which are necessary to meet the ends of justice pursuant to Sections 3A, 1A and 1B of the *Civil Procedure Act*.
15. The plaintiff/ applicant further submitted that he has explained the circumstances leading to the dismissal order of the suit giving rise to the application as contained in paragraphs 4 and 5 of his supporting affidavit which has not been controverted. Also, that the plaintiff's/applicant's advocate late arrival in court on the material date has been explained sufficiently and deposed to on oath. The plaintiff/applicant relied on the case of *Wachira Karani versus Bildad Wachira* [2016] eKLR.
16. By the time of writing this ruling, the defendants/respondents had not filed their written submissions. Be that as it may, I have considered the application, the replying affidavit, supplementary affidavit and the written submissions filed by the plaintiff/applicant. The only issue for determination is whether the plaintiff/applicant has satisfied this court to move it to reinstate the suit.
17. Reinstatement of a suit dismissed for want of prosecution and non-attendance is discretionary. The discretion is couched under Order 12 Rule 7 of the *Civil Procedure Rules* that provides: -

“Setting aside judgment or dismissal.

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.”
18. The legal basis for dismissal of suits for want of prosecution is founded on the principle that litigation must be expedited, and concluded by parties who come to court seeking justice. This court has a duty to assist in clearing backlogs and restoring public confidence and trust in the judiciary. Upon filing of cases, parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all as justice delayed is justice denied. Nonetheless, should there be any delay arising from a justifiable cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the court may in its discretion dismiss the action.
19. The hearing of this case was slated to proceed on May 24, 2023. During the call over of the cause list, Mr Edward Kariuki holding brief for Mr Karanja Mbugua informed the court that he was ready to proceed with one witness. The same applied to Ms Chepkemoi and Mr Kahiga who were all equally ready to proceed. This court issued time allocation of 10.30 am.
20. Later at 10.30 am, when this court called out the matter, Mr. Edward Kariuki, the counsel for the plaintiff/applicant was not present and Mr Kahiga moved this court for dismissal of the suit with costs owing to non-attendance of the plaintiff/applicant and his advocate.
21. The reasons advanced by the plaintiff/applicant and more so Mr Edward Kariuki who deposed that the motor vehicle he was travelling in encountered mechanical challenges which led to his delay in



arriving at the court in time, provide sufficient cause or reason for this court to exercise discretion. I am persuaded by the fact that during the call over, he informed the court that he was ready to proceed with one witness but later arrived late in court when the matter had already been dismissed for want of prosecution.

22. More so, I note that the application is not opposed by the 1st, 2nd, 6th, 10th, 11th, 14th, 19th, 20th, 21st, 23rd, 32nd, 35th, 39th, 43rd, 51 and the 53rd defendants/respondents and I see no prejudice that would be suffered by the defendants/respondents if the application is allowed.
23. Arising from the above, I find merit in the notice of motion application dated June 21, 2023 and the same is hereby allowed in the following terms: -
 - i. That the orders of the court issued on 24th May 2023 are hereby set aside.
 - ii. The suit herein is reinstated and the same to proceed for hearing on a priority basis.
 - iii. The costs of this application be in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 26TH day of **JULY, 2023.**

HON. MBOGO C.G.

JUDGE

26/7/2023

In the presence of:

CA:Chuma

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