



Njogu & 8 others v Thuo Investments Company Limited (Environment & Land Case 42B of 2022) [2023] KEELC 19115 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 42B OF 2022**

**JG KEMEI, J
JULY 25, 2023**

BETWEEN

**JANE WAIRIMU NJOGU 1ST PLAINTIFF
AGNES NYAMBURA MAINA 2ND PLAINTIFF
ANASTACIA WANJIKU KIVILA 3RD PLAINTIFF
AGNES WANGECHI 4TH PLAINTIFF
CATHERINE NJERI NDUATI 5TH PLAINTIFF
MARY WANJIKU NDUATI 6TH PLAINTIFF
GRACE MUTHONI WAITHAKA 7TH PLAINTIFF
MARY WAITHERA KIMANI 8TH PLAINTIFF
MARGARET WANJIRU NDUATI 9TH PLAINTIFF**

AND

THUO INVESTMENTS COMPANY LIMITED DEFENDANT

RULING

1. The ruling is with respect to the notice of motion dated May 17, 2023 filed under Sections 1A, 3, 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 51 Rule 1 of the *Civil Procedure Rules*, Articles 22, 159(2) of the *Kenya Constitution*, the inherent powers and Jurisdiction of the Court and all other enabling provisions of the law by the Applicants/Plaintiffs.
2. The Applicants seeks orders as follows:-
 - a. Spent



- b. That this Honourable Court be pleased to reinstate the Plaintiffs' suit dismissed for want of prosecution on May 16, 2023 and the same be heard on merits.
 - c. That upon hearing this application inter-partes, this Honourable Court be pleased to set aside the orders and/or Ruling given on May 16, 2023 which dismissed the suit for want of prosecution.
 - d. That costs be in the cause.
3. The application is based on the grounds set out hereunder:-
- a. That the Plaintiffs' Advocates complied with all Court directions including filing trial bundle, however during the Mention on January 23, 2023, the Advocate holding brief for Mr. Jaoko Advocate, an Advocate called Gakunju Philip wrongly diarized the matter as a Mention while the Court had indicated on May 16, 2023 that the Court gave a hearing date on January 23, 2023 but not a mention date. This is purely a mistake of the Advocate which should not get the doors of the Court shut for the litigants who are very very innocent.
 - b. That Gakunju Philip-Advocate who appeared in Court on January 23, 2023 during the Mention has sworn an Affidavit to confirm the same facts, attached to the Supporting Affidavit herein.
 - c. That this Honourable Court has an unfettered jurisdiction to correct the mistake and allow hearing of the Plaintiffs' case on merits.
 - d. That it is trite law and / or the practice that in exercising discretion, the Court's concern is to do justice between the parties and avoid hardships resulting from mistakes or inadvertence and excusable mistake and obviate hardships resulting from such mistakes.
 - e. That mistakes, faults/lapses or dilatory conduct of Counsel or his office staff should not be visited on the litigant (Plaintiffs'), Errors or faults of the Counsel or his office staff should not necessarily debar a litigant from enforcing his rights.
 - f. That the Plaintiffs' case should at least see the light of the day. Otherwise they will suffer the prejudice, noting that the Plaintiffs' are not at fault at all.
 - g. That the door of justice should not be closed to the Plaintiffs' against the Defendant because a mistake has been committed, which mistake was not committed by the Plaintiffs' directly or indirectly.
 - h. That no prejudice will be suffered by the Defendant if the case is heard on merits since he will still have a chance to argue his case.
 - i. That it is in the best interests of justice to grant the prayers sought herein.
4. The application is supported by the Affidavit of Jaoko Alexander sworn on May 17, 2023. The deponent states that the matter was misdiarised in their offices as a mention instead of a hearing. That the mistake occurred when Philip Gakunju Advocate held his brief on January 23, 2023 and misdiarised the activity for May 16, 2023.
5. That when the matter came up on May 16, 2023 he was unaware that it was a hearing hence admittedly did not prepare for it, hence the dismissal.



6. The Court was urged not to visit the mistake of Counsel upon the Applicants but instead to exercise its unfettered discretion to hear the parties in the interest of justice. See case of *Moses Muriira Maingi & 2 Others Vs. Maingi Kamuru & Another* Nyeri CA 151 of 2010 which was cited for reference.
7. Philip Fredrick Gakunju filed a Supporting Affidavit on May 10, 2023 where he deponed that on January 23, 2023 he held Mr. Jaoko's brief in the matter and during the online Court, he heard the Court state that the next activity was a mention and proceeded to diarise the same as such. That he is apologetic for the mistake and urged the Court not to hold the mistake of Counsel against the Applicants who are innocent in their quest for justice.
8. The application is opposed by the Respondent vide Replying Affidavit filed by Sharon Njoki Karitu, Defendant's Advocate who deponed that when the matter came for hearing on November 25, 2022, the Plaintiffs' Counsel informed the Court that he had no witnesses as he was of the view that the matter was coming up for a mention. That the Plaintiffs' Counsel had access to the cause list a week before and as such had ample time to acquaint himself with the activity for the day. That as an agent of the Plaintiffs his actions or inaction bind the Plaintiffs in their agency relationship.
9. On the June 13, 2023 parties argued the application orally in Court, which submissions by and large mirror the averments already on record.
10. The key issue is whether the application is merited.
11. The gist of the application is that the Court set aside the orders of dismissal issued on the May 16, 2023 and reinstate the suit for hearing.
12. It is trite that setting aside dismissal orders is a discretionary remedy. The guiding principle in the exercise of this jurisdiction was laid down in *Mbogo vs. Shah* [1968] EA 93 whereby it was stated that the Court's discretion to set aside an order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a litigant who deliberately seeks to obstruct or delay the course of justice.
13. It is the sufficiency of the explanation that sets the flow of discretion in favour of the applicant. In the instant application, the advocates for the applicant have averred that the hearing date was misdiarised as a mention instead of a hearing. Consequently, on the material date the Counsel though present online informed the Court that he had not prepared for the hearing. It is the practice that cause lists are uploaded online at the every least 5 - 7 days before the actual date of hearing. I find the explanation of the Counsel unconvincing on the grounds that he exercised diligence as Counsel he would have discovered that the matter had been causelisted for hearing. If he was in doubt he had the liberty of counterchecking with the registry or even perusing the file physically. I shall make the final orders in the end.
14. That said, I find that in this case the Counsel and the Plaintiffs conduct cannot be termed as conduct that is intended to deliberately obstruct the cause of justice. It has not been shown what prejudice the Respondent stands to suffer beyond what could be ameliorated by costs.
15. Purely in the interests of justice I allow the application on terms;
 - a. Payment of throw away costs in favour of the Respondent in the sum of Kshs 5000/- payable by the Plaintiffs.
 - b. The Plaintiffs to fix the matter for hearing within the next 15 days from the date hereof in default the suit shall stand dismissed with no further orders from this Court.



16. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Jaoko for 1st – 8th Plaintiffs

Ms. Njoki for Defendant

Court Assistants – Phyllis & Lilian

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