



**Mbuthia v Njuguna (Miscellaneous Application E018 of 2022)
[2023] KEELC 20161 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION E018 OF 2022
LN GACHERU, J
SEPTEMBER 28, 2023**

BETWEEN

ISABELLA WANJERI MBUTHIA APPLICANT

AND

JAMES WILFRED WAWERU NJUGUNA RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 3rd April 2023, brought under Section 3A of the [Civil Procedure Act](#), among other relevant provisions of law, the Applicant herein Isabella Wanjeri Mbuthia, sought for the following orders;
 - a. That orders granted on 22/2/2023, be set aside and or varied.
 - b. The Application dated 5/8/2022, be re-instated for hearing.
 - c. That status quo be maintained on the suit property until the application is heard and determined and till the application dated 5/8/2022, and the intended appeal be heard and determined.
 - d. Any other order this honourable Court may deem fit to grant.
2. The said application is premised on the following grounds;
 - a. The Applicant is more than willing to prosecute the application seeking time to appeal out of time.
 - b. There was an internal problem on the Applicant's side when the matter was called for hearing.
 - c. The Applicant wanted to seek a date to urgently dispose the pending application dated 5/8/2022.



- d. No loss or prejudice shall be occasioned to either side.
3. The Application is also supported by the Affidavit of Wanjiru Machari Advocate, dated 3rd April 2023, who averred that this matter was intended for Notice to show cause on 22nd February, 2023. That on the stated date, she had several other matters, which were coming up virtually in two other Courts as shown by annexure WM1.
 4. That she logged in using different gadgets, and when she finished addressing the matter in Nyeri Employment and Labour Relations Court(ELRC), which was called out first, she realised that the gadget she had logged in this matter had logged her out.
 5. Further that when she tried to log in again, she found that the session had ended. Therefore, her failure to attend Court was inadvertent and is highly regrettable. It was her contention that the Applicant shall suffer irreparably if the application and the whole suit is not reinstated. She also contended that the application was made without inordinate delay, and she urged the Court to reinstate the suit and the same be heard and determined on merit. She urged the Court to allow the application.
 6. The Application is opposed vide the Replying Affidavit of David Muchoki Maina, Advocate for the Respondent sworn on 14th March 2023.
 7. He averred that the matter came up for Notice to Show Cause on 22nd February, 2023, but the Applicant and/or her counsel did not appear to show cause either through filing of an Affidavit or by explaining in person the reasons for lack of prosecution of the matter. Further that though the counsel for the Applicant had right to choose which Court to log in first, it is apparent that the said Counsel chose to attend a matter at the lower Court, which matter was coming up for directions at the expensive of attending to the Notice to show cause before this Court.
 8. That since the Applicant's Counsel chose to attend to a matter that was for directions instead of a matter for Notice to Show Cause, then it is clear that the Applicant has lost interest in the prosecution of the matter and thus failure to oppose the Notice to Show Cause, via an Affidavit or otherwise. That allowing this application will defeat the purpose which the Notice to Show Cause, was intended to serve. He urged the Court to dismiss the instant application.
 9. The application was canvassed by way of written submissions. The Law Firm of Kimwere Josphat & Co. Advocates filed the written submissions on behalf of the Applicant on 6th June 2023, and submitted that the listing of the matter for Notice to Show Cause, was premature and uncalled for. That the counsel would have been able to explain the same if she had gotten a chance to do so.
 10. It was further submitted that the dismissed application was filed on 11th August, 2022. That certainly one year had not lapsed since the said application was filed. The applicant relied on Order 17 Rule 2(1) of the *Civil Procedure Rules* which provides;

“In any suit which no application has been made or any step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit”.
 11. It was submitted that the operative word being ‘one year’ then certainly the Notice to Show Cause, was premature as one year had not passed from August 2022 to February 2023 as provided by the Law. That the listing of the said matter for Notice to show cause was premature and thus the said orders should be set aside.



12. Further, that since the Application seeking to be reinstated had sought for stay of execution and/or status quo to be maintained until the intended appeal is heard and determined, then the Court should grant the said prayer for status quo to preserve the suit property. That failure to grant the said order will render the whole appeal nugatory, should the Respondent execute the impugned Judgement. It was further submitted that an order of status quo is crucial to preserve the suit property as the Respondent was awarded title of the whole suit property by the lower Court.
13. In conclusion, the Applicant submitted that it has been well explained that it was an inadvertent mistake which should not be visited upon the Applicant and since the matter was prematurely listed for Notice to Show Cause, then the Court should allow the Application.
14. The Respondent filed his submissions on 29th June 2023, through Muchoki D M & Co. Advocates, and submitted that the Notice to Show Cause, was duly served upon all the parties, and the parties were aware that they needed to explain why the suit should not be dismissed for want of prosecution. However, the Applicant did not show up and did not even file an Affidavit to explain why the suit should not be dismissed. Consequently, the suit was dismissed. The Respondent relied on the case of “*Teleposta Pension Scheme Registered Trustees vs Vicky Khadaka Liyi & Others*(2020) eKLR, where the Court held;

“The Court finds that the reason as to why parties are called upon to show cause is, so that the Court is able to determine whether the suit ought to be dismissed or not and if there is a satisfactory explanation, then the parties may be allowed to prosecute their case with conditions.
15. Therefore, the Respondent submitted that the suit was rightly dismissed as the Applicant failed to show any cause. That if the Court finds that the NTSC was premature, then the Respondent concedes that the matter was not ripe for dismissal under Order 17 Rule 2(1) of the *Civil Procedure Rules*.
16. The Court has considered the instant application, the relevant provisions of law and the written submissions and finds that the issue for determination is whether the Applicant is entitled to the orders sought.
17. The Application is anchored among other provisions of law under Order 12 (7) of the *Civil Procedure Rules*, which provides that;
 - where a Judgement has been entered or the suit has been dismissed, the Court on application may set aside the said Judgement.
18. The dismissal of the suit herein was done after the Notice to Show Cause, issued by the Court was not satisfactorily explained.
19. The power to set aside *ex parte* orders is discretionary in nature and the Court must use such discretion to come to a conclusion, and ensure that justice has been done. See the case of *Patel vs E.A. Cargo Handling Services Ltd* (1974), EA 75, where it was held;

“There are no limits on restrictions on the Judge’s discretion to set aside or vary *ex parte* Judgement, except that if he does vary the Judgement, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to Court by the Rules”.
20. The Applicant herein is seeking to have the orders issued by this Court on 22nd February 2023, set aside and/or varied and that the Application dated 5th April 2022, be reinstated. It is apparent that on



- 11th August 2022, the Applicant filed a Notice of Motion Application seeking to be allowed to file an appeal out of time.
21. This application was filed in the normal manner at the Registry. However, it was never given a hearing date, and therefore remained in the Registry without a date for the next course of action.
 22. It is also not in doubt that on 30th January 2023, Notice to Show Cause, was issued addressed to Kimwere Josephat & Co. Advocates for the Applicant and Muchoki D M & Co. Advocates for the Respondent. The Court has seen a copy of Notice to Show Cause in the Court file with a Rubber stamp from the Law Firm of Kimwere Josephat & Co. Advocates. It is therefore apparent that the said Law Firm was served with the Notice to Show Cause. However, the Court has not come across any Affidavit in the file either sworn by the Applicant nor the Advocate for the Applicant explaining reasons as to why the suit should not be dismissed for want of prosecution.
 23. Order 17 Rule 2 of the *Civil Procedure Rules* provides for issuance of Notice to Show Cause, and the parties are supposed to appear in Court and explain why the suit should not be dismissed for want of prosecution. Failure to do so, means that the Notice to Show Cause has not been explained and the Court would have no option but to dismiss the suit for want of prosecution. See the case of *Teleposta Pension Scheme Registered Trustees (supra)* where the Court had held that; the reasons as to why parties are called upon to show cause is that the Court would then be able to determine whether the suit should be dismissed or not.....
 24. The Applicant herein did not appear in Court to explain the Notice to Show Cause, nor file an Affidavit explaining the reasons for the delay and why the suit should not be dismissed for want of prosecution. Consequently, the suit was dismissed.
 25. However, the Applicant has argued that the said Notice to Show Cause dated 30th January 2023, was premature as the suit was filed on 11th August 2023, and dismissed on 22nd February 2023, which was a period less than one year. The Applicant relied on Order 17 Rule 2(1). The Court has considered the said provision of law and finds that indeed Order 17 Rule 2(1) provides that “ in any suit in which no application has been made or step taken by either party for one year, the Court may given Notice in writing to the parties to show cause why the suit should not be dismissed.....”
 26. Indeed, after the Applicant filed this suit in August 2022, she did not take any other step. The suit was lying unprosecuted in the Registry without any date for the next action. This does not augur well on the case management and clearing of backlog.
 27. However, the law is very clear that if no action period ought to be within a period of one year.
 28. In the instant suit, one year had not lapsed and the Court concurs with the Applicant that the Notice to Show Cause herein was premature. However, the Applicant is reprimanded and reminded that no party should be allowed to file a suit and then keep it pending in the Registry unprosecuted and without any date for the next Court appearance or action. The Court Registry should not be a parking place for unprosecuted matter. Cases are filed so that they can be dealt with expeditiously and avoid clogging the justice system.
 29. The Notice to Show Cause dated 30th January 2023, having been issued prematurely, the Court finds that the subsequent order of the Court issued on 22nd February 2023, should not have been issued and thus as provided by Section 3A of the *Civil Procedure Act*, the Court has power to issue and grant orders that are necessary for the end of justice to be met and to prevent abuse of the Court process.
 30. Thus, the Court finds and holds that the end of justice herein will suffice if the Orders of 22nd February 2023, dismissing the suit herein for want of prosecution are set aside. The Court proceeds to set aside



the said orders and reinstates the application dated 5th August 2022, for hearing and the same be determined on merit.

30. However, the prayer for status quo cannot be issued at this juncture as it is one of the main prayers in the Notice of Motion Application dated 5th August, 2022. The Court declines to issue any orders for status quo.
31. Having reinstated the Notice of Motion Application dated 5th August 2022, the Court directs that the said Application be fixed for hearing within the next 14 days from the date of this Ruling.
32. Consequently, the Court finds and holds that the Notice of Motion Application dated 3rd April 2023, is merited and the same is allowed in terms of prayers NO. (a) and (b) with no orders as to costs.
33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 28TH DAY OF SEPTEMBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of: -

M/s Macharia for the Applicant

Mr Muchoki for the Respondent

