Board of Trustees, Goodnews Church of East Africa v Board of Management, Eldoret Secondary School (Environment & Land Case 18 of 2019) [2025] KEELC 4150 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 4150 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 18 OF 2019

CK YANO, J

MARCH 13, 2025

BETWEEN

BOARD OF TRUSTEES, GOODNEWS CHURCH OF EAST AFRICA .... PLAINTIFF

AND

BOARD OF MANAGEMENT, ELDORET SECONDARY SCHOOL .... DEFENDANT

RULING

1. By Notice of Motion dated 4th December, 2024, the Plaintiff/Applicant sought the following orders: -
   a. Spent.
   b. THAT the court be pleased to set aside its orders of 4th December, 2024 and reinstate the Plaintiff/Applicant's application dated 16th October, 2024.
   c. THAT upon order 2 above being granted, the court be pleased to set down the Plaintiff/Applicant's application dated 16th October, 2024 for mention to confirm filing of submissions.
   d. THAT the costs be in the cause.
2. The application is based on the 11 grounds thereof and the Supporting Affidavit sworn ON 04/12/2024 by ALVIN M. N. ONYANGO, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the Applicant.
3. The Applicant's claim is in respect to Eldoret/Municipality Block 11/20. He avers that he filed an application dated 16th October, 2024; seeking to amend the Plaint. The said application was served and a response duly filed by the defendant and was set down for hearing on 4/12/2024.

4. It is the counsel's contention that on the said hearing date, he was inadvertently and regrettably logged out due to network challenges and by the time he was able to log back into the session, the suit had already been called out. That when he inquired, he was informed that the application dated 16/10/2024 had been dismissed with costs for non-attendance.

5. It is counsel's contention that his non-attendance/absence on the material day was inadvertent and caused by factors beyond his control, occasioned by network challenges. He thus urged the court not to visit the mistakes of the counsel upon the client.

6. He avers that the applicant stands to suffer substantial loss and harm as they have a valid application anchored on strong grounds with high chances of success. Further, that no prejudice will be suffered by the respondent if the orders sought are granted and the application dated 16/10/2024 is heard and determined on merit. He contends that the instant application was filed promptly and in good faith.

7. He thus urged the court to allow the application in the interest of justice and as guaranteed under Article 50 on the right to fair hearing.

8. The application was opposed. The Defendant/ Respondent filed a Replying Affidavit sworn by JANICE J. KEMBOI, an Advocate of the High Court of Kenya, having conduct of the matter on behalf of the respondent, on 06.12.2024 in response to the Application. She dismissed the application as being a non-starter and a mere after-thought, that the hearing date for the application dated 16/10/2024 was taken by consent in the presence of the applicant's advocate on record.

9. It is her contention that on the said hearing date, she attended court in the absence of the applicant and their counsel and thereafter made an application to have the application dismissed for want of prosecution and non-attendance. That the dismissal application came up after the matter had been called out severally in the absence of the applicant's counsel and the application was consequently dismissed at around 10.00am. That at the time of dismissal, the applicant's counsel had not logged in and she therefore dismissed the claims by the applicant's counsel of logging in at around 9.35am.

10. It is therefore her claim that the applicant's advocate is not being candid as to why he did not attend court on 4/12/2024. She outlined various dates since the year 2022 up to 2024, when the matter came up in the absence of the plaintiff's counsel and no explanation was tendered for the non-attendance. She thus dismissed the averments made in paragraph 9 of the Supporting Affidavit.

11. She maintained that he who comes to equity must come with clean hands and the lack of candidness on the part of the applicant's counsel should not benefit the applicant. She urged the court to dismiss the application with costs.

12. The Application was canvassed by way of written submissions. The Applicant filed their submissions dated 27.01.2025 whilst the Respondent filed their submissions dated 18.02.2025, which I have read and taken into account in arriving at my decision.

Analysis and Determination.

13. This court is of the considered opinion that the only issue arising for determination is: -

    a. Whether the Applicant has made out a case for setting aside the Orders made on 04.12.2024 to warrant the grant of the orders sought.

14. The grounds for setting aside an ex-parte order are now well settled. The court in determining whether or not to grant an order of setting aside and reinstatement ought to exercise such powers judiciously, taking into account the circumstances of each case.

15. Order 12 Rule 7 of the Civil Procedure Rules provides that:-

> “ 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.”

16. The Court of Appeal in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR, while emphasizing the factors to consider and the need to exercise discretionary powers judiciously in setting aside ex-parte orders, held that:

> “ We agree with those noble principles which go further to establish that the court's discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

17. Guided by the above decision, it is important to note that the discretionary nature of the orders sought herein ought not to be exercised based on sentiments or sympathy or arbitrarily in favor of an undeserving party. The Applicant contends that when the matter came up for hearing of the application on 4/12/2024, the Applicant’s counsel was unable to log into the virtual court session on time due to network and internet challenges and by the time he managed to log in, the matter had already been handled and the application dismissed for non-attendance. They maintained that their absence was not intentional/deliberate but was occasioned by factors beyond the Applicant’s control.

18. The Respondent on the other hand has dismissed the averments by the Applicant as an excuse and/or an afterthought and maintained that there was no demonstration of the efforts made by either the applicant or their counsel on record to communicate the alleged challenges that they were facing at the time, whether by asking another advocate to hold their brief or informing the defence counsel.

19. The question that follows is whether the reason given by the applicant’s counsel for non-attendance qualifies as a sufficient cause and amounts to a reasonable, excusable mistake or does the same impute negligence, inaction and bad faith aimed at defeating the cause of justice on the part of the applicant.

20. In defining what amounts to sufficient cause, Mativo J. (as he then was) in the case of Wachira Karani vs Bildad Wachira [2016] eKLR held that: -

> “ Sufficient cause is that cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

21. I have critically considered the rival positions taken by both parties. It is my finding that the reason advanced by the applicant’s counsel for non-attendance is sufficient and I will give him the benefit of doubt. Indeed, internet/network challenges is not an isolated case and even courts do also experience network failure and internet downtime and which greatly affects the connectivity in virtual sessions.

His non-attendance was therefore not deliberate or intentional or aimed at defeating the course of justice as alleged by the respondent.

22. In CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173 it was held that:

> "In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

23. Further, it is in the interest of justice that a party shall not be condemned unheard and/or visit the mistake of the advocate on the Applicant. While I do acknowledge that cases belong to the litigants and not their advocates, the counsel on record has demonstrated the efforts made to ascertain what happened in court in his absence and even filed the instant application on the same day of dismissal. I therefore find that this is a clear example of not visiting the mistake of the advocate on the client. The matter was coming up for the hearing of an application and the applicant may not have been aware of the network challenges experienced by his advocate on record in joining the virtual sessions.

24. Article 48 and 50 of *the Constitution* provide the right to access to justice and the right to have any dispute decided in a fair hearing before a court. I do therefore find that there is need to give the Applicant an opportunity to be heard and ventilate their application dated 16/10/2024 on merit. The right to be heard is a well-protected right in our Constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the strike of a pen, where sufficient cause has been shown (See Court of Appeal decision in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR).

25. Further, in my considered view, there is no likelihood of prejudice or injustice being occasioned on the respondent if the orders herein are granted and the application dated 16/10/2024 is reinstated. Both parties will be accorded an equal opportunity to ventilate their rival cases with regards to the application dated 16/10/24 and thereafter a judicial decision will be issued on merit.

26. In the upshot, I accordingly find that the Application dated 4th December, 2024 is merited and I proceed to allow the same on the following terms;

    a. The ex-parte orders issued on 4th December, 2024 be and is hereby set aside.

    b. The Application dated 16th October, 2024 is hereby reinstated for hearing and determination on merit.

    c. The Plaintiff/Applicant is hereby directed to file its submissions with regards to the application dated 16/10/2024 within 7 days from the date of this ruling. The Defendant/Respondent is directed to file its submissions within 7 days upon service.

    d. Matter will be mentioned on 30th April, 2025 to confirm filing of submissions and to take a ruling date. Parties are directed to strictly comply with the set timelines.

    e. Costs of the Application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN ELDORET THIS 13TH DAY OF MARCH, 2025.

HON. C. K. YANO

JUDGE

In presence of: -

Mr. Onyango for the Plaintiff/Applicant

Ms. Odwa for the Defendant/Respondent

Court Assistant – Donna