



REPUBLIC OF KENYA



**Ngure v Ndungu & another (Environment & Land Case E032 of 2022)
[2023] KEELC 21022 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E032 OF 2022
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

PETER NDUNGU NGURE PLAINTIFF

AND

PETER MUTHONI NDUNGU 1ST DEFENDANT

PALSUNTER CAPITAL LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion application dated 31/01/2023 which is expressed to be brought under Order 12 Rule 7, Order 51 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) which sought the following orders:
 - a. Spent
 - b. Spent
 - c. That the honorable court be pleased to reinstate the suit herein for hearing.
 - d. That costs of this application be provided for.
2. The application was supported by the grounds on the face of the application and the supporting affidavit of Peter Chege, counsel for the plaintiff. The grounds on the face of the application and the supporting affidavit are that the suit was set down for mention on 25/01/2023 to confirm compliance and for pre-trial directions; that he was not able to attend court on the said date as he had been taken ill in December, 2022 but had requested a fellow counsel to hold his brief; that it was after perusal of the court record on 30/01/2023 that he found out that the suit had been struck out for non-attendance and alleged failure to comply with the orders issued on 22/11/2022; that the plaintiff had fully complied with the orders issued on 22/11/2022 as he had filed all the documents ordered by the court albeit outside the timelines given by the court due to the illness of the plaintiff's counsel; that it is fair and



just that the suit herein and the orders issued on 22/11/22 be reinstated and that the defendants would not be prejudiced in any way if the application is allowed.

3. In response, the 2nd defendant filed a replying affidavit sworn on 21/02/2023 on 03/03/2023 by Samuel Macharia Kimani its director. He deposed the plaintiff filed the present suit on 24/05/2023; that the plaintiff also filed an application dated 6/07/2022; that the 2nd defendant filed a Notice of Appointment through its firm of advocates on record together with an application dated 04/10/2022; that the court delivered a ruling on both applications on 22/11/2022; that the court ordered service of summons on all the defendants within 7 days of the date of the said ruling; that the suit was mentioned on 25/01/2023 for compliance but neither the plaintiff nor his advocates were present in court; that the suit was then struck out with costs to the 2nd defendant; that the plaintiff misconstrued dismissal of a suit with striking out; that since the present suit was struck out, the plaintiff can only review it through review or on appeal of the said order in a superior court; that the plaintiff neither filed an application for review nor an appeal and so his application is unmerited and an abuse of the court process; that the plaintiff is intent to drag in court half the parties without proper service on all the parties in the suit; that the plaintiff and his advocates failed to attend court on 25/01/2023 and on 14/02/2023; that the intentional failure of the plaintiff to prosecute his case is unjustified and ought not to continue at the expense of the 2nd defendant and therefore the plaintiff's application should be dismissed.

Submissions

4. The plaintiff filed his submissions on 29/05/2023 while the 2nd defendant filed its submissions on 14/06/2023.
5. The plaintiff submitted that his suit was struck out on 25/01/2023 on the ground that he had not complied that with the orders issued on 22/11/2022. It was the plaintiff's submissions that the said orders had been complied with within the said timelines save for a supplementary list of documents that was filed on 3/01/2023. The plaintiff reiterated the grounds on the face of his application and the contents of his replying affidavit and stated that the delay in filing the supplementary list of documents was because his counsel was unwell.
6. The plaintiff then submitted on whether there was a basis for the court to exercise its discretion and set aside the orders issued on 25/01/2023, restore the temporary reliefs on preservation of the suit property and reinstate the suit for hearing. The plaintiff relied on Section 3A of the *Civil procedure Act*, Article 50 & Article 159(2) of *the Constitution* of Kenya 2010, the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] eKLR and submitted that reinstatement is meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable error or mistake.
7. The plaintiff also relied on the cases of *Philip Chemowolo & another v Augustine Kubende* [1982-88] 1KAR 103, *Shah v Mbogo & another* [1967] EA 1116, *Lochab Brothers Limited v Peter Kaluma t/a Lumumba Mumma & Kaluma Advocates & 2 Others* [2013] eKLR, *Ivita v Kyumba* [1984] KLR 441 among other cases and submitted that he is aware that the concept of timelines is a vital ingredient for efficient governance under *the constitution* but there are unavoidable circumstances that have to be considered in the interest of justice. The plaintiff concluded his submissions by relying on the case of *Belinda Murai & another v Amoi Wainaina* (No. 4) Court of Appeal at Nairobi March 8, 1979 [1989].
8. The 2nd defendant identified the following issues for determination:
 - a. Whether the plaintiff's suit was properly struck out on 25/01/2023.
 - b. Whether a suit once struck out can be reinstated.



9. On the first issue, the 2nd defendant relied on Order 2 Rule 15 of the [Civil Procedure Rules](#) and submitted that on 22/11/2022 the court ordered the plaintiff to serve the 1st plaintiff with the pleadings in this matter. The 2nd defendant also submitted that the issue of ownership of the suit property cannot be resolved between the plaintiff and the 2nd defendant and that it would need the presence of the 1st defendant. It was the 2nd defendant's submissions that the plaintiff neglected to comply with the said court order and on that basis the court struck out the plaintiff's suit.
10. The 2nd defendant relied on Order 5 Rule 17 of the [Civil Procedure Rules](#) and submitted that the plaintiff chose to disobey the court orders of 22/11/2022 which affected the disposition of this suit that could not proceed without the court being embarrassed and so it was lawfully struck out. The 2nd defendant relied on the case of [David Ondimu Kombo v Belcom Agencies Limited](#) [2021] eKLR in support of its arguments.
11. On the second issue, the 2nd defendant submitted that the plaintiff relied on the wrong provisions of the law which were Order 2 Rule 17 of the [Civil procedure Rules](#) and yet the suit had been dismissed under Order 2 Rule 15 of the [Civil Procedure Rules](#). The 2nd defendant relied on Order 12 Rule 7 of the [Civil Procedure Rules](#) and submitted that striking out a suit is not similar to dismissing a suit. It was the 2nd defendant's further submissions that once a suit has been dismissed for non-attendance, the court can be moved under Order 12 Rule 7 for reinstatement of suit but in cases where a suit has been struck out under Order 2 Rule 15, the suit cannot be reinstated and a party can only file a fresh suit.
12. In the circumstances, the court cannot exercise its discretion as it is a legal impossibility to reinstate a suit that has been struck out. The 2nd defendant relied on the case of [Harun Kiptarus Tanui v East African Portland Cement PLC](#) [2022] eKLR where it was held that when a court is called to exercise its discretion, it must do so judiciously. The 2nd defendant also relied on the case of [Law Society of Kenya v Center for Human Rights & Democracy & 12 Others](#) [2014] eKLR and submitted that the Supreme Court held that Article 159 of [the Constitution](#) was not a blanket for the misdeeds of the parties to be used as a general patch where they fail to adhere to the dictates of the law or procedure. The 2nd defendant then sought that the plaintiff's application be dismissed.

Analysis and determination

13. After considering the plaintiff's application, the response thereto and the submissions, the only issue that arises for determination is whether the present suit should be reinstated.
14. The plaintiff is seeking that the court reinstates his suit that was struck out on 25/01/2023 for failure to comply with the orders issued on 22/11/2022. The plaintiff argued that he had complied with the orders issued on 22/11/2022 albeit not in time because his counsel was unwell. The defendant opposed the said application on the ground that since the suit was struck out, the only recourse available to the plaintiff would be to apply for review of the court order or to appeal.
15. A perusal of the court record indicates that on 22/11/2022 the court issued the following orders:
 - a. The plaintiff's application dated 6/06/2022 is hereby granted in terms of prayer no (c) thereof;
 - b. The 2nd defendant's application dated 30/05/2022 is hereby dismissed.
 - c. The plaintiff shall ensure an affidavit of service of summons upon all defendants is on the record within 7 days from today;
 - d. The plaintiff shall file a trial bundle duly paginated and indexed comprising of a list and copies of all the documents he intends to rely on at the hearing as well as witness statements and a list



of witnesses within 30 days of this order and no plaintiff's documents shall be filed after this period without leave of court formally applied for with justification given.

- e. The defendants shall file a trial bundle duly paginated and indexed comprising of copies of a list and copies of all the documents that they intend to rely on at the hearing as well as witness statements and a list of witnesses within 60 days and no plaintiff's documents shall be filed after this period without leave of court formally applied for with justification given.
 - f. The time frames issued herein shall run concurrently.
 - g. The suit shall be mentioned on 25/01/2023 for the issuance of a hearing date.
 - h. Each party shall bear the costs of their respective application.
16. On 25/01/2023 the court issued the following orders:
- “The plaintiff has failed to comply with the courts orders of 22/11/2022 and this lethargy may embarrass the trial of this suit. Consequently, the present suit is hereby struck out with costs to the 2nd defendant only”
17. The 2nd defendant argued that since the suit was struck out, the plaintiff ought to have either appealed from the said order or sought for review instead of filing the present application. No provision of the law was relied on by the 2nd defendant in support of this argument. The 2nd defendant also argued that since the suit was struck out under Order 2 Rule 15 of the *Civil Procedure Rules* it cannot be reinstated under Order 12 Rule 7. As this court noted in its ruling delivered in the present matter on 22/05/2023, failure to cite the appropriate provisions of the law are not fatal to an application as they are a mere flaw that can be amended.
18. Reinstatement of a suit is discretionary. Section 3A of the *Civil Procedure Act* provides as follows:
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
19. The plaintiff's advocate on record alleges that the reason why he was not able to comply with the orders of the court issued on 22/11/2022 was because he was unwell. He further argues that that is the reason why he did not also attend court on the said date. Annexed to the plaintiff's application is a letter dated 31/1/2023 written by Dr. Obed Omuyoma indicating that Peter Chege counsel for the plaintiff was unwell and had been put on bed rest for a period of one month. That by the time Peter Chege went for review on 26/12/2022, he was found to have recovered and was fit to resume normal duties.
20. It should be noted that the matter was struck out on 25/01/2023 one month after counsel for the plaintiff was declared fit to resume normal duties. Be that as it may and as aforementioned, on 25/01/2023 the plaintiff's suit was struck out for failure to comply with the court orders issued on 22/11/2022. The orders issued on 22/11/2022 have been set out earlier in this ruling and they required the filing of an affidavit of service indicating service of the summons to enter appearance upon the defendants within seven days and the filing of a trial bundle within thirty days. A perusal of the court record indicates that the plaintiff filed the said affidavit of service on 03/01/2023 which was outside of the seven-day period granted by the court. The trial bundle was equally filed on 03/01/2023 which was also outside the thirty-day period granted by the court.
21. As indicated before, reinstatement of suit is discretionary. Given that the plaintiff's claim in the present matter is one of fraud, it is this court's view that it is in the interest of justice that the suit be reinstated.



It is also this court's view that the plaintiff may suffer great prejudice if the suit is not reinstated. Consequently, the plaintiff's application dated 31/1/2023 is allowed in terms of prayer 3. Only the 2nd defendant shall be entitled to the costs of the application which shall be borne by the applicant in any event.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

