



**Shiro & another v Akufa & another (Environment & Land Case
470 of 2014) [2023] KEELC 21699 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 470 OF 2014
DO OHUNGO, J
NOVEMBER 21, 2023**

BETWEEN

WILSON NYIKURI SHIRO 1ST PLAINTIFF

GEOFFREY LIANDA LUSENAKA 2ND PLAINTIFF

AND

PHILIMON AKUFA 1ST DEFENDANT

MESHACK SHALO J MAKABILA 2ND DEFENDANT

RULING

1. Litigation in this matter commenced on 21st November 2012 when the plaintiffs filed plaint dated 20th November 2012. The record shows that the suit was dismissed on 17th October 2018 for non-attendance. It was however reinstated on 2nd July 2019 on condition that the plaintiffs fix the suit for hearing within thirty days of the said date.
2. The record further shows that parties failed to attend court on 25th November 2020, on 8th March 2021, on 27th April 2021 and on 22nd September 2021. Notice to show cause why the suit should not be dismissed was issued on 28th October 2021 and scheduled for hearing on 11th November 2021. Come 11th November 2021, there was again no appearance by the parties. The court dismissed the suit with no order on costs.
3. The plaintiffs then filed Notice of Motion dated 29th June 2023, seeking setting aside of the order of dismissal of 11th November 2021. This ruling is in respect of the said application.
4. The application is supported by an affidavit sworn by the second plaintiff. He deposed that he instructed the firm of Kiveu & Co Advocates and that the said firm received notices but failed to notify him or even to attend court. He added that he had experienced poor health since 2021 but his health had improved and that he is now ready to prosecute the suit.



5. Although evidence of service of the application upon the defendants was availed, the defendants neither responded to the application nor attended court at its hearing. The applicants relied entirely on the supporting affidavit and urged the court to allow the application.
6. I have considered the application and the supporting affidavit. Since notice of the scheduled court attendance dates as well as that of the notice to show cause is not denied, principles that govern an application such as the present one are that the court has unfettered discretion in determining whether to set aside, the main mission being to do justice as between the parties. See *Mbogob & Another v. Shah* [1968] EA 93 and *James Kanyiita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
7. The record shows that this suit was filed in the year 2012. As noted earlier in this ruling, it was previously dismissed for non-attendance but was conditionally reinstated. Even after the reinstatement, the plaintiffs failed severally to attend court, leading to issuance of the notice to show cause. The plaintiffs admit service of the notice to show cause but blame their then advocate for failure to attend court. Given their past record of failing to attend court, I doubt if the advocate was to blame for failure to attend court on 11th November 2021.
8. Although the second plaintiff claimed that he had experienced poor health since 2021 and annexed some medical notes, I note that all those notes are in respect of treatment given in January 2021, long before the date when the matter came up for notice to show cause. Generally, the record does speak well of the plaintiffs. They did not even attend court on 2nd July 2019 when the ruling in respect of their earlier application for reinstatement was delivered. The case has been pending in court since 2012 with no tangible progress towards hearing and determination. Lastly, I take into account that the present application was filed on 30th June 2023, over one and a half years after the dismissal. That constitutes inordinate delay.
9. I find no merit in Notice of Motion dated 29th June 2023 and I therefore dismiss it. Considering that the defendants did not oppose the application, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant: E. Juma

