



**Langat v Director of Land Adjudication and Settlement & 3 others;
Sabuni & 180 others (Interested Party) (Environment & Land Petition
26 of 2014) [2023] KEELC 21588 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION 26 OF 2014
FO NYAGAKA, J
NOVEMBER 17, 2023**

BETWEEN

NATHANIEL LANGAT PLAINTIFF

AND

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 1ST
DEFENDANT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICE
KITALE 2ND DEFENDANT**

THE SECRETARY NATIONAL LAND COMMISSION 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

AND

KENNEDY MALABA SABUNI & 180 OTHERS INTERESTED PARTY

RULING

1. Before me is an Application dated 25/07/2023. It was brought by the Interested Parties, under Oder 12 Rule 7 of the *Civil Procedure Rules, 2010* and Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Article 159(2)(d) of the *Constitution* and “all other enabling provisions of the law”. While this Court is of the view that the phrase “all other provisions of the law” is meaningless and will not avail much to the Applicants and indeed any other party who cites it but does not elaborate what it is all about in submissions or otherwise, it notes that the Applicants prayed for the following orders:-



1. That the Orders of the Honorable Dr. IUR Fred Nyagaka, J made on 27th July, 2023, dismissing the Interested Parties' Application dated 10th March, 2023 for want of prosecution, together with all other consequential orders be set aside.
 2. That the Interested Parties' Application dated 10th March, 2023 be reinstated for hearing and determination on merit.
 3. That the costs of this Application be in the cause.
2. The Application was based on the grounds that the relevant application was dismissed on 25/07/2023; it was mentioned virtually to confirm the filing of submissions by the Plaintiff and the replying affidavit by the Respondents; the Interested parties had filed submissions by then; on the material date learned counsel experienced network and internet breakdown and as a result could not log into the virtual session and as a result the Application was dismissed for want of prosecution; the mistake of learned counsel should not be visited on clients; the Interested Parties have a case with high chances of success hence in the interest of justice this suit (sic) should be reinstated; the Interested Parties should not be driven away from the seat of justice unheard; they are desirous of prosecuting the Application dated 10/03/2023 hence the orders the orders ought to be set aside.
 3. The Application was supported by the Affidavit of Khisa Ronny sworn on the same date. Apart from repeating the contents of the grounds of the Application in deposition form the deponent added that natural justice demands that a party should not be condemned unheard hence the Application sought to be reinstated ought to be heard on merits. Also, that the Respondents would not suffer any prejudice if the Application was reinstated for hearing.
 4. When the Application came for inter parties hearing, the other parties indicated that they did not wish to file any response. They left it to the Court. Further, none of the parties filed or made oral submissions on the Application. That does not of itself mean that if a Respondent fails to file grounds of opposition or a replying affidavit the Application is allowed as a matter of course: it has to be determined on merits. Order 51 Rule 14(4) of the [Civil Procedure Rules, 2010](#) provides that "If a respondent fails to file to comply with sub rule (1) and (2), the application may be heard ex parte." Thus, this Court proceeds to determine the application.

Issue, Analysis and Determination

5. I have considered the Application and the law regarding setting aside of orders made in absence of parties. First of all, it should be clear that the orders of 25/07/2023 did not constitute the dismissal of the instant suit. Therefore, the ground of the application that the suit be reinstated is misplaced. Such are the simple errors that arise from careless drafting and can cost a client a good application or suit. Learned counsel will do well to be cautious next time.
6. The above notwithstanding, the court is of the view that only two issues commend for consideration herein. These are whether the application merits being granted and who to bear the costs thereof.
7. Regarding the first issue, it is not disputed that on 25/07/2023 an Application dated 10/03/2023 filed by the Interested Parties was due for hearing virtually. The hearing date had been fixed by the Court on 03/07/2023 in the presence of learned counsel for the Applicants and the Defendants but in absence of that for the Plaintiff.
8. On the material date, only learned counsel for the Plaintiff attended court virtually, and for reason of non-attendance on the part of the Applicants and there having been no explanation given for that, this Court dismissed the Application with costs to the Respondents. It is worth noting that it is not the



obligation of the court to inquire into why a party has failed to attend the session at the appointed time and place as long as the party has due notice. For this, the decision in *Solomon Ouko Onyango v Amedo Centre (K) LTD.* [2019] eKLR is instructive.

9. However, if an order has been given to the detriment or dissatisfaction of the party absent from the proceedings, under Order 12 Rule 7 of the *Civil Procedure Rules, 2010*, the court can may on an application by such a party set aside its order or reinstate a suit or application. But that is left to the discretion of the Court which may set such terms as it may deem just.
10. Be that as it may, the Applicant has the obligation to explain to the satisfaction of the Court the failure to attend. It is not automatic that for reason of the other parties being absent, disinterested or not opposed to the application it must be granted. In *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, the court laid down the tests to apply in an application for reinstatement of a suit or application. They are that the grounds upon which the application is brought are reasonable, the prejudice to be occasioned to the adverse party if reinstatement is granted is a factor, and the prejudice the Applicant would suffer if the suit or application is not reinstated.
11. In the instant application, on the one hand, the Applicants argue that they would be driven from the seat of justice if the application is not granted. They also state that the mistake on their part to attend court was of learned counsel and not the clients'. On the other hand, the Respondents do not seem to be bothered as to whether or not the application is granted. That is demonstrated by the fact that they neither opposed the application nor argued it. Instead, they left it to the court to determine. It means that they see no prejudice to be suffered if the same is granted. The applicants having passed the two tests, it is left of the Court to consider the third one.
12. Are the grounds for the Application reasonable? The Applicants argued that learned counsel for them experienced network problems and internet breakdown when trying to log into the virtual session. Of itself without deeper interrogation the reason given for failure to attend court sounds reasonable. But alas! If it is not properly analyzed, to permit parties to rely on failure to log into the virtual session on account of poor network or internet failure only would open a pandoras box and grant every and all lazy and even parties who do not bother about their matters progressing or not to always walk into court rooms and wave the reason, "my Lord" or "your honour, blame the internet!" It would not auger well for practice.
13. Even where there is failure of the internet or anticipated network failure, the parties are under obligation to inform the Court as soon as practicable that they are in a problem and unable to log into the virtual session. They do this through calling other colleagues who can have stronger internet to log into the court session and hold brief or inform the court otherwise. They cannot sit back and wait for another day to move the court to set aside proceedings. Moreover, the party has to use technology to demonstrate to the Court that indeed they attempted to log into the court session but failed. For instance, they need to demonstrate through internet logs that they indeed tried to log into the session but failed.
14. In any event, virtual courts are the same as physical ones save that the virtual ones are only technology-assisted. The practice in them should not be demeaned and the failure of technology in the process should be demystified. The Rules require that parties test their gadgets at least fifteen minutes before the virtual court session to confirm whether their gadgets and internet are working and stable respectively. The Applicants did not demonstrate that learned counsel did any of that and to their disappointment he could not log into the virtual session. The applicants and any other party who may attempt in future to rely on the failure of internet to attend a virtual court session should bear in mind



and know that it is not enough to make a mere allegation failure. There has to be a clear demonstration that they actually 'knocked at the door of the (virtual) court' but could not be permitted to enter.

15. This court could have dismissed the Application herein on account of the failure by the applicants to shown to the satisfaction of the court that they indeed tried to log into the session but they were unable to for internet failure but the Respondents cared not to oppose the application. The upshot is that the application is allowed but on condition that the Applicants pay to the Respondents costs and attend the registry within the next two weeks of this order to take a hearing date on the application dated 10/03/2023, in default of which the same will stand dismissed.
16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 17TH DAY OF NOVEMBER 2023

HON. DR.IUR FRED NYAGAKA

JUDGE

