



**Mukanda v Muganda & another (Environment & Land Case
33 of 2019) [2023] KEELC 21501 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 33 OF 2019
DO OHUNGO, J
NOVEMBER 14, 2023**

BETWEEN

LUKAS MAKALE MUKANDA PLAINTIFF

AND

SALE OCHIENG MUGANDA 1ST DEFENDANT

WILLIS NJIRI MARAMBA 2ND DEFENDANT

RULING

1. Proceedings in this matter commenced in the High Court on 9th February 2012 when the plaintiff filed Originating Summons dated February 9, 2012, wherein he claimed title to the parcel of land known as S/Wanga/Buchifi/2201 (the suit property) by adverse possession. The matter was later transferred to this court.
2. The matter came up for hearing severally, resting with September 20, 2022 when there was no appearance for the plaintiff despite service. Consequently, I dismissed the suit for non-attendance. Subsequently, the plaintiff filed Notice of Motion dated October 18, 2022, seeking setting aside of the order dismissing the suit. This ruling is in respect of the said application.
3. The application is supported by an Affidavit sworn by Phelisters M Toloi, counsel having conduct of the matter on behalf of the plaintiff. She deposed that she was engaged before another court on September 20, 2022 and that she instructed another counsel, Mr Khayumbi, to hold her brief and place the file aside. That the matter was called out when Mr Khayumbi had stepped out to make a phone call. She urged the court not to punish the plaintiff for events which were beyond his counsel's control.
4. The second defendant opposed the application through grounds of opposition dated April 20, 2023 in which he took the position inter alia that the court is *functus officio*, that there had been inordinate delay, and that the application was an afterthought and an attempt to delay recovery of costs.



5. The court was informed on December 7, 2021, prior to the dismissal, that the first defendant had passed away. He has so far not been substituted and his estate did not therefore participate in the hearing of the application.
6. A perusal of the record shows that following the dismissal, the second defendant filed his party and party bill of costs which was taxed at KShs 243,200 on December 21, 2022.
7. The application was canvassed through written submissions which both the plaintiff and the second defendant duly filed. I have considered the application, the Supporting Affidavit, the grounds of opposition and the Submissions. The issues for determination are whether the court is *functus officio* and whether the relief sought should issue.
8. The second defendant has contended that the decision to dismiss the suit was a sound and considered ruling of the court which rendered the court *functus officio* and that this is not the right forum to challenge such a decision. I do not agree with the second defendant. The suit was dismissed for non-attendance. The court has jurisdiction pursuant to order 12 rule 7 of the [Civil Procedure Rules, 2010](#), to set aside such an order. The court is thus not *functus officio*.
9. Now onto the question of whether setting aside of the dismissal should be granted. There is no dispute that the plaintiff was aware of the hearing date. When considering an application such as the present one, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogoh & another v Shah* [1968] EA 93 and reiterated in [James Kanyiiita Nderitu & another v Marios Philotas Gbikas & another](#) [2016] eKLR. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. 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.
10. It is simply claimed that counsel who was instructed to hold brief had stepped out of the courtroom to make a phone call when the matter was called out and dealt with. The second defendant has not filed any affidavit to challenge that position. I have no reason to doubt the explanation given by the plaintiff.
11. The other consideration is whether there has been inordinate delay in bringing the application. I note that while the dismissal was on September 20, 2022, the present application was filed less than forty five days later, on November 2, 2022. There was no inordinate delay. As to any prejudice to the defendants, I see none which cannot be compensated by an award of costs. Parties will still have their day in court.
12. In view of the foregoing, the plaintiff has demonstrated sufficient reasons to warrant exercise of discretion in his favour. I find merit in Notice of Motion dated October 18, 2022 and I therefore make the following orders:
 - a. The order of September 20, 2022 dismissing the plaintiff's case with costs to the second defendant is hereby set aside.
 - b. All other consequential orders including the taxation of party and party costs on December 21, 2022 and any execution process arising therefrom are set aside.
 - c. Costs of Notice of Motion dated October 18, 2022 shall be in the cause.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF NOVEMBER 2023.

D. O. OHUNGO



JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

Mr Iddi for the Defendants

Court Assistant: E. Juma

