



Mburu & 98 others v National Environment Management Authority & 6 others (Environment & Land Case 2 of 2019) [2023] KEELC 22215 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 2 OF 2019
BM EBOSO, J
DECEMBER 7, 2023**

BETWEEN

PATRICK NJENGA MBURU & 98 OTHERS PLAINTIFF

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
DEFENDANT**

NGETHE MBURU 2ND DEFENDANT

YETU LIMITED 3RD DEFENDANT

YETU LEATHER COMPANY LIMITED 4TH DEFENDANT

KIAMBU COUNTY GOVERNMENT 5TH DEFENDANT

KENYA POWER AND LIGHTING COMPANY LIMITED 6TH DEFENDANT

NAIROBI WATER AND SEWARAGE COMPANY LIMITED ... 7TH DEFENDANT

RULING

1. The subject of this ruling is the notice of motion application dated 15/3/2023, filed by the plaintiffs. Through it, the plaintiffs seek the following reliefs: (i) that the honourable court be pleased to set aside the orders given on 6/3/2023 directing dismissal of the plaintiffs' application for reinstatement of this suit dated 31/8/2022; (ii) that the honourable court be pleased to reinstate the application dated 31/8/2022 and by extension reinstate the suit for hearing and determination on merit; and (iii) that costs of this application be in the cause.
2. The application is premised on the grounds outlined in the motion and is supported by a supporting affidavit sworn by the plaintiffs' advocate, Elijah Bitange Mageto on 15/3/2023. It was canvassed through oral submissions. The plaintiffs' advocate states that on 31/8/2022, he prepared a notice of



motion application seeking reinstatement of the suit which had been dismissed pursuant to court directions issued on 7/2/2022. He adds that the said application was scheduled for hearing on 6/3/2023 but the matter was called in his absence and hence the court proceeded to dismiss the application for non-attendance.

3. The advocate states that his absence was due to logistical issues, adding that he later attended the virtual court session and upon inquiry, he was directed to the ELC Registry where he was informed by the court clerk that the application dated 31/8/2012 [sic] had been dismissed. The advocate deposes that the suit relates to environmental issues affecting the 99 plaintiffs in their area of residence, hence it is important that the suit is determined on merits. He adds that the dismissal of the application and the suit will adversely affect the plaintiffs who are innocent.
4. The 3rd and 4th defendants oppose the application through a replying affidavit sworn by Boniface Mwangi Kihia on 9/6/2023. Their case is that the plaintiffs have been indolent in prosecuting their case, as evidenced by the number of times the plaintiffs' advocate has failed to attend court and the fact that the suit was dismissed on 7/2/2022 for non-compliance with court orders. They add that to-date, the plaintiffs have not filed and served their trial bundle, in contravention of court orders.
5. The 7th defendant opposes the application through grounds of opposition dated 31/5/2023. The 7th defendant contends that on 7/2/ 2023, the court issued an order directing the plaintiffs to file and serve a single bound, paginated and indexed trial bundle within 30 days, failure to which the suit would be dismissed. It is their case that the plaintiffs did not adhere to the said court order, hence the suit was dismissed. The 7th defendant faults the plaintiffs for not making follow-ups to know the progress of their case and for filing the application to reinstate the suit almost three months after the suit had been dismissed. The 7th defendant contends that the explanation tendered by the plaintiffs' counsel that he logged into a different link when the application dated 31/8/2022 was scheduled for hearing is lame and unsubstantiated. The 7th defendant adds that the plaintiffs are indolent in prosecuting this suit, adding that the suit has been dismissed twice for want of prosecution, hence the court should not be taken for a ride. The 7th defendant urges the court to dismiss the application.
6. I have considered the application, the responses to the application, and the parties' respective oral submissions. I have also considered the relevant legal frameworks and jurisprudence. Two key questions fall for determination in the application. The first question is whether the criteria upon which a trial court exercises jurisdiction to reinstate a dismissed application has been met. The second question is what order should be made in relation to costs of the application. I will be brief in my analysis and determination.
7. The jurisdiction to reinstate an application dismissed for want of prosecution is a discretionary one. The discretion is, however, exercised on the basis of well-settled principles. The court in *Shah v Mbogo & Another* (1967) EA 116 outlined the following principle on exercise of discretionary jurisdiction:

“The discretion is intended so as to be exercised

to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”



8. One of the policy considerations that guide our trial courts when exercising this discretionary jurisdiction is the need for expeditious disposal of cases. In Mobile *Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR the Court held as follows:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

9. The plaintiffs’ advocate, Mr. Elijah Bitange Mageto, swore an affidavit explaining that his absence was due to “logistical issues.” He did not, however, give details of the logistical issues. He added that the plaintiffs were innocent.
10. In the case of *Belinda Murai & Others v Amoi Wainaina* (1978), Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake by his counsel;

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

11. Taking into account the explanation tendered by the plaintiffs and their advocate; the responses to the application dated 15/3/2023; the parties’ oral submissions; and the prevailing jurisprudence on the issues at hand, I will reluctantly reinstate the application dated 31/8/2022. The said application dated 31/8/2022 is to be set down for hearing on a priority basis. The plaintiff shall pay throw-away costs of the application assessed at Kshs 20,000 to counsel for the 3rd and 4th defendants. A similar amount will be paid to counsel for the 7th defendant. The said sums shall be paid within 30 days. In default, the order reinstating the application shall stand vacated and the plaintiff’s suit shall remain dismissed.
12. For avoidance of doubt, the limb of the application dated 15/3/2023 seeking outright reinstatement of the suit has not been granted. It is to be canvassed and considered through the application dated 31/8/2022.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF DECEMBER, 2023.

B M EBOSO

JUDGE

In the presence of:

Mr Mageto for the Plaintiffs

Ms Muthoni for the 3rd and 4th Defendants

Ms Kyalo for the 7th Defendant

Court Assistant: Dominic

