



**Kamanu v Kirima & another (Environment and Land Case Civil
Suit 1 of 2010) [2022] KEELC 3707 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 3707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1 OF 2010
LC KOMINGOI, J
APRIL 28, 2022**

BETWEEN

PATRICK MWAURA KAMANU APPLICANT

AND

JAMES NJUGUNA KIRIMA 1ST RESPONDENT

MAHIIRA HOUSING COMPANY LIMITED 2ND RESPONDENT

RULING

1. This suit was dismissed on May 28, 2015 for want of prosecution. The plaintiff/applicant then filed this application dated August 5, 2015 filed on February 29, 2016 seeking orders:-
 - a. That this honourable court be pleased to set aside the *ex parte* orders dismissing the plaintiff/applicant's suit for want of prosecution.
 - b. That the plaintiff/applicant's suit be reinstated before this honourable court and the same be heard on merits.
 - c. That the costs of this application be in the cause.
2. It is based on grounds on the face of the application, the plaintiff's supporting affidavit sworn on August 5, 2015 and the supporting affidavit sworn on August 5, 2015 by Moses G Muchoki, counsel in conduct of the matter for the plaintiff.
3. Mr Muchoki deponed that this matter was before the Deputy Registrar on February 3, 2014 where the court directed that it be taken out due to shortage of judges and a fresh date be obtained in the registry. He further deponed that plaintiff's counsel tried to obtain a date for hearing but the file was missing at the registry and they only realized in 2015 that the matter had been dismissed. He added that counsel



for the plaintiff has never been indolent in attending court whenever the matter was listed for hearing and beseeched the court to allow the application.

4. The defendant did not oppose the application. The 3rd party opposed the application vide its grounds of opposition dated April 8, 2016. It raised grounds that the application was brought after inordinate delay and that there is no sufficient explanation to warrant the grant of the orders sought.

Plaintiff's Written Submissions

5. They are dated February 23, 2022. Counsel for the plaintiff admitted that a notice to show cause was served on them but the plaintiff's advocates failed to attend court to show cause due to an inadvertent mistake on the part of the office attendant who received the notice but failed to diarize the matter.
6. It was his submission that section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. He put forward the case of Stephen Muriuki Chiuri v Alice Mwaniki & 2 Others [2017] e KLR. He added that a party should not be completely locked out of a court of justice on account of a mistake. He relied on the case of Belinda Muari & Others v Amoi Wainaina [1978] for that position. He urged the court to consider the principles governing reinstatement of a suit expounded in the case of John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation) [2015] e KLR and find that the plaintiff had presented reasonable grounds to reinstate the suit. He added that the defendant has failed to oppose the application which is proof he will not suffer prejudice if the suit is reinstated. He added that litigants are bound to make mistakes and in such instances, the court has power to determine whether such mistakes can be remedied. He relied on the case of CMC Holdings Limited v Nzioki [2004] 1 KLR for that position.
7. He also submitted that the 3rd party filed grounds of opposition and averred that the application has been brought after inordinate delay but the plaintiff filed this application as soon as the plaintiff's advocates perused the file and discovered that the suit had been dismissed for want of prosecution. He further submitted that the 3rd party did not demonstrate that the alleged delay would cause it prejudice. He urged the court to test the alleged delay with the threshold in the case of Ivita v Kyumbu [1984] e KLR. He added that since the suit was yet to be heard, the parties will not be prejudiced as they will have an opportunity to defend the suit and the court can set it for hearing to be determined at the earliest available time.
8. The 3rd party did not file submissions.
9. The sole issue for determination is whether the orders dismissing this suit should be set aside. While the court has discretion to set aside an order dismissing a suit for want of prosecution, the onus is on the party applying to set aside the order to explain sufficiently to court as to why his application merits the exercise of the court's discretion.
10. The plaintiff claimed that this matter was before the Deputy Registrar on February 3, 2014 but it was taken out due to shortage of judges. Counsel for the plaintiff annexed what he calls the cause list for that day. It is undated. The record does not indicate that the matter was before the DR as claimed. The record also indicates that the matter was last in court on April 11, 2013. The plaintiff does not account for the indolence in the 2 years before the matter was dismissed in 2015, save for several invitations to counsel for the defendant to take a hearing date. The said invitations were drafted in February and March 2014. Counsel for the plaintiff deposed that the parties could not obtain a hearing date even after inviting parties to take a hearing date because the file was missing at the registry. There is no evidence to that claim. The plaintiff claimed that he brought this application as soon as his advocates perused the file and found that the matter had been dismissed. While the application was



filed in February 2016, the application and affidavits in support were signed in August 2015. Again, the plaintiff was indolent to bring the application even after finding out that the matter had been dismissed.

11. There is an admission by plaintiff's counsel that they were served with a notice to show cause issued by this court under order 17 rule 2(1) of the Civil Procedure Rules but they failed to attend court which led to the ultimate dismissal in their absence. In my view, had plaintiff's counsel properly diarized the matter, he would have attended court to show cause and the matter may not have been dismissed. It is counsel who put the plaintiff in the mess and as such, his mistakes should not be visited on the plaintiff. I have considered that the defendant is not opposed to the application and that the matter had not been set down for hearing. I'm guided by the decision of the court in CMC Holdings Limited vs Nzioki [2004] 1 KLR 173 as cited in Josphat Oginda Sasia v Wycliffe Wabwile Kiiya [2022] eKLR that: "In law, the discretion that a court of law has, in deciding whether or not to set aside *ex-parte* order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."
12. In conclusion I find merit in this application and the same is allowed. The costs be borne by the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Kihara for the Plaintiffs

Mr. Gatumuta for the Defendant

No appearance for the 3rd Party

Steve - Court Assistant

