



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT 130 OF 2018

PETER KAHURA KIMARIPLAINTIFF

VERSUS

PETER GIKURA MBURU1st DEFENDANT

NAIROBI CITY COUNTY2nd DEFENDANT

CHIEF LAND REGISTRAR3rd DEFENDANT

RULING

1. Before this court for determination is the Plaintiffs' Notice of Motion Application dated 17th November, 2021 seeking the following reliefs;

i. That the Honourable Court be pleased to set aside the Order made on 4th November, 2021 dismissing the suit.

ii. That the Honourable Court be pleased to reinstate the suit.

iii. That costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Peter Kahura Kimari, the Plaintiff herein of the same date. The Plaintiff deponed that he is the registered proprietor of all that property known as L.R 209/7260/84 (hereinafter the *suit property*) located within Nairobi County and that he has instituted this suit to enforce his rights in respect to the suit property and to seek compensation for damages.

3. According to the Plaintiff, on 4th November, 2021, the matter came up for hearing; that it was first called out during the virtual session and thereafter set down for hearing in open court at 11:00 am; that during the virtual session, his counsel requested for an adjournment as he was in Samburu and was unable to attend to the hearing and that the court was further informed that he was logged onto the virtual platform although he was experiencing technical difficulties.

4. The Plaintiff deponed that the request for adjournment, though unopposed by counsel for the 1st Defendant, was declined by the court; that the matter was fixed for physical hearing at 11:00 am; that at 11:00 am, his counsel reiterated the request for adjournment which request was unopposed by counsel for the 1st and 2nd Defendants and that the above notwithstanding, the court proceeded to dismiss the suit for non-attendance.

5. The Plaintiff deponed that his non-attendance was not deliberate; that he was informed by counsel that the hearing would proceed virtually and the cause list also indicated that the matters would be handled virtually and that to that end, he had virtually logged onto the court at 9:00am.

6. It was the deposition of the Plaintiff that considering the distance, it would have been impossible for him to travel from Samburu County to Nairobi within 2 hours to attend the physical hearing at 11:00 am; that the suit raises triable issues against the Defendants and that he has always been keen on prosecuting the matter.

7. The Plaintiff deponed that the re-instatement of the suit will not prejudice the Defendants who are not opposed to the present application and that the interests of justice dictate that the suit be reinstated. The 1st and 3rd Defendants did not oppose the application.

8. The 2nd Defendant filed Grounds of Opposition in which it averred that:

- i. *The Applicant's application is frivolous, vexatious and an abuse of the court process and should be dismissed with costs to the Respondents.*
- ii. *The Plaintiff has not convincingly explained the reasons for failure to attend court that particular day.*
- iii. *The Applicant/Plaintiff knew the procedure for hearings at the Environment and Land Court matter was in open court and failed to attend;*
- iv. *The 2nd Defendant will incur extra costs in defending the suit afresh since it had closed its case as per the orders of the court.*
- v. *The Application lacks merit and has been brought in bad faith.*

9. None of the parties filed submissions.

Analysis & Determination

10. Having considered the application herein, the sole issue for determination is whether the suit should be reinstated.

11. This suit was dismissed on 4th November, 2021 by an order of the court for non-attendance by the Plaintiff. The dismissal was pursuant to the provisions of **Order 12 Rule 3** of the **Civil Procedure Rules** which provides that if on a day fixed for hearing only the Defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

12. Where a suit has been dismissed as aforesaid, **Order 12 Rule 7** of the **Civil Procedure Rules, 2010** gives this court discretion to reinstate the same in the following terms:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

13. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another (1967) EA 116*, where the Court of Appeal of East Africa held that;

“The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

14. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR* stated that:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

15. The Plaintiff has stated that his failure to attend court was inadvertent; that it was occasioned due to the fact that he had been informed by counsel that the matter would proceed virtually and this was confirmed by the cause list which indicated that matters would be handled virtually; that he logged onto the court at 9:00 am and that when the matter was set to proceed physically at 11:00am, he could not make it.

16. The court has keenly analyzed the record and notes that the hearing date of 4th November, 2021 was fixed by the court in the presence and knowledge of counsel for both parties. On the said hearing date, counsel for the Plaintiff was present. The Plaintiff' counsel sought for an adjournment on the grounds that the Plaintiff was in Samburu and had been unable to travel to Nairobi for the hearing. No explanation nor clarification was given as to why he had not travelled to Nairobi. The court proceeded to dismiss the matter as no good reason had been given as to why the parties could not proceed with the hearing of the matter on that day.

17. Whereas counsel informed the court that the Plaintiff was virtually logged onto the court, counsel did not seek to have the Plaintiff testify virtually. Instead, Counsel sought for an adjournment on the basis of the Plaintiffs absence.

18. In any event, it is trite that other than in the year 2020 when the covid 19 pandemic was at its peak, the Environment and Land Court has always proceeded with hearings in the open court and not virtually. It is only in exceptional circumstances, and with the leave of the court, that the court allows hearings to proceed virtually. The record does not show any request that was made by counsel prior to the morning of the hearing that he wished the Plaintiff's case to be undertaken virtually.

19. For those reasons, I decline to reinstate the suit as prayed. The Plaintiff's application dated 17th November, 2021 is dismissed with no order as to costs.

20. For avoidance of doubts, this suit is marked as having been dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF APRIL, 2022.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MS NDIRANGU FOR NDERITU FOR THE PLAINTIFF

MS. WANGU FOR KIPROP FOR THE 1ST DEFENDANTS

MS. MATUNDA FOR THE 2ND DEFENDANT

COURT ASSISTANT: JOHN OKUMU