



REPUBLIC OF KENYA



**Ndegwa & another v Chauhan & another (Land Case
7 of 2018) [2022] KEELC 3417 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 7 OF 2018
FM NJOROGE, J
MAY 30, 2022**

BETWEEN

WILLIAM GAKUO NDEGWA 1ST PLAINTIFF

DORCAS WANJIKU GAKUO 2ND PLAINTIFF

AND

AVTAR CHAUHAN 1ST DEFENDANT

MARTIN MWANGI NJEGA 2ND DEFENDANT

RULING

1. The plaintiffs *vide* the application dated 4/3/2022 and filed on 7/3/2022 seeks the following orders:
 1. Spent.
 2. That this honourable court be pleased to set aside or stay its orders of February 21, 2022 pending the hearing and determination of this application inter partes.
 3. That this honourable court be pleased to reinstate the plaintiffs' suit herein.
 4. That costs of this application be provided for.
2. The application is opposed. The 1st defendant filed his sworn replying affidavit dated 25/4/2022 on the same date.
3. According to the application and supporting affidavit of Kellen W Kimure, the grounds upon which the application is made are as follows: The counsel for the plaintiff was experiencing an internet hitch and was unable to appear in time to handle the matter and by the time he logged in to the virtual court room the matter had been called out and a new mention date set; that on 1/3/2022 being the new date, the matter was not listed and upon inquiry from the registry counsel found that the matter had been dismissed for want of prosecution; that failure of counsel to appear was not deliberate and the plaintiff



is ready and willing to prosecute the matter and that it is within the unfettered discretion of this court to allow the application and thus avoid an injustice against the plaintiffs.

4. The respondents opposed the application on the basis that on November 21, 2018 the defendant (plaintiff) failed to attend the site visit with the Surveyor as directed by the court. The plaintiff also failed to serve the order upon the Surveyor to enable him prepare the Survey Report; that on 9/5/2019 there was not court attendant on behalf of the applicant and during six mentions held between 25/7/2019 and 1/2/2020 there was no Surveyor's Report filed; that on 21/2/2022 the mention was for the purpose of confirming the filing of the surveyor's report but the plaintiff failed to appear hence the suit was dismissed on that date; that the counsel for the applicant had duty to notify the counterparts and the court of the technical hitch that barred her attendance which she never did and therefore there is no valid reason the exercise of discretion in favour of the applicant.
5. I have considered the application and the reply and the parties' submissions. The only issue for determination in the application is whether the court should exercise its discretion in favour of the applicant and set aside the dismissal order made in this matter.
6. There is no doubt that on December 15, 2021 upon a mention Ms Kimure holding brief for Mr Ikua appeared for the plaintiff in the absence of representation for the defendant and stated that the surveyor's report was not ready yet payment for it had been effected. The court order issued on that date was as follows:

“Mention on 21/2/2022 for receiving the surveyor's report. The plaintiff's counsel to follow up on the report and report on the status on 21/2/2022.”
7. The matter was instead and, in my belief, by reason of inadvertence on the part of the court registry on 21/1/2022. On that day in the absence of the parties the court gave the following order:

“The plaintiff to submit a report on the progress on the survey exercise on 3/3/2022 in default of which this suit shall stand automatically dismissed for want of prosecution.”
8. It would appear that on 3/2/2022 the matter was not listed and on 7/3/2022 the applicant brought the instant application which was placed before Omollo L J on 8/3/2022 for directions.
9. This matter was not listed for 21/2/2022 by reason of inadvertence on the part of the court registry. There is no evidence that the Deputy Registrar notified the parties of the mention held one month earlier on 21/1/2022. Potentially adverse orders were made on 21/1/2022. I find that it was not within the knowledge of the applicant's counsel that the matter would be mentioned on that date. Consequently, this court must accord counsel the benefit of doubt in that she could not have been expected to know of the orders made on 21/1/2022 while she had not been served to attend.
10. In the final analysis, I find that the application for reinstatement of suit dated 4/3/2022 has merit and I grant it in terms of prayers number 2 and 3 thereof and I also order that the costs of application shall be in the cause. The matter shall be mentioned on 22/6/2022 for fixing of a hearing date.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

