



**Ndavi v Kimanthi (Environment & Land Case 147 of 2014)  
[2022] KEELC 2396 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 147 OF 2014  
CA OCHIENG, J  
MAY 30, 2022**

**BETWEEN**

**KALONDU MULWA NDAVI ..... APPLICANT**

**AND**

**SIMON MUTUA KIMANTHI ..... RESPONDENT**

**RULING**

1. What is beforecourt for determination is the plaintiff's notice of motion application dated October 19, 2021, brought pursuant to section 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the [Civil Procedure Rules](#). The plaintiff seeks the following orders;
  - 1) Spent.
  - 2) That the honorable court be pleased to set-aside the orders made on September 22, 2021 dismissing the Plaintiff's suit and all other consequential orders.
  - 3) That the honorable court be pleased to reinstate the plaintiff's suit.
  - 4) That the costs of this Application be provided for.
2. The Application is premised on grounds on the face of it and supported by the affidavit of one Leonard Katunga Mbuvi an advocate having the conduct of this matter on behalf of the plaintiff, where he deposes that this suit came up for hearing on September 22, 2021 and he was ready to attend court. He contends that the advocate holding his brief informed court that the plaintiff who is 96 years old was unwell and could not be present in court for hearing and requested for another date which the court declined but proceeded to dismiss the plaintiff's suit. Further, a hearing date was given for the defendant's case. He insists the suit is rife with merit and warrants to be heard to stop the ongoing injustice against the plaintiff. He seeks that the plaintiff be granted a last chance to prosecute her case.



3. The defendant in opposition to the instant application filed a replying affidavit where he deposes that he is the one who has always been fixing the matter for hearing. He contends that on April 2, 2019 the plaintiff was granted a last adjournment and ordered to pay costs of Kshs. 3,000/= before the next hearing date, which costs remain unpaid to date. He avers that on July 30, 2019, the current advocates for the plaintiff were allowed to cease acting for her, only later to return in the matter vide a notice of appointment dated the March 9, 2021. Further, on November 21, 2019, the plaintiff failed to appear for hearing while on September 22, 2021, there was no prior communication from the plaintiff over her alleged illness and no proof was tendered before court. He explains that on September 22, 2021, he left the plaintiff at her home in Katangi where they are neighbours. Further, that throughout the week she was well hence the purported medical notes from Voi containing an illegible stamp are a fabrication.
4. The plaintiff's advocate Katunga Mbuvi filed a further affidavit reiterating her averments, insisting the medical records are genuine and requesting for the plaintiff to be granted the last opportunity to prosecute her case.
5. The application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the notice of motion application dated the October 19, 2021 including the respective affidavits and rivaling submissions, the only issue for determination is whether the orders issued on September 22, 2021 dismissing the plaintiff's suit should be set aside and the said suit reinstated for hearing.
7. The plaintiff in her submissions reiterated her averments as per the respective affidavits and insisted that failure to attend court was not deliberate. She relied on the annexed medical reports which indicated that she was unwell on the hearing date. She reiterated that the defendant will not suffer any prejudice if the orders sought are granted and that the issue at hand, being a land issue, is very emotive. To support her averments, she relied on the following decisions: *Peter Mumo Masave v Mutua Kilako & another*, 2019 eKLR and *Exon Investments Ltd v African Banking Corporation Limited* (2021) eKLR.
8. The defendant in his submissions relied on the averments in his replying affidavit and urged the court to be guided by the provisions of Order 17 of the *Civil Procedure Rules* which grants the court discretion to dismiss a suit for want of prosecution. He insisted that the instant application should be dismissed for being unmerited. To buttress his averments, he relied on the following decision: *Nilesh Premchad Mulji Sha & another t/a Ketan Emporium v MD Popat and others* (2016) eKLR.
9. On dismissal of a plaintiff's suit for non-attendance, Order 12 Rule 3(1) of the *Civil Procedure Rules* provides *inter alia*:
  - (1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."
10. As per the court proceedings on September 22, 2021, the court on its own motion dismissed the plaintiff's suit for non-attendance. The court further noted that the plaintiff had been indolent in prosecuting the suit, having been granted a last adjournment on November 21, 2019. The counter-claim was then fixed for hearing on October 21, 2021, when the plaintiff arrested it, with the instant application. The suit having been properly dismissed on the aforementioned circumstances, the



plaintiff's remedy then lies with the discretion of the court to reinstate the same in accordance with provisions of Order 12 Rule 7 of the Civil Procedure Act which stipulated that:

"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."

11. In the celebrated case of Ivita v Kyumbu (1984) KLR 441 the court while dealing with an application to reinstate a suit which had been dismissed for want of prosecution, stated that:

"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."

12. In the instant case, the plaintiff's counsel explained she was a senior citizen and had been unwell on the date the matter was set down for hearing, hence her failure to attend court. In support of this, they did annex medical reports to show that she had been treated on the date set for hearing. A cursory glance at the said Medical Report, which is vehemently disputed by the defendant claiming it is a fabrication, it shows that the plaintiff had contracted pneumonia and had been treated for the same. Be that as it may, the defendant except for insisting he left the plaintiff at her home in Katanga, noting that she is of advanced age, this court is inclined to extend a benefit of doubt to her. I have further had a chance to peruse the entire court record and note that the defendant had also be granted several chances before this suit had been set down for hearing. Further, the plaintiff had also attempted to prosecute the matter as, on January 22, 2018 she indeed fixed the matter for Pre-trial directions and her counsel has on several occasions been present when fixing the matter for hearing. It is the defendant who sought an adjournment on April 10, 2018 as he was yet to comply with Order 11 of the Civil Procedure Rules and he later filed an application seeking to amend his statement of Defence, which application was allowed and parties granted leave to file further pleadings on May 8, 2018. It is trite that article 50 of the Constitution grants a party a right to be heard and land matters being emotive, it will be in the interest of justice if the plaintiff's suit was reinstated to enable the court determine this matter on its merits.
13. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the decision I have quoted, I find the notice of motion application dated October 19, 2021 merited and will allow it. I proceed to set aside the orders issued on September 22, 2021 dismissing the plaintiff's suit and all other consequential orders and reinstate it. I further direct that the plaintiff's suit be set down for hearing within the next sixty (60) days from the date hereof, failure of which it will stand dismissed for want of prosecution.
14. I will award the defendant the costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30<sup>TH</sup> DAY OF MAY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

