



**Kaguongo & another v Kimondo & 3 others (Environment & Land
Case 60 of 2018) [2022] KEELC 2215 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 60 OF 2018**

EC CHERONO, J

MAY 20, 2022

BETWEEN

JOSPHAT MBOGO KAGUONGO 1ST PLAINTIFF

PETER KARANI KAGUONGO 2ND PLAINTIFF

AND

GEOFFREY MURIUKI KIMONDO 1ST DEFENDANT

JANE MUTHONI KARANI 2ND DEFENDANT

FREDRICK MIANO MURIUKI 3RD DEFENDANT

JOSEPH KINYUA MURIUKI 4TH DEFENDANT

RULING

1. By a Notice of Motion dated 8th December 2021, the plaintiff/applicant seeks the following orders-;
 - a) Spent.
 - b) That this honourable court be pleased to set aside its dismissal orders of 7th December, 2021 and reinstate the suit herein.
 - c) That upon grant of prayer No. 2 hereinabove this Honourable Court be pleased to reinstate the injunction orders against the defendants herein over the suit property pending hearing and determination of this suit
 - d) That costs of the application be provided.
2. The application is premised on ten grounds apparent on the face of the application and the affidavit of Samson Oino Otuke Advocate. In brief, the Advocate contend that plaintiffs/Applicants were previously represented by one Wangechi Munene Advocate instructed by the firm of Wangechi



Munene & Company Advocates. The learned Counsel stated that Wangechi Munene, the hitherto counsel instructed by the plaintiffs was appointed as a Magistrate and handed over the file in respect of this case to his Firm for finalization. He stated that on 6th December 2021, he requested the said hitherto Advocate M/S Wangechi Munene to call the advocates for the defendants and inform them that the matter was not likely to proceed the following day on 7/12/2021 as he was not in a position to proceed since he had just been instructed.

3. Mr Otuke Advocate stated that he was later informed by said Wangechi Munene Advocate that She called and talked to one Nderi and Wanja Kibe Advocates for the 1st, 2nd & 4th and 3rd defendants respectively and informed them of his predicament and that they agreed to take another hearing date
4. Based on this information, He told his client, the plaintiff herein not to attend court during the hearing on 7/12/2021. He stated that on the hearing date, He sent someone to hold his brief but to his surprise and shock, he later learnt that the counsel for the 3rd defendant who was also holding brief for counsel for 1st, 2nd and 4th defendants denied that she had been informed of the applicants' application for adjournment. He stated that the plaintiff's failure to attend court was not deliberate and that his mistake was made in good faith and should not be visited upon his clients, the plaintiffs herein. He said that the plaintiffs are desirous in prosecuting this case and will be prejudiced if the application is not granted.
5. In conclusion the applicants stated that they have a good case on merit as the subject of this case is a family land.
6. The application is opposed. The 3rd defendant opposed the same with grounds of opposition and a replying affidavit sworn by Eunice W. Njeru Kibe Advocate on 25/01/2022.
7. According to the said Advocate, she did not receive any information that the hitherto firm of Wangechi Munene & Company Advocates had ceased acting for the plaintiffs and a new firm of Advocates instructed to Act for the plaintiffs.
8. She stated that on 6th December, 2021 at around 5.00pm, Jane Wangechi Munene advocate called her to enquire whether their firm was ready to proceed with the hearing of this case scheduled for hearing the next day on 7/12/2021 and she answered in the affirmative and that she had even travelled from Nairobi to Embu in preparation for the hearing.
9. The learned Counsel said that Jane Wangechi Munene also informed her that she had been appointed by the judiciary as a Magistrate and that another firm of Advocates which she did not disclose had been instructed to take over the matter and that the new firm would be sending a lawyer during the hearing on 7/12/2021. She denied the allegations contained in the supporting Affidavit. In particular, the learned Counsel stated that they did not agree to adjourn the case with the hitherto advocate for the plaintiffs
10. She stated that it is wrong and dishonest for Counsel for the plaintiffs to attempt to shift blame to the defendants' Counsel for the deliberate failure by the plaintiffs/applicants and his firm to attend court on 7/12/2021. She submitted that the application lacks merit, an abuse of the court process and the same should be dismissed with costs.
11. The 1st, 2nd and 4th defendants also filed a Replying Affidavit through their Advocate on record, one James Njega Nderi who stated that on 6/12/2021, he was called by the hitherto Advocate for the plaintiffs' M/S Jane Wangechi Munene who informed him that She had been appointed by the judiciary as a Magistrate and requested and that she was in the process of instructing an advocate to take over the matter on her behalf. He stated that the learned Counsel also requested that in the event



that the new advocate would not be ready to proceed, she would be applying for adjournment. The outgoing Advocate further asked him for the contacts of the Advocate for the 3rd Defendant and he gave it to her.

Conclusion

12. I have considered the application dated 8/12/2021, the affidavits, both in support and in opposition thereto. I have also considered the submissions by Advocates appearing for the parties and the applicable law. The following facts are not in dispute-;
 1. This suit was fixed for hearing on 7/12/2021.
 2. During the hearing date, the plaintiffs were absent.
 3. The hitherto advocate for the Plaintiffs M/S Jane Wangechi Munene had just been appointed as a Magistrate.
 4. An application for adjournment was made during the hearing date by a Mr Asiimwe advocate who was holding brief for a Mr. Otuke advocate.
13. From the supporting affidavit, Mr Otuke Advocate explained that based on the information he received from the former advocate M/S Jane Wangechi Munene in respect of this case not likely to proceed for hearing on 7/12/2021, he advised his client, the plaintiffs herein not to attend court on the hearing date. The power whether to allow or not to allow an application for adjournment is a discretion of the court to be exercised judicially and not whimsically. It is mandatory for litigants to attend court every time their case is being mentioned particularly during the hearing unless their attendance is dispensed with.
14. When Mr Otuke advocate advised the plaintiffs not to attend court during the hearing of this case on 7/12/2021, he ousted the power and discretion of the court by ostensibly allowing an adjournment. Cases belong to parties/litigants and not advocates. The plaintiffs in my view took a dangerous risk by failing to attend court during the hearing of their case on 7/12/2021.
15. Order 12 Rule 3 and 7 [CPR](#) is the applicable law in regard to dismissal of suit for want of prosecution and the same provide as follows-;
 3.
 - (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
16. 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.
17. Numerous decisions have been made by the courts on the principles for the exercise of its discretion in either varying a judgment or setting aside a dismissal order under Order 7 [CPR](#). In the case of *Shah v Mbogo* [1968] E.A 93, the Court of Appeal set out the following three principles-;
 1. Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just--The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules



2. Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
 3. Thirdly, the court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.
18. From the facts of this case, the plaintiffs failed to attend court after their advocate advised them not to attend. The mistake in my view cannot be visited upon them. Though the plaintiffs themselves have not sworn an affidavit confirming the deposition by their advocate, I have no doubt that that was the position. The sum total of my analysis is that the plaintiffs should not be made to pay for the mistake of their advocate but the advocate himself must bear the consequence of his wrong advice.
19. In view of the matters aforesaid, I find that the Notice of Motion dated 8th December, 2021 is merited and the same is hereby allowed in the following terms-;
1. The Orders of this Court dismissing this suit for non-attendance and for want of prosecution on 7th December,2021 are hereby set aside.
 2. The plaintiffs' advocate to pay thrown away costs of this application to the defendants/ respondents assessed at KSHS. 10,000/=.
 3. The plaintiffs to take steps to fix this suit for hearing on priority basis within 14 days from today.
 4. The injunction orders vacated on 7th December, 2021 are hereby reinstated.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 20TH MAY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of;

Ms Ndungu h/b for Kibe for 3rd Defendant

Ms Nderi for 1st, 2nd & 4th Defendants

Mr G. Kahiga for the Plaintiff

Kabuta C/A.

