



**Njenga v Wanjiku (Environment & Land Case 1162 of 2014)  
[2022] KEELC 2262 (KLR) (16 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2262 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1162 OF 2014**

**JA MOGENI, J**

**MAY 16, 2022**

**BETWEEN**

**JOHN FORO NJENGA ..... PLAINTIFF**

**AND**

**FRANCIS KAMANDE WANJIKU ..... DEFENDANT**

**RULING**

1. The application for determination is the Notice of Motion dated 9/02/2022 and a further affidavit sworn on 11/03/2022 in which the Plaintiff/Applicant filed this application to have the suit reinstated after it has been dismissed for want of attendance and have the same reinstated for hearing and determination on merit. The Application is supported by the affidavit of John Foro Njenga the Applicant, sworn on 09/02/2022 and further affidavit sworn on 11/03/2022. It is the Plaintiff's contention that when the suit came up for hearing on 9/02/2022 the plaintiff was within the court's precincts/premises, but he was in a different court since the last time the matter was in court it was in court no. 24 and that is where he went.
2. That he was in court some minutes past 10 am and when his matter was called out, he was just getting into court. That the matter was not mentioned at 11:00 a.m but earlier and his advocate had not come to court early she had taken a sick child to the clinic. The plaintiff avers that he has prosecuted the matter since 2014 and he has never caused a delay since the matter was instituted. The plaintiff avers that he genuinely bought the suit property in 1985 and since the defendant has stated that he is willing to defend the suit, he will suffer no prejudice if the suit is reinstated.
3. The plaintiff relied on the case of *Simion Waiti Kimani & Three others v Equity Building Society* (2010) where Koome J (as she then was) held that the court had discretion to reinstate a suit dismissed for want of non-attendance.



4. The plaintiff/applicant stated that it is in the interest of justice that he be given an opportunity to ventilate his claim in a fair manner, adding that no prejudice will be suffered by the Defendant if the orders sought herein are granted. A copy of the cause list of the day is has been annexed. Further the plaintiff avers that when he heard about the dismissal of the suit for non-attendance he instructed his lawyer and they filed for reinstatement of the suit on the same day on 9/02/2022 without undue delay and that this shows that he genuinely is committed to prosecuting this suit to its logical conclusion
5. The application is opposed by the Francis Kamande Wanjiku who is the defendant /respondent through a replying affidavit by the said Francis Kamande Wanjiku sworn on 25/02/2022. He has deposed inter alia, that no plausible reason or at all has been advanced to explain why the Plaintiff and his advocates did not attend court on the material date. He contends that the matter had always been heard in court No. 33 and 29 and not Court No. 24 where the plaintiff states that he went to. Further that the practice of advocates when they fail to attend court is to seek another advocate to hold brief for them and not send their clients to address court. The defendant/respondent avers that the matter had been mentioned only once virtually in court no. 24 and that in any case all matters are always listed on the cause list and the plaintiff should have seen that the matter was in court no. 29 and not court no. 24 as he alleges.
6. The defendant/respondent avers that the advocate for the plaintiff has stated that she was from Koge & Company Advocates and therefore the law firm should have found an advocate to hold her brief if the suit at hand was important to them. The defendant/respondent blames the Plaintiff for failure to prosecute the case since 2014 when it was filed. The defendant/respondent avers that he lives in Mombasa and he incurred costs of upto Ksh. 5,000 to travel to Nairobi and a similar amount to travel back. He therefore contends that he needs to be reimbursed including the court attendance cost of the lawyer of Kesh 10,000 and thrown away costs of Ksh 20,000 in the event the court chose to reinstate the suit. The application was canvassed by way of written submissions.
7. I have considered the application, the affidavits on record, the grounds of opposition filed and the submissions made. The only issue for determination is whether or not the court should set aside the order issued on 9/02/2022 dismissing the Plaintiff's suit and have the same reinstated.
8. The case was before court for mention on 8/11/2021 for directions when the counsel for the plaintiff Ms Ng'ang'a requested the court to have the matter confirmed for hearing since all the parties had complied with Order 11 except the Third Party. The matter was fixed for hearing on 9/02/2022 all parties except the Third Party were represented. However, on 9/02/2022, only Ms Gathii, holding brief for counsel for the defendant/respondent attended court. The Plaintiff and her advocates as well as the Third Party (3<sup>rd</sup>) were not present in court. And since the defendant did not admit any part of the Plaintiff's claim, the suit was dismissed for non-attendance.
9. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate that suit. The Notice of Motion herein was filed on 9/02/2022 the same day the suit was dismissed. The same in my view was therefore filed without delay, considering that the Plaintiff was in court without his advocate.
10. In the case of Shah v Mbogo (1967) EA 116, it was stated that the exercise of discretion of the court to set aside ex-parte Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. In this case the Plaintiff has explained that he was not aware that the matter was coming up for hearing on 9/02/2022 in court no 29 but in court no 24 where he promptly attended. When he learnt that the matter was in court no. 29 he made attempts to dash to the court but the matter had already been called out and there was no advocate nor the plaintiff



and the counsel for the defendant/respondent applied for dismissal for non-attendance which is the right procedure. Following the dismissal, the plaintiff promptly filed for reinstatement of the suit on the same day. From the affidavits in support of the application, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the Plaintiff and the same should be excused. The defendant has not demonstrated that they would suffer prejudice if the orders sought are granted. I am persuaded the circumstances of this case justifies giving the Plaintiff another chance which is not only feasible but also the just thing to do. The overriding objective of the court would also come to the aid of the applicant in order for the case to be decided on merit.

11. For the foregoing reasons, I am satisfied that the notice of motion dated 9/02/2022 has merit. The application is allowed. The Order made herein on 29/02/2022 dismissing the Plaintiff's suit for non-attendance is set aside and the suit is reinstated for hearing and determination on merit. Costs of this application shall be in the cause.

12. It so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF MAY 2022.**

**MOGENI J**

**JUDGE**

**IN THE PRESENCE OF:**

.....for plaintiff

.....for defendant

Mr Vincent Owuor.....Court Assistant

