



Teita Estates Limited v Mwaluma & 91 others (Environment & Land Case 103 of 2007 & Civil Case 352 of 1998 (Consolidated)) [2022] KEELC 3468 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 103 OF 2007
& CIVIL CASE 352 OF 1998 (CONSOLIDATED)**

NA MATHEKA, J

JULY 26, 2022

BETWEEN

TEITA ESTATES LIMITED PLAINTIFF

AND

MNJALA MWALUMA 1ST DEFENDANT

GIBSOB MWABILI LEMBO & 90 OTHERS 2ND DEFENDANT

RULING

1. The application is dated February 15, 2022 and brought under article 50(1) of the Constitution, section 13 of the Environment and Land Court Act, order 12 rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;
 1. That this honourable court be pleased to certify this application as urgent and the same be heard *ex parte* in the first instance.
 2. That this honourable court be pleased to review and or set aside the order/s issued on February 15, 2022 by which it declared the suit dismissed on account of non-attendance by the plaintiff's advocate.
 3. That this honourable court be pleased to set aside and or expunge from this honourable court's record the proceedings of February 15, 2022 and in which proceedings it declared the suit be dismissed on account of non-attendance by the plaintiff's advocate.
 4. That this honourable court be pleased to reopen the plaintiff's case and set the same down for hearing at the earliest convenient date.
 5. That costs of this application be provided to the plaintiff.



2. It is based on the grounds that the matter was to proceed for hearing on day September 23, 2021 wherein the plaintiff and its advocate were ready for the hearing. The matter did not proceed on the September 23, 2021 for the reasons that; The defendant and their advocate did not attend court on that date; the defendant had filed a notice of change of advocate from the firm of Were and Company Advocates to Machora Motuka and Company Advocates; The defendant had filed an application for dismissal of suit for want of prosecution.
3. The plaintiff/advocate responded to the application and included a reply that clearly indicated that its e-mail address was Litigatio@cms-di.com. While the parties awaited the ruling from court, the defendant's, through their e-mail address jnachoramotukaadvocates@gmail.com and maghangahebron2@gmail.com, attempted to negotiate the matter and communicated regularly with the plaintiff advocate's via their email being litigation@cms-di.com, and 1 ob. Achoki@CMS- DI.com
4. The court delivered its ruling on the above application on the November 9, 2021. Under the ruling the application was dismissed with costs and the parties were directed to pick a hearing date at the registry. The plaintiff appeared before the registry on the November 12, 2021 to pick a date but the file was missing and could not be located and further the defendant/respondent did not appear even after being caused by the plaintiff's clerk to appear. On the November 26, 2021, the defendant without the input of the plaintiff/applicant picked a mention date for the January 24, 2022 and served the plaintiff's advocate via the correct e-mail being litigation@cms-di.com. On the January 24, 2022 the plaintiff's advocate noted that the matter was not cause listed. Upon perusal of the record today, the plaintiff's advocate has just noted that the matter; Was mentioned on the January 24, 2022 and no party appeared where after the same was forwarded to the Deputy Registrar for mention on the February 7, 2022; The above directions were amended where after the matter was allocated a hearing date for the February 15, 2022 in the absence of the plaintiff/applicant; and the defendant/respondent was directed to serve the plaintiff/applicant with a hearing notice.
5. The plaintiff/applicant's advocate learned on the February 15, 2022 at 11:04 am, from colleagues, that the subject matter was listed for hearing before Lady Justice Nelly A Matheka where after the honourable court dismissed the plaintiff/applicant's claim against the defendant/respondents on the basis of non- attendance. Upon perusal of the court file, the plaintiff/applicant's advocate discovered that the honourable court had issued the order on the allegation that the defendant/respondents process server had served the plaintiff/applicant with a hearing date on the February 2, 2022 via the e-mail Litigation@dalyinamdar.co.ke. The plaintiff/applicant is enormously aggrieved by the order of the honourable court dismissing claim against the defendants/respondents for non-attendance on the above ground as the plaintiff/applicant's e-mail address, from its recent pleadings, is litigation@cms-di.com
6. The plaintiff/applicant was therefore not aware of the hearing date and will therefore be prejudiced in the event that the matter is not reinstated. There exists sufficient reason to warrant a review and or setting aside of the order/s of February 15, 2022. It is in the interest of justice that the plaintiff/applicant is afforded the opportunity to have a complete and final determination of the case on its merits. This application has been filed timeously.
7. This court has considered the application and submissions therein. The defendant/respondent submitted that the applicant's averments that litigation@cms-di.com as opposed to litigation@dalyinamdar.co.ke was a better and preferred email address to be used is just an excuse and an afterthought which in no way can suffice to be a sufficient cause/reason herein to warrant the courts



discretion in favour of the applicant. The relevant law governing setting aside judgment or dismissal is order 12 rule 7 of the [Civil Procedure Rules](#). It provides as follows:

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

8. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo* (1979) EA 116 quoted with approval in the case of [John Mukuba Mburu v Charles Mwenga Mburu](#) [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. For the court to exercise its discretion in favour of the applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient cause was defined by the Supreme Court of India in *Parimal v Veena* which was cited with approval in the case of [Wachira Karani v Bildad Wachira](#) [2016] eKLR. In the case, the said Supreme Court stated that;

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

10. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”
11. The plaintiff/applicant’s advocate stated that they discovered that the honourable court had issued the order on the allegation that the defendant/respondents process server had served the plaintiff/applicant with a hearing date on the February 2, 2022 via the e-mail litigation@dalyinamdar.co.ke. The plaintiff/applicant is enormously aggrieved by the order of the honourable court dismissing claim against the



defendants/respondents for non-attendance on the above ground as the plaintiff/applicant's e-mail address, from its recent pleadings, is litigation@cms-di.com. I find that it could be possible that the plaintiff/advocate's may have missed the notification and hence was not in court on the said date. I find that the plaintiff ought to be given another chance this being a land matter and I grant the following orders;

1. That this court reviews and or set aside the order/s issued on February 15, 2022 by which it declared the suit dismissed on account of non-attendance by the plaintiffs advocate.
2. That this court reopens the plaintiff's case and the plaintiff is to take a suitable hearing date in the next term within the next 14 days.
3. That costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

NA MATHEKA

JUDGE

