



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Nyagor v Omolo (Environment & Land Case 34 of 2021)  
[2022] KEELC 2344 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2344 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 34 OF 2021  
AY KOROSS, J  
JULY 14, 2022  
FORMERLY KISUMU ELC NO.323 OF 2015**

**BETWEEN**

**ALFRED OKONG'O NYAGOR ..... PLAINTIFF**

**AND**

**DANIEL ODHIAMBO OMOLO ..... DEFENDANT**

**RULING**

**Plaintiff's case and submissions**

1. Pursuant to the provisions of Sections 1A, 1B of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules*, the plaintiff filed a notice of motion dated 16/03/2022 in which he sought the following reliefs;
  - a. Spent;
  - b. The honourable court be pleased to set aside the proceedings of January 25, 2022 dismissing the suit for non-attendance and all consequential orders; and
  - c. Costs be provided for.
2. The motion is supported on the grounds on its face and on the supporting affidavit of the plaintiff's counsel Rayola O.Olel dated March 16, 2022. He contended that while he was enroute to Eldoret on the date of the hearing of this suit, he was faced with a technical hitch and consequently he was unable to attend court on the virtual platform. He stated that his mistake should not be visited on the plaintiff who deserved his day in court. He asserted that the defendant would not be prejudiced if the suit was reinstated.



3. Despite the court directing him to file his written submissions by March 30, 2022, he filed them on May 10, 2022. Because of this delay, the defendant sought for 7 days from 11/5/2022 within which he would comply. However, as this court is penning down this ruling, the defendant has not complied with the strict timelines.
4. In his submissions, the plaintiff identified one issue for determination; whether the plaintiff was entitled to the orders sought. He submitted that within the provisions of Order 12 Rule 7, this court had discretionary powers to set aside, vary a judgment or orders while Sections 1A, 1B and 3A empowered this court to facilitate the just, expeditious and affordable resolution of disputes. He placed reliance on the case of *Richard Murigu Wamai v Attorney General and another* [2018] eKLR which cited with approval the case of *Shah v Mbogo* [1967] EA 166 and *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR which stated that the setting aside of an order was intended to avoid injustice or hardship occasioned by accident, inadvertence or excusable mistake or error.

### **Defendants case and submissions**

5. The defendant's Counsel Samuel M. Onyango filed a replying affidavit dated March 29, 2022. He asserted that the plaintiff had never been keen to prosecute his suit despite it being an old matter. That the hearing notice of January 25, 2022 was served upon them by the plaintiff's counsel. He submitted that a reinstatement of the suit would be prejudicial to the defendant and would amount to being an abuse of the court process and in any case, courts were called upon to conduct matters expeditiously. He contended that the motion was filed on the very day that his bill costs was to come up for taxation. As earlier observed, the defendant as at the time of this court writing its considered ruling, had not filed his written submissions. If at all it will be filed, which as at now it has not, this court will consider them as having been filed out time and will not consider them.

### **Analysis and determination**

6. I have carefully considered the plaintiff's motion, grounds in support, his Counsel's supporting affidavit, the defendant's Counsel's replying affidavit, the plaintiff's submissions and authorities cited and procured. The only issue falling for determination is whether the plaintiff has demonstrated sufficient grounds for setting aside the orders of this court dismissing the suit. I will proceed to analyse the legal and jurisprudential framework.
7. I agree with the plaintiff's submission that Article 50 of *the Constitution* recognises the right of a party to fair hearing. Therefore, a party should not be locked out of the seat of justice because this is a draconian act. However, article 159 (2) (b) provides that one of the guiding principles of courts is ensure that justice shall be administered without undue delay or procedural technicalities. In my considered view, these two Articles are critical in determining whether or not a suit should be reinstated.
8. Though Counsel had sought refuge on the principle of procedural technicalities; this is misplaced. This principle is not a cure for all mishaps and on this, I am persuaded by the decision of Aburili J in *Kakuta Maimai Hamisi v. Peris Pesu Tobiko & 2 others* [2013] eKLR where she stated thus;

“We do not consider article 159 (2) (d) of *the Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.
9. The court is duty bound to give effect to the overriding objective under section 1A of the *Civil Procedure Act* to facilitate the just determination, efficient and timely disposal of proceedings. See section 1B of the *Civil Procedure Act*. The court, under section 3A of the same Act, is equipped with



the powers to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the court process.

10. The Court of Appeal decision of *Pitbon Waweru Maina -vs- Thuka* set out the principles that have long guided courts in exercising its judicious discretion on whether or not to reinstate a suit as follows;

“The matter which should be considered, when an application is made, were set out by Harris J in *Jesse Kimani v McConnel* [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shah* [1968] EA 93, 95 F.

11. In applying these settled factors to this case, the suit was dismissed on 25/1/2022 and the motion was filed on 16/03/2022. This is slightly below two months and this court does not consider it inordinate.
12. The parties conduct prior to the dismissal of the suit is pertinent. This suit was filed on November 24, 2015. The parties had failed to attend court on 7 occasions. Being frustrated by the parties' indolence, the Deputy Registrar made the following remarks on 2/4/2019 “parties have not been attending court since 20/5/2017”. The plaintiff's Counsel failed to attend court on 5/3/2021 when the defence fixed the matter for hearing on 4/10/2021. Subsequent thereafter, the matter was transferred to Siaya ELC for disposal.
13. When the matter was before this court on 13/10/2021, the defendant's Counsel sought time to file his witness statements and the suit was given a hearing date of 30/11/2021; he complied. On November 30, 2021, the plaintiff's Counsel sought an adjournment on grounds that the plaintiff was unwell and sought leave to file a witness statement. The court accommodated him on condition that it was a last adjournment and issued a hearing date of January 25, 2022. When the matter came up on January 25, 2022, the plaintiff and his Counsel were absent and the court dismissed the suit for want of attendance and compliance with courts directions. Prior to its dismissal, the suit had been in court for close to 7 years.
14. The reason the plaintiff's Counsel has given for his non-attendance on the hearing date was that he had a technical hitch in connecting to the court's virtual platform. He stated that his absence in court was not ill-intentioned and that in the interest of justice and equity, the suit should be reinstated. Why was the plaintiff not present in court? Why has he never attended court for 7 years? Without compliance with Order 11 of the *Civil Procedure Rules*, as earlier directed by the court what was the likelihood of the plaintiff prosecuting his case on 25/1/2022? Why did the plaintiff not take advantage of the last lifeline that the court had bestowed upon him? All these questions leave a lot to be desired and in my considered view the plaintiff was not keen to prosecute his matter case on 25/1/2022.
15. It was the plaintiff that dragged the defendant to court and therefore he had a duty to prosecute his case. This was aptly stated in the case of *Savings and Loans Limited -vs- Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No.397 of 2002 as follows;  

“it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case.”
16. The plaintiff had placed reliance on the case of *Richard Murigu Wamai v Attorney General* [supra]. The facts in that authority are distinct from this case. In that case, Counsel had failed to notify the



appellant [defendant in the lower court] that his suit had been set down for hearing and further the court therein found that the appellant was interested in prosecuting his case.

17. The general principles of law on applications of this nature are anchored in the realm of judicial discretion. Reinstatement of a suit is at the discretion of the court which power should be exercised judicially. The case of *John Waweru Njenga & 5 others v Motor Botique Limited* [2020] eKLR was cited with approval in the case of *Shah v Mbogo and another* [1967] EA 116 where the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte Court decisions) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

18. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants, however, the conduct of the plaintiff from the time this suit was filed has been somewhat wanting and it is quite obvious that the plaintiff has never been keen to prosecute this suit. Further, no shred of evidence has been proffered by his Counsel to demonstrate that the plaintiff's failure to attend court was caused by his [Counsel's] mistake, accident, inadvertence, error or excusable mistake. The plaintiff has not demonstrated the prejudice he will suffer if the suit was not reinstated. On the other hand, I am of the humble opinion that the defendant who has had a case hanging over his head without a clear indication of when it will ever be prosecuted will be highly prejudiced bearing in mind that he has expended his time and resources in the case. In the premises, the court is satisfied that the plaintiff's motion is not merited.

19. Ultimately, I make the following disposal orders;

a. The Notice of Motion dated 16/3/2021 is hereby dismissed with costs.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 14<sup>TH</sup> DAY OF JULY 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**14/7/2022**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

M/s Akinyi for the defendant.

N/A for the plaintiff.

Court assistant: Ishmael Orwa

