



**Nyambati & 2 others v Oker & 4 others (Environment & Land Case 314 of 2015) [2022] KEELC 12735 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12735 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 314 OF 2015  
A OMBWAYO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**JASON M. NYAMBATI ..... 1<sup>ST</sup> APPLICANT  
JERUSA B. NYAMBATI ..... 2<sup>ND</sup> APPLICANT  
JAMES AGULO OKORA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**FLORENCE ATIENO OKER ..... 1<sup>ST</sup> DEFENDANT  
PATRICK NGUJU OGUK ..... 2<sup>ND</sup> DEFENDANT  
COUNTY GOVERNMENT OF KISUMU ..... 3<sup>RD</sup> DEFENDANT  
DISTRICT LAND REGISTRAR KISUMU ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/ Applicants herein filed this Application pursuant to Order 10 Rule 1 of the [Civil Procedure Rules](#) 2010 and sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking orders that this Honourable Court be pleased to set aside the dismissal order made on the 12<sup>th</sup> day of May 2022. Costs of this Application be provided for.
2. The Application was based on grounds that the suit was scheduled for hearing on 12<sup>th</sup> May 2022 and Counsel for the Plaintiffs had been in communication with the 1<sup>st</sup> Plaintiff and had informed the Plaintiff of the hearing date scheduled on the same date and even met on 11<sup>th</sup> May 2022 for trial preparations.
3. That it was agreed that the Plaintiffs and their counsel on record would avail themselves and their witnesses on the hearing date. That unfortunately on the morning of 12<sup>th</sup> May 2022, the Plaintiff



- indicated that he could not be able to attend court owing to the fact that his son had a serious accident on the morning of the hearing date and therefore the Plaintiff was unable to come to court.
4. The Application was supported by the Affidavit of Jason M. Nyambati who stated that the Plaintiffs instituted this suit to seek redress concerning the maps and road situation of his property and has always been willing and ready to have the same prosecuted to conclusion expeditiously and has always attended court on the days that the matter was scheduled for hearing save the day that he was involved in an accident.
  5. He stated that the matter was scheduled for hearing on 12<sup>th</sup> May 2022 and his Advocates on record summoned him to their offices on 1<sup>st</sup> May 2022 for per trial and was ready to attend court for the said hearing. That on the morning of the hearing date, him and his wife who is the 2<sup>nd</sup> Plaintiff learnt that their son had been involved in an accident the night of the 11<sup>th</sup> May 2022 and could not walk.
  6. It is stated that they rushed hospital and their son is still undergoing treatment and physiotherapy for the sprained joint. He further stated that he reached out to his Advocate on record to inform them of their predicament and his Advocate informed him that the suit was dismissed for reasons that they failed to attend court on the said date.
  7. It is the Plaintiffs' case that they ready to prosecute the matter every time it came up for hearing save for the unfortunate circumstances that were out of their control. That it would be just and fair if the Plaintiffs are afforded an opportunity to prosecute their case and it would be in the interest of Justice that this matter be reinstated to allow the Plaintiff prosecute this matter.
  8. The Attorney General who is the 5<sup>th</sup> Defendant herein filed Grounds of Opposition on 8<sup>th</sup> July 2022 opposing the Application on grounds that this matter was coming up for hearing on 12<sup>th</sup> May 2022 where the Plaintiffs failed to appear or communicate on non-attendance with due and reasonable period, that order 17 Rule 3 of the Civil Procedure Rules 2010 provides for the procedure if parties fail to appear on the day fixed, which grants court the discretion to dispose a suit if parties or any of them failed to appear.
  9. The Attorney General, further opposed the Application on grounds that failure of the Plaintiffs to show up or attempt to communicate non attendance saw the court exercise its discretion by dismissing the suit, that the Application is frivolous and vexatious since the Applicant has failed to demonstrate sufficient reasons as to why he failed to appear, that the Application for reinstatement is bad in law, an abuse of the court process and devoid of any merits and should be dismissed with costs.
  10. The 1<sup>st</sup> Defendant herein filed her Replying Affidavit to the Application where she stated that the Application is full of falsehood and meant to mislead this court as on 12<sup>th</sup> May 2022 at around 9.00 am, the Plaintiffs' Advocate informed the court that his client was on the way coming to court and the file be placed aside to 11.00am when they will be able to proceed with the Plaintiffs' case.
  11. She stated that at around 11.00am when the matter was called out, the Plaintiffs' Advocate informed the court that the Plaintiff had a medical emergency and could not be able to make to court and therefore sought for an adjournment. That the Plaintiffs' annexure shows that the 1<sup>st</sup> Plaintiff's son was injured on the night of 11<sup>th</sup> May 2022 and not on the hearing date.
  12. It is the 1<sup>st</sup> Defendant's case that the annexure marked JMN-1 does not suffice as a treatment note since the doctor is purporting to give evidence about facts surrounding the alleged accident which does not fall under his job discretion. That since the Plaintiff's son was injured on 11<sup>th</sup> May 2022, the Plaintiff should have informed his Advocate in the morning of 12<sup>th</sup> May 2022 and therefore the statement given by the Plaintiffs' Advocate on 12<sup>th</sup> May 2022 is in conflict to the evidence as stated in the Application.



13. It was further stated that the Plaintiffs' suit was justifiable dismissed for non-attendance of the Plaintiff and equity aids the vigilant and not the indolent. That this suit was instituted in 2015 and the Plaintiff has failed to prosecute the same for more than 7 years which speaks volume to their character of holding the court and the Defendants at ransom. It is also the 1<sup>st</sup> Defendant's case that the Application has failed to meet the required threshold for reinstating a dismissed suit and therefore the same should be dismissed with costs. This court directed that the Application be canvassed by way of written submissions.

#### **Plaintiffs/Applicants' Written Submissions**

14. The Applicants herein filed their submissions on 25<sup>th</sup> July 2022 and raised two issues for determination.
15. On the issue of whether the Plaintiffs' reasons for failure to attend court was intentional, it was stated that the Plaintiffs were willing to prosecute their case as they had a meeting with their counsel to prepare the witnesses but unfortunately the 1<sup>st</sup> Plaintiff's son was involved in an accident on the morning of the hearing date.
16. It was submitted that the Plaintiffs' non attendance was inadvertent and unforeseen as the circumstances were out of their control and therefore the unfortunate circumstances ought not to be the Plaintiffs right to be heard denied. The Plaintiffs relied in the case of *Edney Adaka Ismali vs Equity Bank Limited* [2014] eKLR
17. On whether the Defendants will suffer prejudice, the Plaintiffs stated that no severe injustice will be suffered by the Defendants if the Plaintiffs are heard and the suit herein determined on merit and should there be any prejudice suffered, the same can be adequately remedied by an award of costs and the Plaintiffs are willing to comply with any orders to that end.
18. It was submitted that this being a land matter, the substantial issues in play are of a serious nature that the court ought to consider the same on merit to avoid a miscarriage of justice as the Plaintiffs stand to suffer irreparable harm should the suit remain dismissed.

#### **Defendants' Submissions.**

19. The Defendants herein failed to file their submissions as directed by the court.

#### **Analysis and Determination**

20. I have read the Application, the Affidavits and Submissions filed by the Parties and I am convinced that the main issue for determination is whether there are sufficient reasons to warrant the reinstatement of the suit.
21. This court has the discretion to reinstate the suit as provided for under Order 12 rule 7 of the Civil Procedure Rules which provides 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.”



22. In the case of *Kenya National Private Service Workers Union v Security Guards Services Limited* [2019] eKLR the court had this to say;

“It is trite that, the court exists to do justice to all the parties and it has unfettered discretion to set aside its judgments upon terms. In *Shah Vs. Mbogo and another* [1966] EA 166, Harris J. set out the guiding principle on a Judge’s discretion in setting aside a judgment, thus:

“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained *ex parte*. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent 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.”

23. It is the Plaintiffs’ case that they have always been ready and willing to prosecute their case. That the Plaintiffs were aware of the hearing date and on 11<sup>th</sup> May 2022 a day before the hearing date, the Plaintiffs went to their Advocates office to prepare for their case. The Plaintiffs failed to attend court on 12<sup>th</sup> May 2022 on grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs’ son had been involved in an accident on the night of 11<sup>th</sup> May 2022 and the date of the hearing of the suit , they failed to attend court as they had to rush their son to court as per a copy of the treatment card annexed as JMN-1.
24. It is the Plaintiffs’ case that they failed to communicate to their Advocate in good time about the unfortunate circumstances but they later communicated to him informing him that their son had been involved in an accident. Although the 1<sup>st</sup> and 5<sup>th</sup> Defendant in their Replying Affidavit and Grounds of Opposition respectively stated that the Plaintiffs failed to demonstrate sufficient grounds as to why they failed to appear in court, I am convinced that the record shows that the Plaintiffs are willing to prosecute their case and based on the treatment card, the Plaintiffs have demonstrated sufficient reasons to warrant reinstatement of the suit and based on the nature of the suit, it would be in the interest of justice that parties herein be heard.
25. This court therefore allows the Application and directs as follows: That the orders issued on 12<sup>th</sup> May 2022 are hereby set aside and this suit is hereby reinstated. That the costs of this Application be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020

