



**Mwongo (suing as the administrator and legal representative of Isaiah Mwongo alias Isaiah Mwongo M'aburu v Mugwika & 2 others (Environment & Land Miscellaneous Case E006 of 2022) [2022] KEELC 12774 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12774 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND MISCELLANEOUS CASE E006 OF 2022**  
**CK YANO, J**  
**SEPTEMBER 28, 2022**

**BETWEEN**

**BEATRICE GACHEKE MWONGO (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF ISALIAH MWONGO ALIAS ISALIAH MWONGO M'ABURU ..... APPLICANT**

**AND**

**MURIUKI MUGWIKA ..... 1<sup>ST</sup> RESPONDENT**  
**ADJUDICATION AND SETTLEMENT OFFICER TIGANIA DISTRICT ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application for determination is the notice of motion dated June 3, 2022 in which the applicant is seeking to set aside the orders issued on May 17, 2022 and reinstate the application dated February 10, 2022 for hearing. The applicant further prays that after the reinstatement of the application dated February 10, 2022, the court do allow the same in terms of prayers 2, 3 and 4 thereof.
2. The application is brought under section 3 and 3A, 63 (e) of the *Civil Procedure Act* and order 50 rule 1 of the *Civil Procedure Rules*. The application is premised on the ground that the applicant was not heard on May 17, 2022 due to technological short falls a mistake that not of the applicant or her counsel. The applicant states that the court's link that was provided to counsel failed to work and by the time the advocate appeared in open court, the matter had been dismissed despite the court clerk having been informed of the advocate's predicament. It is further stated that the applicant is an elderly lady of over 85 years and was waiting outside the court and was never called out.



3. The application is further supported by the affidavit of Mercy Kaume, the advocate for the applicant in which she states that she was ready to proceed with the matter on the hearing date, and tried to join the court's link but could not get through. That she then called the court assistant and texted him that she was unable to join the link and decided to attend open court but arrived at about 9.40 am since she was travelling from Tigania. That by the time she arrived in court, she found the matter had been dismissed for non- attendance.
4. Although the respondents were served with the application, they did not file any replies and did not attend court on the hearing date. The application is therefore unopposed.
5. Ms. Kaume submitted that this is a land matter in which the initial suit was filed in the High Court at Meru as No 158 of 2010 which was then transferred to Tigania Chief Magistrate's Court and given case No 76 of 2018. That the new number brought some confusion and the file got misplaced and a skeleton file was opened. That apparently, the original file was found and both files proceeded at different times. Counsel explained that whereas the issue was raised by the then advocate on record, the court did not address itself to it. That on September 21, 2019, the original and skeleton files were before court, but the applicant and his advocate were not aware that there were two files, and they left after the original file had been dealt with. That later they were informed that the matter had been called out and since there was no response, the same was dismissed for non-attendance, and were advised to make a formal application to set aside the orders of dismissal order, but the court declined to allow the application. The applicant's counsel stated that the court stated that the ruling had been delivered to the parties by email. That the applicant kept on waiting for the ruling only to learn that the same was delivered by email. The applicant therefore made an application to appeal out of time, which is a discretionary order.
6. I have considered the application. The application dated February 10, 2022 was scheduled for hearing on May 17, 2022 but none of the parties were present before court when the matter was called out. Accordingly, the court dismissed the application for non- attendance.
7. Order 12 rule 3 of the [Civil Procedure Rules](#) allows the court to dismiss a suit or application for non-attendance while rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit (or application as in this case). In the affidavit in support of the application, the applicant's counsel has explained why she did not attend court in time on the material day. She stated that she had challenges joining the court's link, and had to travel from Tigania to open court but by the time she arrived, the matter had been dismissed for non-attendance.
8. In this case, the applicant's counsel has given an explanation as to why she did not attend court in time before the application was called out and subsequently dismissed. As already stated, the application has not been opposed by the respondents, though they were duly served. It has therefore not been shown that the respondents will suffer any prejudice if the dismissal order made on May 17, 2022 is set aside and the application is reinstated for hearing on merit.
9. Further, the court has considered that this application was filed on June 10, 2022 while the orders of dismissal were made on May 17, 2022 which is a period of about three weeks. I am therefore satisfied that the application was filed timeously. I am also satisfied that the failure to attend court in time on May 17, 2022 has been explained sufficiently and the same is excusable. It has not been shown that the failure to attend court in time on May 17, 2022 was intentional or deliberate on the part of the applicant and her advocate.
10. In [Shah - V- Mbogo](#) ( 1967) EA 116 it was held that the exercise of discretion of the court to set aside exparte orders is to avoid injustice 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 the present case, the overriding objective of the court would no doubt come to the aid of the applicant.

11. I note however, that the application herein is also seeking some substantive reliefs in respect of the application dated February 10, 2022 that was dismissed. In my view, it is only appropriate that the application be reinstated and heard on merit. I therefore decline to grant any substantive prayers sought in the application that was dismissed at this stage.
12. For the foregoing reasons, the application dated June 3, 2022 is allowed in the following terms:-
  - a. The order made on May 17, 2022 dismissing the application dated February 10, 2022 is set aside.
  - b. The application dated February 10, 2022 is hereby reinstated for hearing on merit on a date to be given by the court.
  - c. Each party to bear his/her own costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> SEPTEMBER 2022**

**In the presence of**

C/A Mwenda

No appearance for the parties.

C.K YANO

ELC JUDGE

