



**Ngitui v M'ikunyua & another (Environmental and Land Originating Summons  
26 of 2015) [2022] KEELC 12744 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 26 OF 2015**

**CK NZILI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**CHARLES NGARUNI NGITUI ..... APPLICANT**

**AND**

**ZIPPORAH KATHENGU M'IKUNYUA (SUING AS THE LEGAL  
REPRESENTATIVE OF THE ESTATE OF M'IKUNYUA NGWARI  
(DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**M'MARETE MWOGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated March 22, 2022 by the plaintiff seeks for review or setting aside of the order made on February 22, 2022 in which the suit was dismissed for non-attendance so that the suit is reinstated and heard on merits.
2. The reasons given are contained on the foot of the application and a supporting affidavit sworn by Kaumbi Kioga advocate on March 22, 2022.
3. The grounds are that the matter was scheduled for defence hearing, but counsel for the 2<sup>nd</sup> defendant was unwell and had notified his counterpart that he was going to seek for an adjournment. Counsel stated this led to the plaintiff's counsel to attend to other matters hoping the other side would get another date. He urged that it is only fair that the matter be reinstated for finalization on merits.
4. The applicant has attached a letter dated February 21, 2022 from the defendant's advocates and a medical report.
5. The court record indicates PW 1 testified on April 17, 2018 and the suit was adjourned at the behest of the applicant to call the agricultural officer for July 26, 2018. The suit could not proceed on July 26, 2018 since the advocate on record had passed on.



6. On March 12, 2019 there was no appearance and another hearing date for May 23, 2019 was issued when the plaintiff sought for adjournment till October 21, 2019.
7. The case came up again on January 22, 2020. There was no appearance and the court gave another date of June 3, 2020 and later on the following dates were issued:- January 20, 2021, February 25, 2021, April 7, 2021, July 20, 2021, November 22, 2021 and later on was listed for February 22, 2022.
8. The plaintiff was not present as well as his advocate on record. The matter was mentioned at 9.00 am and placed for hearing at 10.25 am. Both the plaintiff and his counsel on record did not appear at all. Counsel present for the defendant therefore sought for the dismissal of the suit for non-attendance.
9. There was no indication whatsoever of any alleged sickness by the plaintiff's counsel on record from the 2<sup>nd</sup> defendant, given to the court. Similarly, there was no letter on the court file from the plaintiff suggesting the alleged sickness and or requesting for an adjournment, on account of indisposition.
10. As indicated in the court record, the plaintiffs had not been closed nor was there any indication that the plaintiff had abandoned the agricultural officer's testimony.
11. From the court record, it is quite clear that the plaintiff and his counsel on record had between July 26, 2018 and February 22, 2022 missed hearing dates on four consecutive occasions without explanation.
12. That explanation is also lacking in this application. The applicant has not even attempted to give reasons why he was unable to attend court on February 22, 2022 if at all his advocates on record were unavailable out of sickness. The suit belongs to the plaintiff and one would have expected that he would give priority to this matter and attend the court. Counsel for the applicant has also not given evidence of which other superior court he was engaged before, on the material date.
13. Incidentally, the application was filed almost a month after the suit was dismissed which is a clear indication that the plaintiff did not bother to find out the outcome of the case soon after February 22, 2022.
14. As to whether the letter dated February 21, 2022 is genuine, counsel for the respondent appeared in court on February 22, 2022 and he is the one who moved the court for the dismissal of the suit. The alleged medical report is also not bearing a date of February 2022 but refers to the events of 2020, which is almost two years before the time the case came for hearing.
15. In *Ivita v Kyumbu* (1984) KLR 441 the court held that the principles to apply on whether to reinstate a suit include, the delay, if it is excusable, if justice can still be done despite the delay and the prejudice to the opposite party.
16. In *James Mwangi Gathara & another v OCS Loitoktok & 2 others* (2018) eKLR, the court held a party slumbering only to rise up when he has been stripped off certain rights is guilty of laches and may not deserve such orders of setting aside.
17. In *Shah v Mbogo & another* (1967) EA 116, the court held the discretion to set aside a dismissal order is intended only for excusable mistake, error or inadvertence, but not to aid a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
18. The court record depicts an applicant who is guilty of indolence and lack of interest in prosecuting his suit.
19. Instead of owning up the mistake and or inadvertence the plaintiff has instead sought to blame the 2<sup>nd</sup> defendant and mislead the court that the matter was slated for defence hearing yet the record shows otherwise.



20. In the premises I find the application lacking merits. The same is dismissed with costs. File closed.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**In presence of:**

C/A: Kananu

No appearance

**HON. C.K. NZILI**

**ELC JUDGE**

