



**Karani (as a Legal Representative of the Estate of Karani Chepsongol-
Deceased) v Cheboiwo (Environment & Land Case 183 of 2014)
[2022] KEELC 13353 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 183 OF 2014
SM KIBUNJA, J
SEPTEMBER 23, 2022**

BETWEEN

**WILLY KARANI PLAINTIFF
AS A LEGAL REPRESENTATIVE OF THE ESTATE OF KARANI
CHEPSONGOL- DECEASED**

AND

KIPSETIM CHEBOIWO DEFENDANT

RULING

1. The notice of motion dated February 7, 2022 under the provisions of article 159 of the *Constitution of Kenya* 2010, section 1A, 1B and 3A of the *Civil Procedure Act* chapter 21 laws of Kenya, order 12 rule 7, order 51 rule 1 of the *Civil Procedure Rules* is by the Willy Karani, plaintiff, and seeks for the following orders;

- a. Spent;
- b. This honourable court be pleased to review and set aside orders of January 1, 2022 and reinstate the plaintiff's suit for hearing.
- c. That costs be provided. ”

The application is based on the nine (9) grounds on its face and supported by the affidavit sworn by Sambu Isaac, Advocate, on the February 7, 2022. In summary, the plaintiff's case is that the failure to attend court by his advocates on February 1, 2022 was not deliberate but was caused but the counsel's failure to diarize it, which is an excusable mistake. Further, that mistakes of counsel should never be visited upon their clients. That further plaintiff will suffer great prejudice should the suit not be re-



instated since the mistake was inadvertent and not *malafide*. That the application was made promptly, and it is fair that the same be allowed.

2. The application is opposed by the defendant through the replying affidavit sworn by Sammy Boiwo A Setim, a next friend of the defendant, on the March 7, 2022. He among others deposes that the plaintiff instituted this suit in 2014 and never took any steps to prosecute it for seven (7) years. That the plaintiff should not blame the court for dismissing the suit, and that the reasons he has advanced do not warrant the reinstatement of the suit. That the defendant has been in occupation of the suit land continuously, and will suffer extreme prejudice should the matter be reinstated as he will be forced to defend a case which the plaintiff is unwilling to prosecute. That the application is an abuse of courts process and judicial time and should be dismissed.
3. That pursuant to the directions issued on the March 22, 2022, the counsel for the defendant and plaintiff filed their submissions dated the April 13, 2022 and April 22, 2022 respectively, as summarized here below.
 - a. The learned counsel for the plaintiff submitted that the mistake of failing to attend court on the date fixed for hearing of the suit was not deliberate and such mistakes of counsel should not be visited upon the plaintiff, but the suit should be reinstated. The counsel relied on principles of natural justice enshrined under article 50 *Constitution of Kenya*, 2010, section 80 *Civil Procedure Act*, order 45 rule 1 *Civil procedure Rules*, 2010 and the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR. The counsel further submitted that the application is premised on account of some mistake or error apparent on the face of record, and for any other sufficient reason, and relied on the case of *Wachira vs Karani* [2016] eKLR. That the reasons provided in support of the application fall under the limb of sufficient reasons, which has been proved. Lastly counsel urged the court to exercise its discretion and in doing so, not to visit the advocate's mistake upon the client. The counsel relied on the case of *CMC Holdings Limited versus Nzioki* (2004) 1 KLR 173, and urged the court to grant the application.
 - b. The learned counsel for the defendant submitted that the defendant became the registered proprietor of the suit land after the 1984 Land Disputes Tribunal decision on the May 31, 1985. That he had lawfully and procedurally acquired the property from Karani Chepsongol-deceased father to the plaintiff, and has been in possession of the said land from 1965. That by the time this suit was filed, it was time barred as the cause of action arose in 1985. He further contends that the Land Disputes Tribunal award was adopted in Nakuru Senior Resident Magistrate Land Disputes Case No 12 of 1984, and that decision remains unchallenged. The defendant submitted that the application is unmerited on majorly reasons that the explanation given by the plaintiff is not reasonable or sound, and the suit is incompetent from the onset on account of the suit being statute barred; that the decision of the Land Disputes Tribunal No 12/1984 remains unchallenged; the plaintiff though represented, has failed to appropriately and timeously prosecute his case; and that the failure to attend court on the date fixed for hearing of the case is inexcusable. The defendant in reliance cites the following cases; *Kestem Complany Limited v Ndala Shop & 2others* (2018) eKLR; *Plorence Nyabolke Machani v Mongere Amos Ombui* (2018) eKLR; *Paul Muraya Kaguri v Simon Mabaria Muchunu* (2015) eKLR; *Plorence Nyabolke Machani v Mongere Amos Ombui* (2014) eKLR; *Plorence Nyabolke Machani v Mongere Amos Ombui* (2015) eKLR.
4. The following are the issues for the court's determinations;



- a. Whether the plaintiff has made a reasonable case for the setting aside or varying the orders issued on February 1, 2022 and reinstating of the suit.
 - b. Who bears the costs of the application?
5. The court has after considering the grounds on the application, affidavit evidence tendered, submissions by both learned counsel, and the superior courts decisions cited thereon come to the following conclusions;

- a. It is not contested, and indeed the record confirms, that the plaintiff's suit was coming up for hearing on the February 1, 2022, but the plaintiff and his advocate failed to attend. The court heard the counsel for the defendant who applied for the court to dismiss the suit with costs. The application was granted and the suit dismissed with costs for non-attendance. The record further confirms that a counsel holding brief for counsel for the plaintiff later attended the court and was briefed of the order that had been made. The plaintiff then filed the instant application on the February 7, 2022, which was on the after six (6) days after the dismissal order. I therefore find that the application was filed timeously, and without undue delay. The plaintiff explains that the non-attendance for the hearing of his suit was inadvertent and due to an excusable mistake, of failure of the advocate to diarize the matter, and should not be visited upon him.
- b. That in determining whether to reinstate a suit or not I am well guided by the provisions of order 12 rule 7 Civil *Procedure Rules*, 2010 which provides that;

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

The above provision leaves no doubt that the court is with discretion to set aside or vary the dismissal of the suit order as sought by the plaintiff herein, but the discretion must be exercised with the aim of ensuring justice is done. The court in the case of *Yamko Yadpaz Industries Limited –versus- Kalka Flowers Limited Nairobi* HCCC No 591 of 2012 as cited with approval in *Adam Said Jumbe & Merceline Kishaga Buluma v Preston Mwakio Jumbe* [2017] eKLR held that;

“That there are no limits or restriction on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether be evasion or otherwise to obstruct or delay the course of justice. *Shah versus Mbogo* (1967) EA 116 at page 123b, *Shabir Din –versus- Ram Perakash Anand* (1955) 22 EACA 45.”

- c. The plaintiff's counsel has stated that on the material date, he had failed to diarize the matter hence his failure to inform the client and the resulting non-attendance. That explanation appears plausible to the court, and the fact that the counsel swiftly acted by filing the application timeously within six (6) days after the suit's dismissal is a clear indication of the plaintiff preparedness to prosecute the case. The court is cautioned against barring litigants



who wish to have their disputes litigated before it as reiterated in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173, where it was held that;

“In law, the discretion that a court of law has, in deciding whether or not to set aside *ex-parte* order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here... In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

- d. The defendant has submitted that the plaintiff and his counsel are to blame for their own mistakes and misfortunes and the court should decline to grant the application. However, the court takes note that the plaintiff herein had not known of the hearing date for reason that his advocate had not informed him of the hearing date. That mistake by counsel in this case should not be attributed to the plaintiff, or used to lock him from the seat of justice, since he was not aware of the hearing date. In the case of *Peter Kimundi v Government of Makueni County; Mukaa Trading Company Limited (Interested Party)* [2019] eKLR the learned court held as follows:
- “I have considered the reasons that have been proffered by the plaintiff’s/applicant’s for his failure to appear in court on the November 7, 2017 when the application dated June 13, 2017 was dismissed. In my view, failure to diarize the date is an excusable mistake or error. It would be unjust to visit the mistake of the plaintiff’s/applicant’s counsel on the plaintiff/applicant himself. In the circumstances, I hold that the application has merits and I hereby proceed to grant prayer 2 of the application with costs in the cause”
- e. Though the defendant has expressed the fear that he will be prejudiced if the dismissal order is set aside as he is currently in possession of the suit property, he has failed to establish in what way reinstatement of the suit will amount to prejudice. The court is of the view that it will be in the interest of both parties that the suit be heard and determined on merit, to ensure the dispute between them is finally determined for posterity. The plaintiff has therefore shown sufficient cause to warrant varying and setting aside the orders issued on February 1, 2022 and reinstating the suit.
- f. That though the plaintiff’s application has merit, and ordinarily the defendant would have been condemned to pay the costs to the plaintiff under section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya, the costs will be paid by the counsel on record for the plaintiff whose failure to diarize the hearing date and notify his client made the application necessary.
6. For the above reasons I find the application dated the February 7, 2022 has merit and is hereby allowed and the following orders issued;
- a. The application be and is hereby allowed in terms of prayer (2).
- b. The counsel on record for the plaintiff to pay the defendant’s costs in the application assessed at Kshs 20,000/- (twenty thousands) before the next hearing date.



c. That the suit be fixed for hearing on priority basis.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF SEPTEMBER, 2022

S. M. Kibunja, J.

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent.....

DEFENDANT: Absent.....

COUNSEL: Absent.....

COURT ASSISTANT: ONIALA

S. M. Kibunja, J.

Environment & Land Court - Eldoret

