



**Brek v Said (Environment & Land Case 84 of 2019)  
[2022] KEELC 12628 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12628 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 84 OF 2019  
NA MATHEKA, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**MBARAK BREK ..... PLAINTIFF**

**AND**

**NASSIR ABDALLA SAID ..... DEFENDANT**

**RULING**

1. The application is dated 22<sup>nd</sup> June 2022 and is brought under order 45 rule 19, order 12 rule 29, order 18 rule 10 and Order 51 rule 1 of the [Civil Procedure Rules](#) 2010 Sections 1A, 1B and 3A of the [civil procedure act](#) seeking the following orders;
  1. That this application be certified as urgent and be heard ex-parte in the first instance.
  2. That this Honorable court be pleased to vacate and set aside the orders of 30<sup>th</sup> November, 2021 dismissing the plaintiff's suit.
  3. That this Honorable court be pleased to make any other or such further orders as it may deem fit and just to grant.
  4. That costs of this application be provided for.
2. It is based on the grounds that the suit herein was scheduled for mention for taking directions on the surveyor's report that was to be tendered and be produced by the plaintiff. That on the said 30<sup>th</sup> November, 2021 Counsel for the plaintiff had challenges in logging into the virtual court proceedings and that by the time he managed to log in, the matter had been called out and orders made dismissing the plaintiff's suit for non-attendance. That the omission for counsel for the plaintiff to appear was not deliberate nor intentional but due to a technical hitch. That the plaintiff stands to suffer irreparably since the complaint against the defendant on the subject of the suit herein still stands and in persistence. That in the interests of justice the plaintiff's suit should be reinstated and be heard on merit.



3. This court has considered the application and the supporting affidavit. Order 12 Rule 1 of the Civil Procedure Rules State that:

"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit."

4. On 30<sup>th</sup> November 2021 when the matter came up for hearing, neither the plaintiff nor the defendant were present when the matter was called out. The court dismissed the suit for nonattendance. The effect of dismissal is captured by Rule 6 (1) of Order 12 which states:

"Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit."

5. The principles upon which the court will exercise its discretion to reinstate or not a suit dismissed for nonattendance were set out in Ivita vs. Kyumbu (1984) KLR 441, where it was held that:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

6. The supporting affidavit dated 22<sup>nd</sup> June 2022 sworn by K.O Mokaya, Counsel for the plaintiff attributes the delay to technical hitches experienced when he tried to access the virtual court on 30<sup>th</sup> November 2021. He claimed that by the time he managed to log in the matter has already been called out and dealt with. He contended that the failure of Counsel to attend court was not deliberate and argued that the plaintiff stands to suffer irreparably since the claim against the defendant still stands. He urged court to reinstate the suit and hear it on merit for the interest of justice.

7. This application seeking reinstatement was filed on 23<sup>rd</sup> June 2022, 6 months and 24 days after the suit was dismissed. A delay of nearly 7 months in my view is unreasonable and ought to be explained to the satisfaction of court by the plaintiff. Delay is a question of facts and the plaintiff has not placed any evidence before court to demonstrate that indeed the same was beyond his control and he did everything possible to file the application within reasonable time. Counsel for the Plaintiff claimed to have logged into the virtual court late due to technical hitches, therefore he ought to have followed up with a perusal of the court file at the registry to know what orders court had given. More specifically because the date of 30<sup>th</sup> November 2021 was taken on 1<sup>st</sup> November 2021 in his presence and in the absence of the Defendant. On the 1<sup>st</sup> of November 2021, court stated that was the last adjournment that was granted to the Plaintiff and further ordered the Plaintiff to pay the court adjournment fees. The Plaintiff was therefore aware that if the matter did not proceed on the 30<sup>th</sup> November 2021, there would be no more adjournment and the matter will be ripe for dismissal. The Plaintiff has not justified to court through evidence that his delay ought to be excused, I therefore find no permissible reason to set aside the order of dismissal for non-attendance issued by court on 30<sup>th</sup> November 2021.



Consequently, the Plaintiff's application dated 22<sup>nd</sup> June 2022 is dismissed with no order as to costs as the same was undefended.

8. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

