



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Matindi & 3 others (Environment & Land Case 436 of 2016)
[2022] KEELC 4839 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 436 OF 2016
EK WABWOTO, J
SEPTEMBER 22, 2022**

BETWEEN

PURITY NJOKI MWANGI APPLICANT

AND

JOHN MWANGI MATINDI 1ST DEFENDANT

ANN WANJIKU WAWERU 2ND DEFENDANT

EMBAKASI RANCHING CO. LIMITED 3RD DEFENDANT

DAVID KAMAU MWANGI 4TH DEFENDANT

RULING

1. The application is premised on the dismissal of the suit due to non-attendance of the plaintiff on May 12, 2022. The plaintiff moved the court *vide* a notice of motion dated May 16, 2022 and a supporting affidavit sworn by Purity Njoki Mwangi the plaintiff herein
2. In respect to the said application, the plaintiff sought the following orders:
 - i. That the order issued on May 12, 2022 dismissing this suit for non-attendance be set aside, the suit be reinstated and proceeds for full hearing and determination on merit.
 - ii. That the costs be in the costs.
3. The application was opposed by the 1st, 2nd and 3rd defendants through an affidavit sworn by John Mwangi Matindi the 1st defendant herein on July 8, 2022.



4. Pursuant to the directions issued by this court, it was directed that the application be canvassed by way of written submissions. plaintiff filed her written submissions dated August 24, 2022 while the 1st, 2nd 3rd and 4th defendants did not file any written submissions.
5. Counsel for the plaintiff submitted that on the said hearing the plaintiff was already in open court and was ready to proceed with the hearing and further that she was not aware that the matter would be mentioned virtually before allocation of time. Owing to these circumstances and this being a suit involving land, she urged the court to reinstate the same and allow the matter to be heard on merit.
6. Through an affidavit sworn by the 1st defendant, it was deposed that the plaintiff ought to have been aware that matters are usually mentioned virtually before the time allocation is set. It was also averred that the court had granted a last adjournment on February 15, 2022 and hence therefore the plaintiff ought to have been diligent enough and made effort to attend court on May 12, 2022. The 1st defendant urged the court to dismiss the application and decline any attempts to reinstate the suit.
7. I have carefully considered the application as presented and the written submissions filed by the plaintiff together with the replying affidavit filed on behalf of the 1st, 2nd and 3rd defendants. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit.
8. The court is guided by Order 12 rule 7 of the [Civil Procedure Rules](#) which expressly provides as follows:

“...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.
9. The test for consideration for reinstatement of a suit that has been dismissed for non attendance is whether the plaintiff or the defendant will be prejudiced by reinstatement of the suit.
10. The Court of Appeal in [Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others](#) [2015] eKLR considered the duty that advocates owe to the court:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. [Halsbury’s Laws of England, 4th Edn, Vol 44 at p 100-101](#)) and also [Re Jones](#) [1870], 6 Ch App 497 in which Lord Hatherley communicated the court’s expectations this way:
‘... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’
11. I have considered that by filing the reinstatement application, the plaintiff moved with haste to correct her inadvertent error. Should this error or blunder by the advocate be visited upon the client? The



courts have adopted an equitable approach in addressing this issue. In the case of *Philip Chemwolo & another v Augustine Kubede* (1982-1988) KAR 103, Apaloo posited as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

12. In *Belinda Murai & 9 others v Amos Wainaina* (1979) eKLR, the court pronounced itself on the consequences of a mistake of an advocate as follows:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

13. I have considered the plaintiff’s assertion that the suit was dismissed during the virtual call over for allocation of the time for hearing of the main suit and yet she was already waiting to proceed in open court. In my view, the defendants have not demonstrated what prejudice they will suffer should the suit be reinstated. I will give the plaintiff a benefit of doubt to the effect that she was already in open court and was eager to prosecute her case when the same was dismissed.

14. For this reason, the court so orders that:

- i. The order of dismissal given on May 12, 2022 is hereby set aside and the suit is reinstated.
- ii. There shall be no orders as to costs.
- iii. The suit to be set down for hearing after delivery of the ruling.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022

E. K. WABWOTO

JUDGE

In the presence of: -

No appearance for the Plaintiff/Applicant

No appearance for the 1st, 2nd and 3rd Defendant/Respondent.

No appearance for the 4th Defendant/Respondent.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

