



**Osowo v Auma Odhiambo & another (Environment & Land Case
E005 of 2021) [2022] KEELC 12621 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E005 OF 2021
AY KOROSS, J
SEPTEMBER 22, 2022**

BETWEEN

LUCAS ODUOR OSOWO PLAINTIFF

AND

EMMA AUMA ODHIAMBO 1ST DEFENDANT

JOSEPHINE ADHIAMBO OJODE 2ND DEFENDANT

RULING

Plaintiff's case and submissions

1. Pursuant to a motion dated January 31, 2022, the plaintiff has invoked the provisions of sections 1A, 1B, 3, 3A of the *Civil Procedure Act* and Order 51 rule 1 of the *Civil Procedure Rules* and sought my invitation to intervene on his behalf by issuing him the following reliefs:
 - a. Spent
 - b. That the honourable court be pleased to issue an order setting aside the orders issued on December 7, 2021 dismissing the plaintiff's motion dated November 15, 2021;
 - c. That the honourable court be pleased to issue an order reinstating the plaintiff's motion dated November 15, 2021;
 - d. That the honourable court be pleased to give directions on the disposal of the plaintiff's motion dated November 15, 2021; and
 - e. Costs of the application be provided for.
2. The motion was based on the grounds set out on its face and supported by the affidavit of the plaintiff's counsel Robert Ouma Njoga dated February 2, 2022.



3. It was mainly grounded on the fact that the plaintiff's motion dated November 15, 2021 that had sought injunctive orders was dismissed by the court on December 7, 2021 for want of attendance and compliance.
4. Counsel averred that on the said date of December 7, 2021, his associate arrived in court late due to circumstances beyond his/her control and when he/she arrived in court, he/she found that the motion had been dismissed for non-attendance. Further, that the plaintiff was present in court.
5. Counsel filed written submissions dated March 25, 2022. In it, he stated that the court had powers to set aside its own orders and he relied on the High Court decision of *Peter Kiplagat Rono v Family Bank Limited* [2018] eKLR where the court stated that its discretion was meant to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. This decision cited with approval the case of *Shah v Mbogo and Another* [1967] EA 116. He also relied on the High Court decision of *Edney Adaka Ismael v Equity Bank Limited* [2014] eKLR.

Respondents' case and submissions

6. Despite service, the respondents failed to either file a response or submissions and even if the motion is unopposed, this court has to determine it on its own merits.

Analysis and determination

7. I have carefully considered the plaintiff's motion, grounds in support and counsels supporting affidavit and his written submissions and the only issue falling for determination is whether the motion is merited.
8. Before considering the merits of the motion, I wish to point out that there are certain gaps on the face of the motion that need to be addressed. The supporting affidavit alludes to an affidavit of service, an email and written submissions which were allegedly annexed to the application. From the record, this is not the position. This plays into the reasons given by the plaintiff concerning why his application should be reinstated.
9. Order 51 rule 15 of the *Civil Procedure Rules* gives the court discretion to set aside or vary an order made ex parte. The authorities cited by the plaintiff indeed captures the settled law on such applications. The celebrated case of *Shah v Mbogo & Another* (1967) EA 116 stated thus;

“The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”
10. The motion was filed slightly close to two months after its dismissal. The question that begs to be answered is whether the reasons advanced by the plaintiff amounts to sufficient cause to justify the exercise of the court's discretion in his favour. Was it an excusable mistake or was it meant to deliberately delay the cause of justice?
11. Sufficient or good cause is defined in *Black's Law Dictionary, 11th edition*, P 274-275 as;

“A legally sufficient reason. Good cause is often the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.”



12. The case of *[FWNM v SMM](#)* [2019] eKLR described sufficient cause to be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.
13. Counsel stated that in compliance with the court orders, he indeed served the motion dated November 15, 2021. On the day the case was slated for mention, his associate arrived in court late and found that the motion had already been dismissed.
14. Counsel has however failed to sufficiently explain why he did not file written submissions as directed by the court. The purported email and draft submissions are not attached to the motion thus the plausibility of the reasons provided by counsel are skewed.
15. But what does justice look like in the present case? It means allowing the parties to fully ventilate their case. I have looked at the court record and save for the one time that the plaintiff's motion was dismissed for want of attendance, his counsel has always been attending court and I find in the interest of justice, that this court should give the parties an opportunity to be heard.
16. The dismissed motion pertains to preservation of land pending the hearing and determination of the main suit. The same is deserving of recourse and I am persuaded by the decision of the Court of Appeal in the case *[CMC Holdings Limited v James Mumo Nzioki](#)* [2004] eKLR wherein it stated thus;

“our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us 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”.
17. In conclusion, I am persuaded that the motion is merited and consequently it is hereby allowed. It is trite law that costs follow the event and because the plaintiff was the author of his own misfortune and the fact that the defendants did not participate in these proceedings, there shall be orders as to costs.
18. Consequently, the court makes the following disposal orders:
 - a. The order dismissing the motion dated November 15, 2021 is hereby set aside and the motion is hereby reinstated for hearing.
 - b. Plaintiff do comply with orders of this court issued on November 23, 2021.
 - c. Plaintiff to serve all pleadings upon the defendants and file a return of service within 21 days from the date of this ruling.
 - d. Mention to confirm compliance with order no (b) and take a ruling date on November 2, 2022.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

22/9/2022

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING THE PRESENCE OF:**

Mr. Nyangweso h/b for Mr. Ouma Njoga for plaintiff

N/A for the defendants

Court assistant- Ishamel orwa

