



**Ngaari v Chebii & another (Environment & Land Case 169 of 2017)
[2022] KEELC 4881 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 169 OF 2017
FM NJOROGE, J
SEPTEMBER 20, 2022**

BETWEEN

JAMLICK MURIUKI NGAARI APPLICANT

AND

MARTHA KABON CHEBII 1ST RESPONDENT

LAND REGISTRAR NAKURU 2ND RESPONDENT

RULING

The Application

1. By a notice of motion application dated May 6, 2022 and filed in court on May 10, 2022 brought under [section 12\(7\)](#) and order 51(1) of the [Civil Procedure Rules](#), 2010 the applicant sought the following orders:
 1. That this honourable court be pleased to reinstate the plaintiff's suit herein for hearing on merit.
 2. That cost of this application be provided for.
2. The application is supported by the sworn affidavit of Jamlick Muriuki Ngaari the applicant herein sworn on 6/05/2022. The grounds on the face of the application and the supporting affidavit are that the suit was dismissed for want of prosecution on October 21, 2021 when the same came up for hearing; that the matter was virtually mentioned that morning where both counsels and himself were present and the matter was given time allocation for 11:30 am; that his advocate had other matters to attend to on that particular day in different courts being Nakuru Cmcc No 413 of 2014, Nakuru Elc No 32 of 2016 and Nakuru Succession No 85 of 2014; that his counsel was in conduct of Nakuru Cmcc No 413 of 2014 which came up for mention to show cause why the judgment debtor should not be committed to civil jail and which matter took longer than anticipated; that the counsel then



arrived in court a few minutes late and found the judge leaving the court; that his advocate failed to inform him that the suit had been dismissed for want of prosecution; that he had left court that day with the belief that his case had been fixed for another hearing date; that he visited the registry on April 20, 2022 and found that his case had been dismissed for want of prosecution on October 21, 2021; that he then visited his advocate the same day who advised that they file the instant application, and it was filed on May 10, 2022 less than a month later. He urged this court to reinstate the suit since he has an arguable case with high chances of success.

The Response

3. The respondents have not filed their response despite the directions the court issued on June 2, 2022 that they file their response within 21 days.

Submissions

4. There are no submissions on record by any of the parties.

Determination

5. It is clear that that the main issue for determination in the instant application is whether the plaintiff's suit should be reinstated.
6. Order 12 rule 7 of the [Civil Procedure Rules](#) under which the instant application has been brought 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”.

It is this court's view that the power to set aside *ex parte* orders is discretionary, and this court must use its discretion to come to ensure that justice is achieved.

7. In the case of [Racheal Njango Mwangi \(Suing as Personal Representative of the Estate of Mwangi Kabaiku\) v Hannah Wanjiru Kiniti & another](#) [2021] eKLR the court held as follows:

“...having given a satisfactory explanation for non-attendance, and the fact that the defence raises a triable issue, the defendants/ applicants have satisfied it, to enable it exercise its discretion in their favour.”

8. In the instant case, the plaintiff/applicant contends that his advocate who was present in court and who, after being allocated time, proceeded to mention other matters before different courts thus causing him to arrive in court a few minutes late. He further contends that he brought the instant application promptly adding that he has an arguable case and should be accorded a hearing opportunity.
9. This court notes that the suit was dismissed for want of prosecution on October 21, 2021 while the instant application was filed on May 10, 2022. This is a period of seven (7) months after the suit was dismissed. The applicant has indicated that he was not informed of the dismissal and he only thought that the hearing had been rescheduled, which averment has not been disputed by the respondents. In the circumstances of this case, it is this court's view that there is no inordinate delay that would disentitle the applicant from obtaining the relief he seeks.
10. The court has perused the plaint on record and it is its view that the plaint raises triable issues which ought to be heard on merit. Further, that the plaintiff has a right to be heard as enshrined under article



50 of the Constitution. I have also considered that the respondents will not suffer any prejudice if the relief sought is granted as they can be compensated by way of costs.

11. In view of the foregoing, I find that the instant notice of motion dated May 6, 2022 has merit and I allow it. I further proceed to make the following final orders:
- a) That the order of this court made on October 21, 2021 dismissing the plaintiff's case is hereby set aside;
 - b) That the plaintiff's suit is hereby reinstated for hearing on its merits.
 - c) The plaintiff is directed to set down this suit for hearing on its merits within 60 days from the date hereof. In default of which it shall stand automatically dismissed.
 - d) The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF SEPTEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

