



**M’Eringa v Mugaa (Sued as the legal representative of Muga Mugambi – Deceased) (Environment & Land Case 36 of 2019) [2022] KEELC 13829 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 36 OF 2019  
CK NZILI, J  
OCTOBER 26, 2022**

**BETWEEN**

**WILSON KAJUKI M’ERINGA ..... PLAINTIFF**

**AND**

**MARTIN GITONGA MUGAA ..... DEFENDANT  
SUED AS THE LEGAL REPRESENTATIVE OF MUGA MUGAMBI – DECEASED**

**RULING**

1. The court is asked to review, vary or set aside the order dismissing the suit for no-attendance, for the reinstatement of the suit together with the interim orders issued on September 27, 2019.
2. The reasons given are contained on the face of the application and two supporting affidavits of Michael Muthomi Ngunjiri Advocate and Stanley Njindo Matiba Advocate sworn on May 19, 2022.
3. The applicant states the failure to attend court on February 23, 2022 was because of sickness, misdiarizing of the date; that he lives on the suitland and stands to suffer prejudice should the suit be dismissed and orders not reinstated.
4. Order 12 Rule 3 of the *Civil Procedure Rules* grants the court powers to dismiss a suit where only the defendant attends court unless there is a good cause to be recorded by it.
5. The court under Sub Rule (7) has powers to set aside the dismissal order upon such terms as may be just.
6. By a ruling dated January 22, 2020, this court granted temporary injunction over the suit property, stayed an injunction in Maua Case No 95 of 2019, transferred Maua CM No 95 of 2019 to be consolidated with this matter and confirmed inhibition orders issued on September 24, 2019.



7. By a ruling dated February 3, 2021, the court dismissed an application by the defendant seeking for stay of execution of the aforesaid pending the hearing of an intended appeal to the said orders.
8. Orders were also given that parties do comply with Order 11 of the *Civil Procedure Rules* and list the matter for hearing. The case was listed for hearing on November 28, 2021. The court was not sitting that day. A new date for February 23, 2022 was taken by consent.
9. On February 23, 2022, counsel present for the plaintiff sought for an adjournment on account of sickness of his client that morning. The defendant was present in court. The court allowed the adjournment and ordered costs of Kshs 5000/= to be paid to the defendant before the next hearing on May 17, 2022.
10. On May 17, 2022, the case was called out and placed aside for 11.21 am but the plaintiff did not show up. The defendant told the court previous costs had not been paid as ordered. Counsel moved the court to dismiss the suit for non-attendance and discharge all the existing interim orders.
11. The applicant now says there was mis-diarizing and or inadvertence mistake of counsel which should not be visited upon him and that it is in the interest of justice to reinstate the suit alongside the previous interim orders otherwise he stands to suffer irreparably.
12. The principles to apply on whether to reinstate a suit have been discussed in several case laws. In *Shah v Mbogo* (1967) EA 1116 the court said that the discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the court of justice.
13. In *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782, Madan J stated that a mistake is a mistake and the door of justice is not closed because a mistake has been made by a lawyer and the court ought to do whatever is necessary to rectify it if the interest of justice so dictates.
14. In *Richard Ncharpi Leiyagu v IEBC & 2 others* (2013) eKLR, the issue was the failure to diarize the date properly. The court assessed whether this was meant to deliberately delay the cause of justice. The court said it must be cautious in exercising the discretion to avoid an injustice.
15. Counsels for the applicant have sworn two affidavits explaining the mistake and regretting for the same. As much as the court is persuaded to find the non-attendance by counsels excusable, what remains unclear is why the applicant himself has not sworn an affidavit to explain the issue of prejudice and or sickness following which a previous adjournment had been sought. The issues Mr Ngunjiri advocate is swearing on are contentious which he may not substantiate as held in *Raila v Ruto & 10 others; LSK & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (consolidated) (2022) KESC 54 (KLR) (Election Petitions) (5 September 2022) Judgment and *Magnollia Pvt Ltd v Syuermed Pharmaceuticals (K) Ltd* (2018) eKLR.
16. The court has looked at the court record. It cannot be true the respondent has not been and will not be prejudiced by the reinstatement of the suit and the previous interim orders.
17. The court therefore finds no material placed before it to warrant for the granting of prayers numbers 2 & 4 of the application. The applicant has failed to disclose the orders made on January 22, 2020 and subsequently on February 3, 2021, its implications and steps which he took to fast track the hearing of the suit after the order for consolidation and the compliance with orders made on February 23, 2022.
18. In the circumstances I find it is not in the interest of justice to grant any such orders at this stage.



19. Be that as it may the suit is hereby reinstated for hearing. Throw away costs to the defendant of Kshs 15000/=

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**In presence of:**

C/A: Kananu

Kieti for Ngunjiri for plaintiff/applicant

Plaintiff/applicant

**HON. C.K. NZILI**

**ELC JUDGE**

