



REPUBLIC OF KENYA



KENYA LAW
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**Kungu v Chege (Environment & Land Case E016 of 2021)
[2022] KEELC 13589 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E016 OF 2021
LN GACHERU, J
OCTOBER 13, 2022**

BETWEEN

WILSON KIBUNA KUNGU PLAINTIFF

AND

STEPHEN MUGUTI CHEGE DEFENDANT

RULING

1. The matter for determination is the Notice of Motion Application dated June 28, 2022, seeking for the following orders:
 1. That the Ruling/Decree of this Court issued on 2nd June 2022, in ELC Case No. E016 of 2021, dismissing the applicant's originating summons of August 5, 2021, be set aside.
 2. That costs be in the cause.
2. The application is premised on the following grounds; -
 1. That the Advocate in record M/S Tumuti & Company Advocates were never served with a hearing notice as claimed by the defendant's/respondent's affidavit of Service dated 18th May, 2022.
 2. That the defendant's/respondent's claim that he served the hearing notice via Email is not true, since the plaintiff's/applicant's Advocate did not receive any hearing notice as claimed.
 3. That the respondent's Advocate sent the Email to stimuti@gmail.com and stumutiadvocates@gmail.com instead of stumutiadvocate@gmail.com which is the official email address.
 4. That it is in the best interest of justice that that the said Ruling dated June 2, 2022, be set aside since the plaintiff/applicant has a good case with a high chance of success.



3. The Application is also supported by the affidavit of Sammy N. Tumuti Advocate for the applicant dated 28th June 2022, wherein he averred that on May 25, 2022, the applicant's amended originating summons dated August 5, 2021, in ELC E016 of 2021(OS) was dismissed for lack of attendance on their part. That though the respondents claimed that he sent them a hearing notice via an email, that was not true as the respondent served the plaintiff/applicant's Advocates using a wrong email address.
4. That the respondent's Advocate used a wrong email address instead of his official email, and therefore the applicant's Advocate was not properly served.
5. That after the dismissal of the plaintiff/applicant's case, the defendant/respondent has cut down the applicant's maize plantation and he trespassed on his land and caused malicious damage to property. That it is for the best interest of justice that the Application be allowed.
6. The respondent, Stephen Muguti Chege, opposed the application through his Replying Affidavit dated July 6, 2022, in which he averred that the allegation that the plaintiff's/applicant's counsel was not served with the hearing notice of May 25, 2022, for being addressed to the incorrect email address was false. He indicated that the emails served were stumuti@gmail.com and CC to stumutiadvocate@gmail.com.
7. The Respondent further avers that the applicant is being elusive and misleading the court, since the applicant or his counsel have failed to appear in court even when properly served with hearing notices and lastly, that the applicant failed to follow the court's direction on filing of trial bundles.
8. The Respondent also avers that the Applicant has displayed lack of seriousness in this matter. That when the matter was dismissed on May 25, 2022, the Applicant brought an application dated June 13, 2022, to reinstate the matter due to his advocate's failure to attend court citing lack of instructions from the applicant at the time. He further states that the applicant was aware of the hearing date and therefore he cannot claim both, that he was unaware of the hearing notice and that his advocate did not have proper instructions. The respondent further states that the applicant has come to court with unclean hands. He further states that he has filed affidavits of Service in this matter and produced the same as exhibits.
9. With regard to the suit property, the respondent avers that the same is in the name of the parties' deceased father and should the applicant intend to seek legal redress, he should sue the estate of the deceased. He further states that the applicant has not been in possession of the suit property for a period of 12 years, and is not currently in possession of the suit property. He prays that the application be dismissed.
10. The Application was canvassed by way of written submissions.
11. The Applicant filed his written submissions on August 31, 2022, in which he relied on the following authorities:
 - a. Order 5 Rule 22B of the [Civil Procedure Rules](#) on Electronic Mail Services (E-mail). It states:
 - (1) Summons sent by Electronic Mail Service shall be sent to the Defendant's last confirmed and used E-mail address.
 - (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 - (3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is



sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.

(4) An officer of the Court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

b. *James Kanyita Nderitu and another v. Marios Philotas Gbikas and another* (2016) eKLR, where the court held as follows:

If there is no preps or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular judgement liable to be set aside by the Court ex debito justiae. Such a judgement is not set aside in the exercise of discretion, but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

12. The respondent through the Law Firm of Kanyi Kiruchi & Co Advocates, filed his written submissions on August 16, 2022, and relied on the following authorities:

a. Order 12 Rule 7 of the *Civil Procedure Rules* which provides for Setting aside Judgment or dismissal. It states:

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.”

b. *Julius Kibiwott Tuwei v Reuben Argut & 7 others* (2022) eKLR which upheld the decision in *John Mukuba Mburu v Charles Mwenga Mburu* (2019) eKLR, where it was held:-

.... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designated to assist a person who had deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

c. *Utalii Transport Co. Ltd and 3 others v NIC Bank & another* (2014) eKLR, where it was held:

It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

d. Lastly, the respondent relied on the case of *Republic v Rosemary Wairimu Munene (ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No 6 of 2004, where the Court held that costs follow the event.

13. Having considered the pleadings and rival written submissions of the parties, the Court finds the issues for determination are as follows; --

1. Whether there was effective service of the hearing notice date May 25, 2022, via email?

2. Whether this court ought to grant the prayers to reinstate the application?

14. From a review of the court records, in particular the affidavit of service dated May 18, 2022, which was sent to stumuti@gmail.com and carbon copied stumutiadvocates@gmail.com, one can identify the error in the applicant's address of service the correct address as per the applicant is stumutiadvocate@gmail.com.



15. As with any address postal or electronic, the character input must be accurate, otherwise delivery will surely fail. In this instance, the Hearing Notice was addressed to stumuti@gmail.com which clearly displays an error on the gmail.com section.
16. There is also a discrepancy in the carbon copied email address of the applicant's advocate between stumutiadvocates@gmail.com, where the email was sent as opposed to the address stumutiadvocate@gmail.com which the applicant states is his correct email address. The address in the notices is therefore different from the one provided by the plaintiff's/applicant's counsel in pleadings.
17. However, from the above analysis, it is also evident that the plaintiff/applicant failed to attend court in a matter which he instituted through filing an application. The plaintiff/applicant therefore failed to prosecute his own case necessitating the defendant's/respondent's Counsel to serve him with respective notices.
18. Order 12 of the *Civil Procedure Rules* provides for hearings and consequences for non-appearance. Rule 3 provides that where only the Defendant attends as is the case herein, then; -

If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

19. Rule 6 and 7 of the said Rules further provide for effect of dismissal and setting aside judgment or dismissal, respectively. They state:

Rule 6(1) - 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.

(2) When a suit has been dismissed under rule 3, no fresh suit may be brought in respect of the same cause of action.

20. Rule 7 - 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.
21. To determine the issue of whether to reinstate the application or not, this court will be guided by the case of *Magendo & another v Miningwo & 3 others* (Environment and Land Case Civil Suit 13 of 2021) [2022] KEELC 2563 (KLR) (5 July 2022) (Ruling) which quoted Sila, J in E.L.C. case at Nakuru No.383 of 2017, *Southern Empire Traders v Nakuru Players Theatre Club* [2018] eKLR wherein an application to reinstate was dismissed for non-attendance and failure to prosecute. The court held as follows:

The reinstatement of any application or suit that has been dismissed for non-attendance and/or for failure to prosecute ought not be considered to be automatic. Cogent reasons must be given for the non - attendance, for failure to attend court is a serious issue, and any person failing to attend court must be ready to bear the consequences which may arise therefrom. No applicant should imagine that all he/she needs to do is file an application for reinstatement and that the same will be allowed as a matter of course and indeed, if courts adopt that stance, it will greatly prejudice the administration of justice for all that a person will need to do is fail to appear, and sit in the comfort zone, that he can always file an application for reinstatement which will be allowed.

In this instance, I am afraid that I am not persuaded by the reasons tabled.”



22. The plaintiff/applicant states that his Advocate failed to appear incourt because he had not given his counsel proper instructions. The applicant later says that that he was not served with the hearing notices and/or the same were sent to the wrong email address.
23. In his supporting affidavit, the plaintiff's/applicant's counsel states that he now has proper instructions to prosecute his client's case, yet he has not indicated what circumstances changed between the time of filing of the application and delivery of the ruling that restricted him from acting. The plaintiff has also not explained what prevented him from prosecuting his own case.
24. On the final issue of whether the plaintiff/applicant has a high chance of success on the suit for adverse possession, this case is greatly diminished considering that the respondent's possession and occupation of the suit property was interrupted and ceased. This court is therefore not moved by this plea.
25. Having now carefully considered the instant notice of motion application dated June 28, 2022, the court finds it not merited and the same is dismissed entirely with costs to the defendant/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF OCTOBER 2022.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Joel Njonjo - Court Assistant

Plaintiff/Applicant - Absent

Ms Muchemi H/B Defendant/Respondent

L. GACHERU

JUDGE

13/10/2022

