



**Makobo (Suing as legal representative of the Estate of the Late James Makobo)
v Matungulu Farmers Company Limited (Environment & Land Case
370 of 2019) [2022] KEELC 15105 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 370 OF 2019
AA OMOLLO, J
NOVEMBER 23, 2022**

BETWEEN

**ANNE MWIKALI MAKOBO APPLICANT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES
MAKOBO**

AND

MATUNGULU FARMERS COMPANY LIMITED RESPONDENT

RULING

1. In this notice of motion dated May 20, 2022, the applicant seeks the following orders;
 1. Spent
 2. That the honourable court be pleased to direct that the notice of motion application dated September 17, 2019 be reinstated and admitted for hearing at the earliest possible date owing to the urgency subscribed therein.
 3. That any other relief that the court deems fit to so order
 4. That costs be in the cause.
2. The grounds of the motion were stated in the supporting affidavit sworn on May 20, 2022 by John Swaka, counsel for the Applicant, who stated that the applicant is the administrator of the estate of the late James Makobo, the deceased and the legal proprietor of plot No 1 and 12.
3. The deponent stated that an ownership dispute of the two plots was dealt in Civil Case No 769 of 1992 between the applicant and the respondent company in which the deceased was a member and the



court entered a judgment in favour of the Applicant and issued an order restraining the respondent from further dealing with the parcels in subject.

4. The deponent further stated that after the deceased demise, despite the judgement issuing a mandatory injunction against the respondent from further dealing with the mentioned parcels, the respondent continued to deal. The Applicant thus sought to have the respondent be cited for contempt but the matter was wrongly diarized and as such the counsel was unable to attend or instruct someone so authorized to attend which resulted in the application being dismissed for non-attendance.
5. Counsel for the Applicant stated that the Applicant should not be punished for his honest mistake and that the subject of the suit is a very sensitive and emotive matter. The applicant seeks the reinstatement of the application to guard and protect her proprietary interest envisioned in article 40 of the Constitution and that there has been no delay in filing the current application.
6. The motion was unopposed however, court directed that the same be argued by way of written submissions.
7. Order 12 rule 7 of the Civil Procedure Rules. It provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
8. The application before this court seeks to reinstate another application that was dismissed by this court on February 2, 2022 due to non-attendance of the Applicant or her counsel. The Applicant is seeking the exercise of this court’s discretion. This discretion has to be exercised judiciously, as was stated the case of Shah v Mbogo (1979) EA 116 quoted with approval in the case of John Mukuba Mburu v Charles Mwenga Mburu [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
9. For this Court to exercise its discretion of reinstating the applicant’s application dated September 17, 2019 in her favour, she has to satisfy that there is sufficient reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.
10. Sufficient Cause was defined by the Supreme Court of India in Parimal v Veena which was cited with approval in the case of Wachira Karani v Bildad Wachira [2016] eKLR that;

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”



11. The objective in setting aside court's orders is to achieve substantial justice to all the parties without technicalities of law and the test to be applied is whether the Applicant honestly and sincerely intended to remain present when the suit was called for hearing.
12. In this case, the sole ground on which the Applicant seeks the court to set aside the dismissal order is a mistake of the litigant on account of her counsel to properly diarize the matter hence failing to attend court. The Applicant's Counsel on record has owned up to the mistake and explained in the supporting affidavit why the mistake occurred.
13. A cursory look at the application sought to be reinstated shows that the Applicant was seeking for mandatory injunction against the Respondent company and that the Respondent be held in contempt of court order after judgement entered in the Applicant's favour. The re-instatement of the application is intended to cause the respondent to comply with a decree.
14. It is my opinion that the door of justice should not be closed on the Applicant for the genuine mistake of counsel. In the case of *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782 (CALL) Madan, JA (as he then was) stated:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
15. The current was brought three months after the dismissal order and it is this court's view that three months is not unreasonable delay. After considering the subject matter and the reason for nonattendance given by the Applicant; and the objective of the application dismissed, I find that the circumstances are sufficient to persuade the Court that the non-attendance by the Applicant at the hearing of the dismissed application was not a deliberate attempt to obstruct or delay justice.
16. Consequent to the above finding, the application dated May 20, 2022 is allowed with no orders as to costs. The notice of motion dated September 17, 2019 is forthwith re-instated and fixed for hearing on February 7, 2023.

DATED, SIGNED AND DELIVERED THROUGH VIRTUAL COURT AT NAIROBI THIS 23RD NOVEMBER, 2022.

A OMOLLO

JUDGE

