



**Kembe v Sule (Environment and Land Appeal 18 of 2020)  
[2022] KEELC 14892 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14892 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 18 OF 2020  
SO OKONG'O, J  
NOVEMBER 21, 2022**

**BETWEEN**

**MOSES AGEYA KEMBE ..... APPELLANT**

**AND**

**WASHINGTON OKELLO SULE ..... RESPONDENT**

**RULING**

1. On March 11, 2018, judgement was entered for the respondent against the appellant in Kisumu Chief Magistrates Court ELC No. 36 of 2018 (the lower court). The lower court declared that the respondent was the registered owner of all that parcel of land known as Kisumu/Kasule/5649 (suit property) and issued a permanent injunction restraining the appellant from interfering with the property. The court gave the appellant 30 days from the date of the judgment to vacate the suit property in default of which the respondent was given the liberty to apply for his forceful eviction from the property.
2. The appellant was aggrieved by the said judgment and filed the present appeal to challenge the same. On January 31, 2022, this court dismissed the appellant's appeal and upheld the lower court's decision. The respondent filed party/party bill of costs that was taxed at Kshs. 266,975/- on July 6, 2022. On August 26, 2022, the appellant filed an application by way of Notice of Motion dated August 1, 2022 seeking a temporary injunction restraining the respondent from trespassing on, constructing on, ploughing, selling, alienating or otherwise interfering in any way with the suit property pending the hearing and determination of the intended appeal to the Court of Appeal. The appellant also sought a stay of execution of this court's judgment of January 31, 2022 pending the hearing and determination of the said intended appeal.
3. The appellant's application was placed before the duty judge on August 31, 2022 who directed that the same be served for hearing on September 28, 2022. When the application came up for hearing on September 28, 2022, the appellant's advocate did not appear in court to prosecute the application. The application was consequently dismissed for non-attendance.



4. What is now before me is the appellant's Notice of Motion application dated October 10, 2022 filed on October 19, 2022 seeking an order for the setting aside of the order made on September 28, 2022 dismissing the appellant's application dated August 1, 2022 and the reinstatement of that application for hearing on merit. The application has been brought on the grounds that when the application dated August 1, 2022 came up for hearing on September 28, 2022, the advocate who was handling this appeal on behalf of the appellant had several other matters in various courts which he dealt with until 12.07 pm and upon checking on this matter thereafter found that the said application had been called out and dismissed.
5. The application is opposed by the respondent through grounds of opposition dated November 9, 2022. The respondent has contended that the application has no basis and that litigation must come to an end. When the application came up for hearing on November 16, 2022, the respondent's advocate did not attend court and the appellant's advocate informed the court that the appellant wished to rely entirely on the affidavits filed in support of the application.
6. I have considered the appellant's application together with the affidavits filed in support thereof. I have also considered the respondent's grounds of opposition filed in opposition to the application. What I need to determine is whether valid grounds have been put forward by the appellant to warrant the setting aside of the order made herein on September 28, 2022 dismissing the appellant's application dated August 1, 2022 for non-attendance.
7. There is no dispute that the court has power to reinstate the application dated August 1, 2022 that was dismissed for non-attendance. The power is however discretionary. The applicant for reinstatement has to satisfy the court that he deserves the exercise of the court's discretion. It is common ground that the appellant was aware of the hearing date of September 28, 2022 for his application and that neither he nor his advocate attended court on the material day. The dismissal of the application was regular and proper in the circumstances.
8. I am not satisfied that the appellant's advocate has given reasonable explanation for his failure to attend court on September 28, 2022. The mere fact that the advocate had other cases on the material day that he was attending to is not a sufficient excuse in my view for his failure to attend to this matter. The advocate had a duty to make arrangement with his colleagues to inform the court of his difficulty and to seek adjournment of the matter or to have the matter heard after he was through with the other matters he was attending to.
9. That said, I have noted that the said advocate came to court albeit after the application had been dismissed to find out the position of the matter. I have also noted that the advocate reached out to the respondent's advocates on the same day and sought to have the application reinstated by consent. I have also noted that the application for reinstatement of the application was filed soon after the respondent's advocates declined to have the application reinstated by consent. The foregoing is a demonstration that the appellant was interested in prosecuting his application dated August 1, 2022. There is no evidence on record that the appellant had attempted at any time in the course of the proceedings in this appeal to delay or to frustrate the prosecution of the appeal or any application filed therein. As I have stated earlier, there is no reasonable explanation given by the appellant and his advocate why they did not attend court to prosecute the application dated August 1, 2022 on September 28, 2022. However, this alone in my view cannot fetter the court's discretion in an application of this nature. In *Nchapi Leiyagu v IEBC & 2 others*, Civil Appeal No 18 of 2013,[2013] eKLR, the court stated that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to



dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

10. In *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 1033 at 1040, Apaloo J.A. Stated as follows:

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

11. Due to the nature of the application that was dismissed, I am inclined to give the appellant a chance to prosecute the same. I am not persuaded that the respondent will suffer prejudice that cannot be put right by payment of costs if the application is allowed.
12. In conclusion, I allow the Notice of Motion application dated October 10, 2022 in terms of prayer 1 thereof. The respondent shall have the costs of the application assessed at Kshs. 5000/-.

**Delivered and Dated at Kisumu this 21<sup>st</sup> Day of November 2022**

**S. OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of

Mr. Omondi T. for the Appellant

N/A for the Respondent

**Ms. J. Omondi-Court Assistant**

