



**Swaptic Holdings Limited v Kimani (Civil Suit E369 of 2021)  
[2022] KEELC 15664 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15664 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL SUIT E369 OF 2021  
JA MOGENI, J  
NOVEMBER 9, 2022**

**BETWEEN**

**SWAPTIC HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ANN NYAGUTHI KIMANI ..... DEFENDANT**

**RULING**

1. The plaintiff herein filed a notice of motion application under section 1A, 1B, 3A, 63e of the *Civil Procedure Act* cap 21 Laws of Kenya order 45, rule 1, order 51 rule 1 & 2 articles 48, 50 (1), (2), article 159(1), 2 a, b, and e of the *Constitution* of Kenya and all enabling provisions seeking the following orders:
  - a. Spent
  - b. That this honorable court be pleased to set aside its orders issued on July 12, 2022 by Hon Justice JA Mogeni dismissing this plaintiff's suit for want of prosecution occasioned by the non-attendance of the plaintiff and its advocates on record.
  - c. That an order be issued allowing the plaintiff/applicant to reinstate this suit and the same be set down for hearing and determination on merits.
  - d. That orders issued on March 10, 2022 that were subsisting pending the hearing and determination of and final disposal of the suit herein be reinstated.
  - e. That the court be at liberty to make such further orders as it deems fit and just to grant in the circumstances.
  - f. That the cost of this application be provided for.



2. The application was based on grounds that the applicant's suit was dismissed on July 12, 2022 for non-attendance and that counsel for the applicant together with client were stuck in traffic snarl up on the hearing date hence absence from the court.
3. That the subject matter of the suit is a property of land and it would be in the interest of justice if the suit is determined on merits otherwise the plaintiff shall suffer irreparable harm if the claim is not heard on substance and merit. It was stated that at the time of dismissal of the suit, the parties had complied in terms of filing their respective documents and that the suit was certified ready for hearing on May 6, 2022.
4. The application was supported by the affidavit of Sathishcandra Rameshbhai Patel who is the Managing Director of Swastik Holdings Limited the plaintiff herein. That the plaintiff is the sole, legal and indefeasible proprietor as lessee in possession of that property known as LR 21080/26 IR 68327/75.
5. He deposed and stated that they got to court together with his lawyer at 10:45 a.m due to a heavy traffic snarl up and found that the suit had already been dismissed for want of prosecution. He further states that he has an arguable case which raises triable issues. That the failure to get to court on time was not intentional but caused by the unpredictable traffic snarl up.
6. Further that no prejudice will be suffered by the defendant if the suit is reinstated.
7. Ann Nyaguthii respondent herein filed a replying affidavit where she deposed and stated that the honorable court was right in dismissing the suit under order 12 rule 3. Further that the applicant/plaintiff has not indicated where the traffic jam was at. That her counsel tried to call the plaintiff's counsel at 8:15 and he never picked up because he wanted to have the file set aside.
8. She avers that if there was a jam as the plaintiff has stated he should have attempted to call counsel for the defendant to explain his predicament. She contends that reinstatement of the suit is prejudicial to her since the hearing of her counter-claim is scheduled for November 28, 2022 and the building works on LR 21080/26 has stalled.

### **Analysis and Determination**

9. This suit was filed by the applicant on November 1, 2021 seeking for orders for a mandatory injunction restraining the defendant and or their agent from interfering or whatsoever dealing with the plaintiff's possession of parcel number LR 21080/26 IR 68327/75, that he be declared to be the owner of the suit property and damages for trespass to be paid to him. The matter came up for hearing on July 12, 2022 and the same was dismissed for non-attendance. The applicant filed the instant application seeking for orders of reinstatement of the suit.
10. The respondent on the hand has opposed the said application on grounds that the court has scheduled the hearing of the counter-claim on November 28, 2022 and that his building works on the on the suit property has been stopped because of the suit. Further that the applicant/plaintiff has not disclosed where he was stuck in a traffic snarl up.
11. In the case of *Phillip Chemwolo & Another v Augustine Kubende (1982-88 1 KAR 1036*, Apaloo, JA enunciated the broad equitable approach in these sort of cases as follows:

“I think a distinguished equity judge has said: ‘Blunders will continue to 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 the merits’.



I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

12. This court finds that the applicant has not given enough evidence to indicate where exactly he was stuck in traffic. Further one wonders why if he was stuck in traffic did not call his fellow advocate to inform him of his predicament so that the file could be set aside for a few minutes.
13. However, the applicant has stated in his affidavit that he has followed up his case strenuously without fail. I have perused the file and I have seen that the advocate for the plaintiff has attended court every time this case came up in court. I am therefore of the view that the applicant is keen on prosecuting his suit owing to the fact that he even came to court after the dismissal of his case when the court was still in session together with his advocate. Therefore, I am of the view that if I dismiss this application the applicant will be condemned unheard.
14. There is a school of thought that states that whereas there is a law that allows for dismissal of a suit for want of prosecution, there is however no law that guides the court to reinstate the suit dismissed in the circumstances states. I hold a different view point. My reading of order 12 rule 7 of the *Civil Procedure Rules*, which 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.”

I believe does allow the court the discretion to reinstate a suit dismissed for want of prosecution. order 12 rule 7 states ‘...or the suit has been dismissed,...’. I infer that it is one dismissed for any reason including want of prosecution.

15. Therefore, under order 12 rule 7, this court has made discretion in determining an application for setting aside an order dismissing the suit due to non-attendance of the plaintiff. In the case of [\*Yamko Yadpaz Industries Limited v Kalka Flowers Limited Nairobi HCCC No 591 of 2012\*](#), the court stated as follows;

“That there are no limits or restriction on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the court of justice. *Shah v Mbogo [1967] EA 116* at page 123(b) *Shabir Din v Ram Perkasb Anand [1955] 22 EACA 45.*”

16. For these reasons I allow the application and make the following orders:
  - i. That this honorable court hereby sets aside its orders issued on July 12, 2022 dismissing this plaintiff’s suit for want of prosecution occasioned by the non-attendance of the plaintiff and its advocates on record.
  - ii. That an order be and is hereby issued reinstating the suit
  - iii. That orders issued on March 10, 2022 that were subsisting pending the hearing and determination of and final disposal of the suit herein be reinstated.



- iv. The matter is now fixed for hearing on November 28, 2022 together with the counter- claim.
  - v. That the cost of this application shall be paid to the respondent.
- It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2022.**

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**MOGENI J  
JUDGE**

**In the virtual presence of: -**

Mr Chumo holding brief for Mr Manwa for plaintiff/applicant

Mr Mwaura for the defendant/respondent

Caroline Sagina : Court Assistant

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**MOGENI J  
JUDGE**

