



Clean Air System Ltd & another v Mungai & another (Environment and Land Case Civil Suit 28 of 2009) [2022] KEELC 15472 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 28 OF 2009
SO OKONG'O, J
DECEMBER 20, 2022**

BETWEEN

CLEAN AIR SYSTEM LTD 1ST PLAINTIFF

KAMITI FARMERS COMPANY LTD 2ND PLAINTIFF

AND

SAMUEL MUNGAI DEFENDANT

AND

MBUGUA KARIUKI INTENDED DEFENDANT

RULING

1. What is before the court is the plaintiffs' notice of motion application dated November 11, 2021 brought under order 17 rule 2 of the [Civil Procedure Rules](#), sections 1A and 3A of the [Civil Procedure Act](#). In the application, the plaintiffs have sought the following orders;
 1. That this court be pleased to set aside the order made on July 19, 2021 dismissing the plaintiffs' application dated November 29, 2019 for non-attendance and reinstatement of the application for hearing.
 2. That the costs for this application be in the cause.
2. The application is based on the grounds set out on the face thereof and on the affidavit of the plaintiffs' advocate Karuku Wachira sworn on November 11, 2021. The plaintiffs have averred that it is necessary to reinstate the suit so that the matters in controversy between the plaintiffs and the defendants can be resolved. The plaintiffs have averred that they had not taken one year without taking a step towards prosecuting this suit by the time the suit was dismissed. The plaintiffs have averred that the last court attendance was on February 9, 2021 while the suit was dismissed on July 19, 2021.



3. The plaintiffs have averred that the failure of their advocate to appear in court on July 19, 2021 was due to an error of putting a wrong hearing date in his diary. The plaintiffs have averred that they are keen on prosecuting this suit and that being innocent litigants who are not guilty of dilatory conduct, they should not be barred from pursuing their rights in court because of their advocates' mistake. The plaintiffs have averred that the defendants will not suffer any prejudice if the application is allowed. The application is not opposed by the defendant.
4. When the application came up for hearing on July 13, 2022, the plaintiffs' advocate relied entirely on the affidavit in support of the application and urged the court to allow the application. I have considered the application together with the affidavit filed in support thereof. This suit was dismissed for want of prosecution on March 11, 2015. On December 4, 2019, the plaintiff filed an application by way of notice of motion dated November 29, 2019 seeking the setting aside of the order of dismissal and the reinstatement of the suit for hearing on merit. The plaintiffs' application dated November 29, 2019 was fixed for hearing on July 19, 2021 in the presence of the plaintiffs' advocate. On July 19, 2021, neither the plaintiffs' nor the defendants' advocates turned up for the hearing of the application and the same was dismissed by the court for non-attendance.
5. The present application has been brought to set aside the said order of July 19, 2021. As mentioned earlier, the plaintiffs have averred that their advocate's failure to attend court on July 19, 2021 was due to the error that was made by the said advocates of not getting the correct hearing date which they took to be September 19, 2021 instead of July 19, 2021. The application is not opposed. The reasons given by the plaintiffs for failure to attend court have not been challenged.
6. This court has the discretion to set aside an order dismissing a suit or an application for non-attendance. The court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
7. The principles applied by the court in applications for setting aside ex parte judgments were set out in *Shah v Mbogo* [1967] EA 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, 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 cause of justice.”
8. 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.”



9. In *Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 1033* at 1040, Apaloo JA 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.”

10. The plaintiffs have given an explanation for their advocate’s failure to attend court on July 19, 2021. The explanation given is not reasonable to me and does not look genuine. First, no evidence has been placed before the court showing that the plaintiffs’ advocate entered the hearing date of the application dated November 29, 2019 in his diary as September 17, 2021 instead of July 19, 2021. Secondly, September 19, 2021 fell on a Friday on which day the court does not hear applications. Thirdly, it was not until November 23, 2021 that the plaintiffs brought the present application. That was more than 2 months after September 19, 2021 which is the date when the plaintiffs allegedly learned that the said application was heard on July 19, 2021. That said, the application is not opposed as stated earlier. Due to the nature of the dispute between the parties, I am inclined to give the plaintiffs a chance to prosecute their application. It appears that the defendants would not suffer any prejudice if the application is allowed.

Conclusion:

11. In conclusion, I hereby make the following orders on the application;

1. The order made on July 19, 2021 dismissing the plaintiffs’ notice of motion application dated November 29, 2019 for non-attendance is set aside and the application is reinstated for hearing on merits.
2. The costs of the application are to be borne by the plaintiffs.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF DECEMBER 2022

S OKONG’O

JUDGE

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

Ms Mukabi h/b for Mr Wachira for the plaintiffs

N/A for the defendants

Ms J Omondi-Court Assistant

