



Ndungu t/a Urutagwo Mwiruti Women Group v Kanyia (Environment and Land Case 1255 of 2013) [2025] KEELC 5045 (KLR) (8 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 1255 OF 2013**

CA OCHIENG, J

JULY 8, 2025

BETWEEN

**ANN WAIRIMU NDUNGU T/A URUTAGWO MWIRUTI WOMEN
GROUP PLAINTIFF**

AND

EVA MUTIO KANYIA DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated the 13th December 2024 where she seeks for the following Orders:
 - a. Spent.
 - b. Spent.
 - c. The Honorable Court be pleased to set aside and vacate the orders of E.M. Washe J. issued virtually on the 13th December 2024 dismissing the Plaintiffs' plaint together with all consequential orders thereto.
 - d. The Honorable court be pleased to reinstate the Plaintiffs' suit and set it down for hearing on its merits.
 - e. Costs be in the cause.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. She avers that on 23rd October 2024, Counsel for both parties in this suit appeared virtually where they fixed a mutually convenient hearing date being 13th December 2024. Subsequently, her advocate conducted a pre-trial briefing and she was well prepared for the said hearing date.



3. She avers that she was not able to attend Court on the said date since when she was preparing to leave for her advocate's chambers in order to participate in the hearing, she began feeling dizzy and light headed with severe headache and was rushed to Joska Royal Care Hospital where she has been treated since 2019 as an outpatient. Further, while at the said hospital, she was diagnosed with hyperglycemia after a series of tests and the doctor immediately begun IV fluid management which was intravenous, together with analgesics and insulin management and recommended a seven (7) days' bed rest.
4. She asserts that she is an elderly woman suffering from diabetes mellitus type II and is hypertensive with congestive cardiac failure which conditions she has been controlling with medications.
5. She claims that she informed her advocate of her sudden illness and requested him to seek an adjournment but his request to adjourn the matter was declined. Her advocate also sought court's leave to proceed virtually at 2pm on the said date but the prayer was equally declined and the court proceeded to dismiss her suit. She contends that she is willing to prosecute the suit and failure to attend Court on account of ill health and physical infirmity should not be a ground for driving her away from the seat of justice. Further, that the Defendant will not suffer if her claim is heard. She annexed medical reports from Joska Royal Care Hospital as her evidence.
6. The Defendant filed a replying affidavit in opposition to the instant application. She avers that the suit was filed in 2013 hence by the time the Plaintiff's suit was dismissed, the case had been in Court for over eleven (11) years, yet the Law requires a speedy disposal of cases. She insists that the Plaintiff has always thwarted the hearing of this matter by failing to appear.
7. She urges the court to consider the Plaintiff's past conduct in the matter, where the suit has been adjourned eight (8) times at her instance and her former Advocate made an application to cease acting due to frustration, by the plaintiff. She also urges the court to consider that she spent money on the suit premises but she cannot enjoy the same as it has benefitted the Plaintiff at her detriment.
8. She points out that the Plaintiff's alleged medical reports do not indicate the date and time she was at the alleged hospital and if it is true she has been diabetic then a document would have been attached showing the history of her illness.
9. The application was canvassed by way of written submissions.

Submissions

10. The Plaintiff submits that reinstatement of a suit is at the discretion of the Court and she has made a good case for reinstatement of this suit by demonstrating that failure to attend court on the date set for hearing was not deliberate. Further, that the suit should be reinstated since dismissal of suits is a draconian order, which drives away the litigant from the seat of justice. To buttress her averments, she relied on the following decisions *Simion Waiti Kimani & Three Others v Equity Building Society* [2010] eKLR, *John Nahashon Mwangi v Kenya Finance Bank Limited (In liquidation)* [2015] eKLR, *Joseph Kinyua v G.O Ombachi* [2019] eKLR and *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR.
11. On her part, the Defendant submits that the Plaintiff cannot escape the tag of indolence, inertia, lack of interest or candor in delaying the cause of justice due to her conduct in the matter thus she does not deserve discretion being exercised in her favour. To support her arguments, she relied on the following decisions: *Fran Investments Limited v G4S Security Services Limited* [2018] eKLR and *Tan and Athi Rivers Development Authority v Jeremiah Kimigho Mwalao & 3 Others* [2015] eKLR.



Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether this Court's orders issued on 13th December 2024 dismissing the Plaintiff's suit should be set aside and the suit reinstated.
13. The Plaintiff has sought for the setting aside of Orders issued on 13th December, 2024 dismissing her suit. She claims she got unwell and received treatment. She has annexed certain medical records to support her claim. The Defendant has opposed the instant application contending that the Plaintiff has been indolent in proceeding with her matter.
14. On reinstatement of a suit, the Court of Appeal held as follows in *Tabuche v Tinga & 2 Others* (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024) (Judgment);

“Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances.”
15. In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another* (2014) eKLR, the Court held that:

“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.”
16. Although the court has discretion to set aside orders dismissing a suit, it should not be done so as to cause an injustice. The Court of Appeal stated as follows in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”
17. From perusal of the Court record, I note that this suit was first set down for hearing on 13th May, 2020, then adjourned to various dates including 24th February, 2021, 8th November, 2021, 19th May, 2022, 10th November, 2022, 7th June, 2023, 8th November, 2023, 29th May, 2024, 23rd October, 2024, and on 13th December, 2024 when it was finally dismissed for want of prosecution.
18. For a Court to set aside an order dismissing a suit for want of prosecution, there has to be sufficient cause demonstrated as held in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where Mativo J (as he then was) held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-



jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

19. It is trite that setting aside of judgment is discretionary but the court has to consider sufficient cause proffered by the applicant, before proceeding to do so. However, based on the facts before me including the perusal of the Court record, I find that Plaintiff including her advocate intentionally and severally failed to proceed with this matter. I opine that the Plaintiff has failed to provide plausible reasons to demonstrate sufficient cause why together with her Advocate, she severally failed to attend court and proceed with this matter which she now claims, she will be prejudiced if the suit is not reinstated.
20. In the foregoing while associating myself with the decisions cited, I find that the Notice of Motion application dated the 13th December 2024 is not meritorious and will proceed to dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Outa for Plaintiff

Were for Defendant

Court Assistant: Joan

