



REPUBLIC OF KENYA



**Koech v Gitonga & 4 others (Environment & Land Case
212 of 2017) [2024] KEELC 471 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 212 OF 2017
MAO ODENY, J
FEBRUARY 6, 2024
FORMERLY KERICHO ELC NO. 54 OF 2016**

BETWEEN

SAMWEL KIPNGENO KOECH PLAINTIFF

AND

AGNES WAMBUI GITONGA 1ST DEFENDANT

THE SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE DISTRICT LAND REGISTRAR, NAKURU 5TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 24th July 2023 by the plaintiff/applicant seeking the following orders:
 - a. Spent
 - b. That this honorable court be pleased to set aside and vacate the orders issued on 23rd November, 2022 dismissing the suit for non-attendance and suit be reinstated for inter partes hearing.
 - c. That the costs of this application be provided.
2. The application was supported by the annexed affidavit of Samwel Kipngeno Koech sworn on 24th July, 2023 where he deponed that on 22nd November, 2022 he was called by his advocate reminding him of the hearing of his case. He stated that he informed his advocate that he was not feeling well and instructed him to take another date to allow him to recuperate.



3. He stated that upon regaining his health he went to his advocate's Chambers to find out the position of the case, who followed up at the Nakuru ELC Registry but the file could not be traced. He stated that he was later informed by his advocates that the matter had been dismissed for non-attendance.
4. The applicant also deponed that his advocate had informed the 1st defendant's counsel that he would not be able to proceed and requested him to get an advocate to hold his brief and paid him Kshs.3000/= . That on 23rd November 2022 when the matter was coming up for hearing, his advocate was at Kericho High Court.
5. The applicant further deponed that when his advocate called the 1st Defendant's counsel, he was informed that counsel for the 1st defendant had sent one of his advocates to court and was yet to be informed of the position of the matter. That upon perusal of the file, they discovered that no one held his advocate's brief hence the dismissal for non- attendance.
6. The Applicant stated that the dismissal of the suit for non-attendance was not through his fault and further deponed that the delay in filing the present application was occasioned by the lack of the file at the registry and urged the court to allow the application as prayed.
7. The 1st defendant filed a replying affidavit sworn on 25th October 2023 where she deponed that the plaintiff's absence in court on 23rd November 2022 was meant to delay the determination of the present case and stated that the plaintiff's reasons for non-attendance was not supported by any tangible evidence.
8. It was the 1st defendant's case that the plaintiff has continued to benefit from her property and that the delay in filing the application was inordinate.
9. The 2nd, 3rd, 4th and 5th defendants did not file any response to the application.

Plaintiff's Submissions

10. Counsel identified two issues for determination namely; whether or not the applicant has given a satisfactory explanation for failure to attend court for hearing on 23rd November, 2022 and on whether or not the pleadings on record raises triable issues warranting the matter to go for full hearing.
11. On the first issue, counsel submitted that the plaintiff was unwell and that is why he did not attend court on 23rd November 2022 and relied on the case of Coftea Machinery Services Ltd v Akiba Bank Ltd & 2 others [2004] eKLR.
12. Mr Migiro submitted that the plaintiff's plaint dated 3rd August 2017 disclosed triable issues hence he should be given a chance to be heard on merit. Counsel relied on the case of Mwinyi Rama Ngwaya v Lenny Maxwell Kivuti & another [2019] eKLR and submitted that the Plaintiff has been in occupation of the suit property since 2002.
13. Counsel further relied on Article 50 of *the Constitution* of Kenya which provides that a party should not be condemned unheard and that the court should exercise its discretion and allow the application as prayed.

1st Defendant's Submissions

14. The 1st defendant submitted that since the matter was transferred to Nakuru Law Courts from Kericho Law Courts in 2017, the plaintiff has failed to prosecute his case. Further that the Deputy Registrar had issued a Notice to Show cause why the suit should be dismissed for want of prosecution.



15. It was her evidence that the plaintiff has not given sufficient reasons as to the inordinate delay in filing the application for reinstatement of the suit. She also stated that the Plaintiff has not attached any medical records to show that he was unwell. Further that the Plaintiff alleged that his advocate on record was engaged in Kericho Law Courts, but he did not mention the case he was attending to.
16. The 1st defendant argued that the plaintiff's allegation that the file could not be traced at the registry was not tenable as she and her previous advocates on record have always gained access to the file.

Analysis and Determination

17. The issue for determination is whether the Plaintiff has met the threshold for reinstatement of a dismissed suit for non- attendance.
18. On 23rd November 2022 the court dismissed this suit under Order 12 Rule 3(1) of the Civil Procedure Rules which provides as follows:
 - “ 3. If on the day fixed for hearing, after the suit has been called on for hearing (1) outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”
19. Order 12 Rule 7 of the Civil Procedure Rules provides as follows on setting aside judgement or an order of dismissal:
 - “7. 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.”
20. In an application for reinstatement of a dismissed suit for non-attendance, the Applicant must present sufficient reasons why he/she failed to attend court. The reasons for non-attendance must be excusable and that the application must be filed without inordinate delay. The reinstatement of the suit must also not prejudice the defendant.
21. The duty of the court is to ensure that parties who approach the court are given a fair hearing and an opportunity to ventilate their disputes as was held in the case of K.G. Patel & Sons Ltd. –vs- John Kabukuru Gituro [2016] eKLR
22. The court also has powers to dismiss suits for want of prosecution where parties file cases and are not willing or ready to proceed with their cases hence causing harm to the defendants. Litigation must come to an end either by being heard on merit or through preliminary applications, which might have the effect of terminating a case prematurely before being heard on merit.
23. The court also has discretion to reinstate a suit that has been dismissed for want of prosecution or for non-attendance like the present case. In the case of David Bundi v Timothy Mwenda Muthee [2022] eKLR the court held as follows:
 - “The Court of Appeal in Njue Njagi v. Ephantus Njiru & Another [2016] eKLR stated that dismissal of a suit for none attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.



The court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. See *Shah v. Mbogo & Another* [1967] E.A. 116.

In *Patel v. E.A. Cargo Handling Services Ltd* [1974] E.A. 75 the court stated that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

24. The plaintiff has annexed to his supporting affidavit a copy of Mpesa statement that indicate that Mr. Waiganjo Mwangi received Kshs.3,000/= on 22nd November 2022 at 16:45. Upon perusal of the court record it is clear that the firm of Waiganjo & Co. Advocates was on record for the 1st defendant.
25. It is within the 1st defendant’s right to oppose the application for the reinstatement of the suit but she has not demonstrated any prejudice that she is likely to suffer if the suit was reinstated and heard on merit as was held in the case of *Esther Nyambura Ngotho v Harbans Singh Birdi & 2 others* [2014] eKLR where the court held thus:

“There is now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of *the Constitution* and not to pay undue regard to procedural technicalities, and in light of the above reasons I find that there is sufficient ground to set aside the orders of dismissal of this suit given on made on 25th November 2011. In determining the issue whether the suit herein should be reinstated, I am also guided by the ruling of this Court in *Ivita vs Kyumbu* (1984) KLR 441 that even if there are good reasons for the delay in prosecuting a suit, the court must also be satisfied that justice will still be done to the parties despite the delay.

The Defendants and Third Party have not demonstrated any prejudice they will suffer in having the suit herein reinstated, and on the contrary it is in the interests of justice that the issue of which of the two titles in existence with respect to the suit property is the valid title be determined. In addition, the Defendants have filed a petition seeking a determination of their rights in this respect, and it is prudent that all issues arising from the dispute between the parties herein be determined on merit and with finality.”

26. It is evident that once the plaintiff realized that he would not be able to attend court on 23rd November 2022, he informed his advocate who in turn informed counsel for the 1st defendant which suffices as sufficient explanation for his absence in court.
27. Consequently, I find that the application has merit and is therefore allowed as prayed. Plaintiff to fix this case for hearing within 30 days failure to which the suit stands dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

