



Nkonge v Marangu; Marangu (Legal Rep’ of the Estate of George Mbaya Marangu) (Intended Defendant) (Environment & Land Case E019 of 2021) [2024] KEELC 3248 (KLR) (1 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E019 OF 2021**

**CK YANO, J
APRIL 1, 2024**

BETWEEN

GEORGE NKONGE PLAINTIFF

AND

GEORGE MBAYA MARANGU DEFENDANT

AND

FLORENCE MAKENA MARANGU (LEGAL REP’ OF THE ESTATE OF GEORGE MBAYA MARANGU) INTENDED DEFENDANT

RULING

1. The subject of this ruling is a notice of motion application dated 5th October, 2023 said to be brought pursuant to Article 159(2) of *the Constitution*, Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 12 Rules 7 of the Civil Procedure Rules and all enabling provisions of the law.
2. The plaintiff/applicant is mainly seeking for orders to set aside the orders issued on 3rd October, 2023 dismissing the plaintiff’s application dated 13th June, 2023 for non-attendance and have it reinstated for hearing on merit.
3. The application is premised on the grounds thereon and supported by the affidavit of Mutua Josephat, the applicant’s counsel sworn on 5th October, 2023 and a supplementary affidavit dated 20th November, 2023. The explanation given by the applicant’s counsel for his non-attendance on 3rd October, 2023 is that he logged into a different virtual court link and was not admitted up to 9:30am and thought the court was not sitting, but on making follow up with colleagues, he was given the correct link. That upon logging in the matter had already been called out and the application subsequently dismissed. That he was desirous of prosecuting the application and the non-attendance was not deliberate.



4. It is the applicant's contention that the application has been made without unreasonable delay. That there is a danger that the applicant would suffer substantial loss should the application be dismissed as he stands to lose his parcel of land forming the substance of the case. That it is in the interests of justice that the application dated 13th June 2013 be reinstated so that the same may be heard on merit. That no prejudice or injustice will occur on the part of the defendant/respondent if this application is allowed. The applicant's counsel has annexed copies of the cause list and WhatsApp screenshots.
5. In opposing the application, the defendant filed a replying affidavit dated 9th November, 2023 sworn by Desderio Nyaga Nyamu, the defendant's counsel. It is his contention inter-alia that the explanation given by the applicant's counsel for his failure to attend court on 3/10/2023 does not add up and raises several questions which have not been explained to the court. That if the applicant had difficulties as alleged, he could have made telephone calls to the ELC Registry at Meru or to the defendant's counsel. That there is no case before court culpable of being heard as the same has since abated. That contrary to the allegations by the plaintiff's advocate that the defendant will not suffer any prejudice if the application is allowed the defendant and/or his estate will suffer great loss and prejudice, adding that litigation must come to an end. The respondent urged the court to dismiss the application with costs.
6. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties and which I read and considered

Determination

7. I have carefully considered the application as presented, the replying Affidavit and the submissions made by counsel for both the plaintiff and defendant. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the application dated 13th June, 2023.
8. The Constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*. It is also the duty of the Court, to ensure that matters are concluded expeditiously without inexcusable delay. Section 1A and 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya, are relevant, with regard to that.
9. Section 3A of the *Civil Procedure Act* gives Court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay.
10. It is also within the general discretion of the Court to set aside any order issued by it ex-parte, so long as sufficient cause has been shown for the exercise of such discretion.
11. It is my view that such would be valid considerations in an application for dismissal of an application for non-attendance such as in the present case.
12. The factors considered or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita Vs Kyumbu (1984) KLR 441 Chesoni J (as he then was)*, where the court stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the Defendant: so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and



dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

13. Further, I find instructive the expressions of the Court in *CMC Holdings Limited vs Nzioki* (2004) 1klr 173 that:

"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

14. Accordingly, the Court would be interested in finding out the Plaintiff's explanation for not attending Court and whether any prejudice will be suffered by either the Plaintiff or the Defendants should the ex-parte orders be set aside and the application reinstated for hearing and disposal on the merits. In this case, the Plaintiff's advocate averred, in his Supporting Affidavit, that the matter came up for hearing on 3rd October July 2023. That he timely downloaded the Cause List for the day from the Kenya Law Website and logged into the court link provided. However, he realized non-admission to the virtual court at around 9.30 AM. That he contacted his colleague who informed him that the court was sitting albeit with use of a different link which he shared. That despite being admitted some minutes past 10.00am, the court had already called out the matter and dismissed the Application for non-attendance.
15. On the question of prejudice, it was submitted on behalf of the applicant that the defendants would suffer no prejudice or injustice. On the other hand, counsel for the respondent submitted that the respondent stands to suffer prejudice if the application is allowed and that the defendant/respondent and/or his estate will suffer great loss and prejudice if the application is reinstated.
16. It is instructive however, that in the case of *Ivita vs. Kyumbu* (supra) it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. The defendant must satisfy the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.
17. Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the defendant which cannot be remedied by an award of costs; and that to the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, were his application to be dismissed.
18. The foregoing being my view of the matter, I would allow the application dated 5th October, 2023 and set aside the dismissal order made on 3rd October, 2023 and order that the application dated 13th June, 2023 be reinstated for hearing and determination on the merits.
19. The plaintiff shall however meet the costs of this application.
20. It is so ordered.

DELIVERED DATED AND SIGNED AT MERU THIS 1ST DAY OF FEBRUARY, 2024



C.K YANO

ELC JUDGE

In the presence of:

Court Assistant: Kiragu

Mageria holding brief for Nyamu Nyaga for defendant

Mutua for plaintiff

