



**Kangethe v Nkirote (Environment & Land Case E012 of 2022)
[2024] KEELC 5191 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E012 OF 2022**

**CK YANO, J
JULY 11, 2024**

BETWEEN

DANPHONE KAMUNA KANGETHE PLAINTIFF

AND

JENIFFER NKIROTE DEFENDANT

RULING

1. This ruling relates to the Notice of Motion application dated 11th December, 2023 by the plaintiff/applicant brought under Order 12 Rule 7, Order 51 Rules 2 & 15 of the *Civil Procedure Rules*. The applicant seeks to set aside the court's order made on 11th December, 2023 dismissing the plaintiff application dated 30th October, 2023 for non-attendance and have the said application reinstated for hearing on its merits.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Jason Kiambi Mungania, the plaintiff's advocate sworn on 11th December, 2023 and a supplementary affidavit sworn by the applicant on 16th February, 2024. The applicant's advocate states that he was aware of the matter and had logged into the court's link before the time appointed for the hearing of the matter and waited in the lobby until 10.30 a.m. for the case to be called out for hearing. That he then called the court registry to find out why the case was not being called out and was told by the court assistant that the application had been dismissed for non-attendance. It is the applicant's contention that the failure to be heard was not deliberate nor intentional. The applicant urged the court to exercise its discretion and allow the application herein.
3. The defendant/respondent opposed the application and filed a replying affidavit dated 24th January, 2024 wherein she states inter alia that no viable explanation has been given by the applicant for failing to attend the virtual hearing of the application. That the court is functus officio having dismissed the applicant's suit and having concluded the matter, and that the only remedy available for the applicant



is an appeal. It is the respondent's contention that the application is defective, bad in law and should be dismissed with costs.

4. The application was heard by way of written submissions which were duly filed by both parties and which I have read and considered and I need not reproduce the same herein.

Analysis and Determination

5. 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 30th October, 2023.
6. The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*. It is only 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.
7. 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 or an application dismissed on account of non-attendance.
8. It is 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. It is my view that such would be valid consideration in an application for dismissal of an application for non-attendance or for want of prosecution. In this case the application was dismissed for non-attendance.
9. The factors for consideration for the purpose of reinstatement of suit or applications are numerous, and were addressed in *Ivita Vs Kyumbu* (1984) KLR 441 by Chesoni J (as he was then) 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.”

10. I also find instructive the expression of the court in *CMC Holdings Limited Vs Nzitoki* (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 advocates.”

11. 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 defendant should the *exparte* orders be set aside and the application reinstated for hearing and disposal on the merits. To this end, the plaintiff averred in his supporting affidavit that on the 11th December, 2023 the court dismissed his application dated 30th October, 2023 for non attendance. That the application was the only one fixed for hearing before the court. The applicant has annexed a copy of the day’s cause list marked “JKMI”.
12. The applicant’s counsel avers that the cause list had provided the court virtual link for parties to be heard virtually. That he logged into the link before the time appointed for the hearing of the case and waited for the application to be called out for hearing. That after waiting until 10.30 a.m. he called the court to find out why the case was not being called out. That he spoke to the court assistant who informed him that the application had been dismissed for non-attendance.
13. The applicant avers that the failure to be heard was neither deliberate nor intentional. That setting aside of an order is an exercise of judicial discretion and urged the court to exercise its discretion in his favour and reinstate the application for hearing on its merits.
14. On the question of prejudice, it was submitted on behalf of the applicant that the defendant would suffer no prejudice. However, on the other hand, the respondent avers that if the application is allowed it will be prejudicial to her as it is taking her as a successful litigant into a circular expedition which is turning the legal process into a theatrical absurdity and is already proving costly to her.
15. Whereas 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, in this case, I am persuaded that the applicant has proffered a satisfactory explanation for failing to attend court during the hearing and any prejudice that may be suffered by the respondent can be compensated by way of costs. On the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, if his application is dismissed and the dismissed application not reinstated.
16. The foregoing being my view of the matter, I would allow the application dated 11th December, 2023 and set aside the dismissal order made on 11th December, 2023 and order that the application dated 30th October,2023 be reinstated for hearing and determination on the merits.
17. The plaintiff shall meet the costs of this application.
18. It is so ordered.

DELIVERED DATED AND SIGNED AT MERU THIS 11TH DAY OF JULY, 2024.

IN THE PRESENCE OF

Court Assistant – Tupet

Mungania for plaintiff

Ms Otieno for defendant

C.K YANO

JUDGE

