



REPUBLIC OF KENYA



**National Social Security Fund v Mbula (Environment & Land Case
1565 of 2014) [2024] KEELC 6640 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1565 OF 2014**

MD MWANGI, J

JULY 11, 2024

BETWEEN

NATIONAL SOCIAL SECURITY FUND PLAINTIFF

AND

PENINAH NTHENYA MBULA DEFENDANT

RULING

(In respect to the Notice of Motion dated 5th March, 2024 primarily brought under the provisions of Order 1 Rule 7 of the [Civil Procedure Rules](#) seeking the setting aside of the Court order dismissing the suit on 28th May, 2020).

Background

1. The Plaintiff filed this suit way back on 18th December, 2014. From the Court's record, the Defendant entered appearance on 15th October, 2015 filing alongside the Memorandum of Appearance, a statement of Defence and a witness statement. The matter was thereafter fixed for a pre-trial conference. On 2nd April, 2019, the Deputy Registrar of this Court fixed the matter for directions before Eboso J on the request of the Plaintiff who stated that it had fully complied with the provisions of Order 11 of the [Civil Procedure Rules](#).
2. On 30th October, 2019, Eboso J, directed the Plaintiff to file and serve a single bound and paginated trial bundle enclosing the pleadings, witness statements and documentary evidence within 45 days. The Learned Judge ordered that in case of default to comply with the directions, the suit would stand dismissed.
3. The suit came up for mention on 28th May 2020. None of the parties was in attendance. The Court noted that there was no evidence of compliance with its order issued of 30th October, 2019. Consequently, the Court affirmed that the suit stood dismissed and marked it as such. It is that order,



marking the suit as dismissed for non-compliance with the directions of 30th October, 2019 that the Plaintiff seeks to set aside and with the intention of reinstating the suit.

4. The current application has been filed almost 4 years after the dismissal of the suit. The Plaintiff/Applicant avers that it is desirous of prosecuting this suit to the very end. It asserts that its Advocate on record then, inadvertently failed to diarize the date when the matter was scheduled for mention, which resulted into the dismissal of the suit. It is the Plaintiff's further ground that it stands to suffer great prejudice if the matter is not reinstated. The Plaintiff therefore prays that its application be allowed and this suit be reinstated, in the interest of justice.
5. In the supporting affidavit sworn by Kennedy Modi, the Advocate for the Plaintiff, the deponent asserts the matter was dismissed in the midst of the Covid-19 pandemic and the Courts were closed for the public. That is the reason why the Plaintiff is pursuing the matter now, since they lost track of it as a result of the Covid-19 pandemic.
6. The Defendant/Respondent responded to the Plaintiff's application by way of a replying affidavit sworn on 2nd May, 2024 by the Defendant. The Defendant deposes that the Plaintiff's suit was dismissed for non-compliance with the orders of 30th June, 2019 and not because of the non-attendance of the Advocate for the Plaintiff.
7. The Defendant affirms that there has been inordinate delay in bringing this application and which has not been explained. She urges the Court not to entertain the application. She states that the Plaintiff has not been keen to pursue the suit. The claim of losing track of the suit is not sufficient to warrant the setting aside of the dismissal. She avers that she stands to suffer injustice.

Court's directions

8. The Court directed that the application be canvassed by way of written submissions. Both parties complied and the Court has had the occasion to read and consider the submissions filed.

by the Parties.

9. On its part, the Plaintiff submitted that Order 12 rule 7 of the [Civil Procedure Rules](#) allows the Court, where a suit has been dismissed or judgment entered, on an application, to set aside or vary the judgment or order upon such terms as may be just.
10. The Plaintiff relies on the decision in the case of [Sagoo & Ano - vs - Mesa](#) (KEELC) 21475 (KLR), where the Court cited the holding in the case of [Richard Ncharpi Leiyagu - vs - IEBC & 2 others](#) (2013) eKLR, where the Court of Appeal stated that: -

“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 incurable mistake or error but not to assist any person who deliberately seeks to obstruct or delay the cause of justice.”

11. In the said case, the Court further made reference to the well-known case of [Philip Chemweno & ano - vs - Augustine Kubende](#) (1982-88) KLR, where the Court stated that;

“Blunders will continue to 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 merits...”. The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”



12. That Plaintiff submits that it was a mistake of the Advocate handling the matter on its behalf that she failed to diarize the mention date and later left employment without updating the files she had handled. Further, the Covid-19 pandemic affected the follow up of this case.
13. The Defendant on her part submitted that the absence of the Plaintiff's Advocate in Court on the mention date was not the basis for the dismissal of the suit; rather it was the non-compliance with the Court's directions on filing of a paginated trial bundle that led to the dismissal of the suit.
14. The Defendant while citing the decision in the case of *Frau Investments Ltd – vs – G4S Security Services Ltd* (2015) eKLR, urged the Court to do justice to both sides. In the said case, the Court stated that:

“Dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ‘sword of the Damocles’. But that reality must be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old adage and now express constitutional principle of justice under Article 159 of the *Constitution*, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff. This is the test I shall apply here.”

Issues for Determination

15. The issue that this Court is called upon to determine is the merit of the application by the Plaintiff which is brought under the provisions of Order 12 rule 7 of the *Civil Procedure*.

Analysis and Determination

16. Order 12, as the title indicates deals with the consequences of non-attendance by either of the parties to the suit or both on the date that the suit has been set down for hearing.
17. The Defendant has rightly pointed out in her submissions as well as in her replying affidavit that the Plaintiff's suit was not dismissed for non-attendance by the Plaintiff. It was dismissed for non-compliance with the pre-trial directions issued by the Court.
18. I have in details elaborated the occurrences leading to the dismissal of the Plaintiff's suit. The Court had on 30th October, 2019 issued explicit directions. The directions were self-executing. Non-compliance with the directions would automatically lead to the dismissal of the suit. In fact, if there were any orders to be set aside or varied, it would be the orders of 30th October, 2019.
19. At this juncture, I need to categorically state, for the avoidance of any doubt, that parties in a civil suit are obligated to strictly comply with the provisions of Order 11 of the *Civil Procedure Rules* whose intention is to help in the expedition of hearing of cases in compliance with the provisions of Article 159 of the *Constitution* and the overriding objective as stipulated in Section 1A and 1B of the *Civil Procedure Act*. The consequences of non-compliance with any orders/directions issued under Order 11 are dire, including but not limited to the striking out of the suit or pleadings, an award of costs and striking out of any document or part of it.
20. The Plaintiff's failure to comply with the directions of the Court resulted in the dismissal of the suit. It was not the failure to attend on the date of the mention that resulted in the dismissal.
21. Consequently, the Plaintiff's application has been brought under the wrong provisions of the law. It does not address the reasons leading to the dismissal of the suit.



22. Accordingly, the Plaintiff's application dated 5th March 2024 is dismissed for want of merit with costs to the Defendant.

it is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JULY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Ndeda h/b for the Plaintiff/Applicant

Mrs. Shabana for the Defendant/Respondent

Court Assistant: Yvette.

