



**Mburu v Evans & 9 others (Environment & Land Case 154 of 2018)  
[2024] KEELC 6976 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 154 OF 2018  
A OMBWAYO, J  
OCTOBER 16, 2024**

**BETWEEN**

**MERCY WANJIRU MBURU ..... APPLICANT**

**AND**

**ELIZABETH WANJIRA EVANS & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9  
OTHERS ..... RESPONDENT**

**RULING**

1. Mercy Wanjiru Mburu has come to this court with application that the court be pleased to reinstate this suit herein on grounds that the plaintiff filed the instant suit on 19th April, 2018 seeking for several orders as prayed in the plaint through the firm of Hassan, Mutembei & Co Advocates. The applicant contends that pending the hearing and determination of the suit the firm of M/S Nanda, Ogame & Company advocates later on thereafter took over from the firm of Hassan, Mutembei Co Advocates without any instructions from the plaintiff herein thereby occasioning injustices. That the said firm of M/S Nanda, Ogame & Company advocates did not appraise the plaintiff appropriately on whether they were substantively representing the plaintiff or holding brief for the firm of Hassan, Mutembei & CO advocates and as result Plaintiff was all along confused on the unfolding of events in this suit.
2. The applicant states that she appointed the firm of M.S Munene, Chege & Co Advocates to represent her in this suit and a notice of change of advocates was filed on 25th January, 2023. According to the plaintiff, her advocate on record erroneously and inadvertently was advised by the registry staff that the suit was due before ELC Court 2 before Hon. Mwangi Njoroge and actually appeared before the said court in an exercise that proved futile.
3. That by the time that the plaintiff's counsel on record realized the inadvertent mistake the matter had already been called out and orders accordingly recorded by the Honorable Trial Court.
4. That the dismissal was as a result of failure on the part of the advocate to attend court.



5. That the advocates over sight ought not be met upon the client as to cause dismissal of an otherwise valid case with high chances of success.
6. That in the interest of justice the application ought to be allowed as prayed. The application is supported by the affidavit of Mercy Wanjiru Mburu which reiterates the grounds.
7. The respondent filed grounds of opposition whose import is that the said Application is bad in law, mischievous, frivolous, vexatious, and totally incompetent and should be struck out. He contends that the said Application offends the Provisions of Order 12 Rule 3 and 6 of the Civil Procedure Rules, 2010. The 8th Defendant's counsel appeared at the hearing of the Application dated 9th February 2023 wherein the absence of the Applicant's Advocate the matter Application was dismissed pursuant to the provisions of Order 12 Rule 3.
8. The respondent argues that the Plaintiff has been an orchestrator of her own lethargy having had so many advocates on record and the issue of whom she gave instructions cannot fall on the Defendants. It is also certain that the Plaintiff and her many counsels have always known which court the matter was to be heard, but on the material day both were conspicuously absent despite knowledge of the hearing. The delay in the expeditious prosecution of this suit is indifference and/ or negligence of the Plaintiff and that negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendants,
9. That allowing this Application would be prejudicial to the Defendants herein who for no fault of the own were ready to proceed with the hearing of the suit. The Application is an abuse of court process and should therefore be dismissed with costs to the Defendants.
10. I have considered the rival submissions on this matter and do find that the plaintiff blames his advocate for failure to attend court. He states that his advocate was misadvised that the case was before ELC 2 and actually appeared before court 2 and yet the matter was before ELC court 3 hence the matter was unattended and therefore dismissed.
11. The unattendance was due to mistake by counsel. The defendant filed grounds of opposition and not a replying affidavit and therefore the facts in the affidavit are not controverted save on points of law. The plaintiff relies on the provisions of Article 159 of *the constitution* of Kenya 2010 which provides as follows: -

159.

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
  - a. justice shall be done to all, irrespective of status;
  - b. justice shall not be delayed;
  - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and
  - (e) the purpose and principles of this Constitution shall be protected and promoted.



3. Traditional dispute resolution mechanisms shall not be used in a way that—
  - a. contravenes the Bill of Rights;
  - b. is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
  - c. is inconsistent with this Constitution or any written law.
  
12. This article is two pronged, thus justice shall be done to all irrespective of status and that justice shall not be delayed. In this case, the court should weigh between fair trials to both parties and also delay delivery of justice in the case of non-attendance and adjournments. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
  
13. In this case, I do find that the plaintiff applicant has explained herself to the courts satisfactory that failure to attend court was due to counsel’s mistake to appear before the wrong court. A mistake is a mistake whether it is due to the advocate appearing in the wrong court, logging in the wrong court, mis-diarizing or failure to diarize and this court should not allow a matter to be determined due to a mistake. Courts are a temples of justice and parties should be ultimately allowed to appear before the alter of justice to enable substantive justice be done. I do allow the application and give the plaintiff a chance to present her case. The applicant is allowed.

**RULING DATED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF OCTOBER 2024.**

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT  
ENVIRONMENT AND LAND COURT**

**DATE: 2024-10-16 16:07:16**

