



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oyugi & 2 others v Cheptarus; Oyugi & another (Third party) (Environment & Land Case 211 of 2018) [2023] KEELC 737 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 737 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT & LAND CASE 211 OF 2018**  
**FM NJOROGE, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

**JOB OKUNA OYUGI ..... 1<sup>ST</sup> PLAINTIFF**

**DOUGLAS ODHIAMBO OYUGI ..... 2<sup>ND</sup> PLAINTIFF**

**JOSHUA OGANGO OYUGI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LABAN CHEPTARUS ..... DEFENDANT**

**AND**

**DOREEN ARIBETA OYUGI ..... THIRD PARTY**

**ATTORNEY GENERAL ..... THIRD PARTY**

**RULING**

1. This ruling is in respect of the plaintiff/applicant's Notice of Motion application dated January 17, 2023. The application is said to be brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 12 rule 7 and order 51(1) of the [Civil Procedure Rules](#) and seeks the following orders:
  - a. ...spent
  - b. That this honorable court do set aside its orders of January 17, 2023 and the suit herein be reinstated.
  - c. That costs of this application be in the cause.
2. The application is supported by the sworn affidavit of Job Odhiambo Ochieng counsel for the plaintiff sworn on January 17, 2023. The grounds on the face of the application and the supporting affidavit are that the matter was scheduled for hearing on January 17, 2023; that the matter was called out virtually



for time allocation and since counsel for the plaintiff was absent, the suit was dismissed for want of prosecution; that he had been unable to log in due to poor network connectivity as he was on his way to court from Nairobi; that he has been keen to pursue the matter but only arrived in court late as he was travelling from Nairobi; that the plaintiff's claim against the defendant is to restrain them from intermeddling with their deceased father's property known as Nakuru/Municipality Block 12/80; that the 1<sup>st</sup> defendant in his statement of defence claims to be the bonafide purchaser of the suit property which he claims to have bought from the 2<sup>nd</sup> defendant who is also a beneficiary of the deceased's estate; that the 2<sup>nd</sup> defendant claims to have been gifted the suit property by the deceased before his death; that the plaintiff's case has a high chance of success and will suffer irreparable harm since the suit properties form part of the estate of the plaintiff's deceased father and the grant is yet to be confirmed; that the suit raises triable issues which ought to be heard and determined to their logical conclusion; that the applicant has moved the court without unreasonable delay and it is in the interest of justice that the application be allowed as prayed.

3. In response to the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on January 20, 2023 where he deposed that the matter was set down for hearing on January 17, 2023, that he attended court together with his advocates on record; that the matter was called out but the plaintiff was not present; that the court dismissed the matter for nonattendance of the plaintiff; that the matter has been in court since the year 2008; that the plaintiff and his counsel did not call the court or his counsel to indicate that they would be late and he therefore prays that the plaintiff's application dated January 17, 2023 be dismissed with costs.
4. Neither of the parties filed their submissions to the application.

#### **Analysis and determination**

5. After considering the application and the replying affidavit, the only issue that arises for determination is whether the court should reinstate the plaintiff's suit.
6. The plaintiff seeks that his suit be reinstated because at the time the matter was dismissed, he was on his way to court. That his advocates on record were also on their way to court and were unable to log in because of poor internet connectivity.
7. The 1<sup>st</sup> defendant opposed the setting aside of the orders of dismissal on the grounds that neither the plaintiff nor his advocates called to inform the court or the opposing counsel that they would be late to court.
8. Order 12 Rule 1 and 7 of the Civil Procedure Rules provide as follows:
  1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.  
...
  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.
9. This matter came up for hearing on January 17, 2023 and neither the plaintiff nor his advocates were present in court when the matter was called out. The suit was then dismissed for non-attendance and the plaintiff is now seeking the setting aside of the said orders.
10. The court in the case of *Njue Njagi v Ephantus Njiru & Another* [2016] eKLR stated that dismissal of a suit for non-attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.



11. The court has the discretion to set aside orders of dismissal of a suit for non-attendance. The court in the case of *Shah v Mbogo & Another* [1967] E A 116 held as follows:

“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.”

12. As pointed out earlier, the plaintiff’s explanation for his failure to attend court was that he was on his way to court and his advocates on record were unable to log in due to poor internet connectivity. As per the court proceedings, counsel for the plaintiff was able to log in at 11.00 am when he was informed that the matter had been dismissed.

13. In the circumstances of this case, it is in the interest of justice that this court grants the application at hand. The upshot of the foregoing is that the orders issued on January 17, 2023 dismissing the plaintiff’s suit are hereby set aside and the suit is reinstated for hearing. The costs of the application shall be paid by the plaintiffs to the 1<sup>st</sup> defendant. The parties shall attend a mention online on February 27, 2023 for issuance of a hearing date.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

