



Ruchu Gacharage Farmers Co-operative Society v Mugo (Environment & Land Case 22 of 2020) [2023] KEELC 15857 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 22 OF 2020**

LN GACHERU, J

MARCH 2, 2023

BETWEEN

RUCHU GACHARAGE FARMERS CO-OPERATIVE SOCIETY PLAINTIFF

AND

SAMUEL MICHAEL WAGAI MUGO DEFENDANT

RULING

- 1 The Plaintiff/Applicant herein vide a Notice of Motion Application dated August 31, 2022, sought for the following orders against the Defendant/Respondent;
 - a. That this honourable Court be pleased to set aside the orders made on July 27, 2022, dismissing the Notice of Motion dated June 17, 2022, and the said Notice of Motion be reinstated for hearing and determination on merit.
 - b. Costs of the application be in the cause.
- 2 The application is premised on the grounds stated on its face and the Supporting Affidavit of Mbiyu Kamau Advocate, sworn on the August 31, 2022. Mr Mbiyu Kamau averred that the application dated June 17, 2022, was set down for virtual hearing on July 27, 2022. Unfortunately, when the matter was called out, the Applicant's Advocate experienced a power outage and as a result his network connection was disconnected. That by the time the Applicant returned online the matter had been mentioned and the Court concluded its virtual session. He further deponed that upon perusing the Court file later on, he discovered that the Court had dismissed the application dated June 17, 2022, for non-attendance. It was Mr Mbiyu Kamau further contention that the dismissal of the application infringed on the Applicant's constitutional right of access to justice and fair trial. He prayed that the application be reinstated and be heard and determined on merit.
- 3 The Respondent's counsel Ms Jerusha Kabata, from the Law Firm of Njoroge Kugwa & Co Advocates opposed the application through a Replying Affidavit dated October 13, 2022, on behalf of her client.



- It was the Respondent’s case that on July 27, 2022, when the matter was dismissed for non-attendance, she had logged on to attend the virtual Court session, but did not see the Plaintiff/Applicant’s Counsel present. She contended that the Applicant’s counsel failed to log in for the Court session, and is therefore misleading the Court regarding their non-appearance.
- 4 Furthermore, the Respondent contends that the Applicant’s advocates failed to make any effort to contact her to explain the predicament. That as a result of non-attendance, the application dated June 17, 2022, was dismissed for non-attendance. She further contended that the Applicant filed the present application two months after the orders of the Court were issued dismissing the application. The Respondent prays that the application be dismissed.
 - 5 The application was canvassed by way of written submissions. The Applicant through the Law Firm of Mbiyu Kamau & Company Advocates, filed their written submissions dated October 26, 2022 in support of the application. The key issue for determination stated by the Applicant is whether the orders issued on July 27, 2022, should be set aside?
 - 6 On the issue of setting aside the orders, the Applicant submitted that the Courts have discretion to set aside judgements or orders, and that there are no limitations and restrictions on the discretion of the judge except that it must be done on terms that are just. Reliance was placed on the case of Wanjiku Kamau v Tabitha Kamau & 3 Others (2014) eKLR. Applicant further relied on Order 12 Rule 17 of the Civil Procedure Rules which gives the Court discretion to set aside or vary a judgement or ruling in which a suit has been dismissed under Order 12 of the Civil Procedure Rules.
 - 7 The Applicant contends that their non-attendance of the Court session was unintentional and was caused by a power outage and that it would be unjust for this Court to deny them an opportunity to be heard on merit. Lastly, that the failure to attend Court was counsel’s inadvertent mistake which ought not to be visited upon his client. On this issue Applicant relied on the case of Lucy Bosire v Kebancha Div Land Dispute Tribunal & 2 Others (2013) eKLR.
 - 8 In conclusion, the Applicant submitted that it is in the interest of justice that the parties be heard on merit as per the provision of Article 50(1) of the Constitution, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court. The Applicant further submitted that they are prepared to prosecute the application dated June 17, 2022 and urged the Court to allow the said application.
 - 9 The Respondent through the Law Firm of Njoroge Kugwa & Company Advocates, filed their written submissions opposing the application dated November 10, 2022. The Respondent’s key issue for determination is whether there was a valid reason to reinstate the application. He submitted that the Applicant’s explanation that a power outage resulted in the non-attendance was unsubstantiated. They relied on the case of Reynolds Construction Ltd vs Festus Marithi M’mboroki (2022), eKLR, in which the Court reinstated a dismissed Petition due to failure of internet connectivity since the advocate made efforts to reach the Court at the earliest possible opportunity. The Court in the Reynolds case stated in particular:

“Further, the Court takes judicial notice that there are other available service providers through mobile telephone handsets which the applicants counsel could have used and or accessed as a show of vigilance to reach the Court.”
 - 10 In conclusion, the Respondent submitted that the Applicant’s advocates did not inform the Court of the power outage in time and failed to provide proof of the said power outage. He prayed that the application be dismissed.



11 The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is:

i. Whether the application dated August 31, 2022 is merited?

12 The instant application is dated August 31, 2022, and seeks to set aside the orders of the Court issued on July 27, 2022, and reinstate the Application dated June 17, 2022. It is not in dispute that the application dated June 17, 2022, was dismissed on July 27, 2022, for non-attendance of the Applicant's counsel when the matter came up for virtual hearing. It is on this basis that the present application is filed.

13 Reinstatement of an application previously dismissed for want of prosecution and non-attendance is discretionary. The discretion is couched under Order 12 Rule 7 of the Civil Procedure Rules 2010, that provides: -

“Setting aside judgment or dismissal.

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.”

14 The principles governing reinstatement were enunciated in the case of John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR where the Court stated as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court. These principles were enunciated in a masterly fashion by Courts in a legion of decisions which I need not multiply except to state that; Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a Court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

15 The principles that guide the Court in its exercise of discretion were set out in the case of Patel Vs East Africa Handling Services Limited (1974) EA where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties. In the case of Shah – v- Mbogo & Anor (1967) EA 470, the Court of Appeal for Eastern African held:-

“Applying the principle that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.



- 16 The Applicant filed an exhaustive Supporting Affidavit setting out the facts, leading to the dismissal. The Applicant blames their advocate, who they say was unable to attend the hearing due to a power outage which was out of his control that led to a loss of internet connection. The Applicant averred that following the outage, they attempted to reconnect by which point the virtual session was concluded. The Applicant then proceeded to the registry and discovered the application was dismissed on June 27, 2022, before filing the present application for reinstatement 1 month and 18 days later on September 14, 2022.
- 17 The Respondent opposed the application stating that the Applicant had in fact failed to log in entirely for the virtual session and that no proof was offered to verify the power outage. The Respondent further contends that the Applicant failed to take any steps to alert the Court or the Respondent to inform them of their predicament and seek the Court's indulgence.
- 18 The question herein is whether the Applicant has demonstrated reasonable grounds for the reinstatement of the application dated August 31, 2022, and whether the Respondent will suffer prejudice if the application is reinstated?
- 19 The Court is called upon to exercise its discretion judiciously to avoid injustice resulting from accident, inadvertence, or excusable mistake. It is trite law that the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the Court of justice.
- 20 The Applicant's counsel blames a power outage for the loss of internet connection. The Applicant has not attached any verification that the electricity distributor or internet service provider ever notified about, admitted, or apologized for the power outage leading to the internet interruption on the June 27, 2022. Furthermore, the Applicant's advocate failed to notify the opposing counsel. Lastly, the application for reinstatement was filed 1 month and 18 days after the dismissal of the application which raises the question of whether there was inordinate delay?
- 21 In *Belinda Murai & 9 others -vs- Amos Wainaina* [1961] EA 679, it was held that mistakes of a legal adviser may amount to sufficient cause. In the case of *Gideon Mose Onchwati Vs Kenya Oil Co Ltd & Another* (2017) eKLR the Court held that;
- “Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”
- 22 This Court places reliance on the case of *Mutinda Musila Malua -vs- Ngunga Yatta Deputy County Commissioner Kitui West Sub-County & 2 Others* [2021] eKLR, wherein Angote J reinstated a dismissed Petition due to the failure of internet connectivity since the advocate addressed the Court albeit late after the Petition had been dismissed as a sign of his efforts to reach Court at the earliest opportunity possible.
- 23 On the issue of the timeliness of the present application, the Court notes that there was a delay of 1 month and 18 days. The Court in the case of *Utalii Transport Company Ltd & 3 Others Vs NIC Bank & Another* (2014)eKLR, emphasized that the word inordinate should not be taken in its ordinary meaning since what amounts to inordinate delay will depend on the circumstances of each case. In my view there was no inordinate delay in filing the present application.



- 24 The Court is called upon to consider two issues. On the one hand, if the application is not reinstated the Applicant will be condemned unheard and that they would suffer grave injustice and prejudice. On the other hand, the Respondent alleges there has been an unsatisfactory explanation as to the non-attendance which the Court ought not take lightly.
- 25 Articles 48 and 50 of the Constitution guarantees every Kenyan the right of access to justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to technicalities whereas Sections 3, 4 and 13 of the Environment and Land Court Act as read together with Section 1A, 1B and 3A of the Civil Procedure Act expects the Court to strive towards substantive justice as was held in the case of Lochab Bros Ltd –vs- Peter Karuma T/A Lumumba, Lumumba Advocates [2003] eKLR.
- 26 Taking the above into consideration, this Court finds that the Applicant has provided sufficient cause or reasons to allow the setting aside of the orders issued on July 27, 2022, and reinstatement of the application dated June 17, 2022.
- 27 From the foregoing conclusion, the Court finds and holds that the Notice of Motion Application dated August 31, 2022, is found to be merited and the same is allowed entirely in terms of prayer No (b) with costs being in the cause.
- 28 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

M/s Njoroge H/B Mbiyu Kamau for the Plaintiff/Applicant

M/s Kabata H/B Njoroge Kugwa for the Defendant/Respondent

