



Sigei & another v Chief Land Registrar Nakuru & 2 others (Environment & Land Case E051 of 2022) [2023] KEELC 17167 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E051 OF 2022**

FM NJOROGE, J

MAY 4, 2023

BETWEEN

DAVID KIPSANG SIGEI 1ST PLAINTIFF

GEOFFREY KIPKIRUI MISOI 2ND PLAINTIFF

AND

CHIEF LAND REGISTRAR NAKURU 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

AUGUSTINE K. KOROS 3RD DEFENDANT

RULING

1. This is a ruling in respect of the Plaintiff/Applicant's Notice of Motion application dated 10/03/2023 seeking the following orders:
 1. Spent.
 2. That this Court be pleased to set aside the orders of 9th March, 2023 dismissing the suit dated 19th September, 2022 and an order that the same be and is hereby reinstated for hearing on merit.
 3. The suit be fixed for mention to take a hearing date.
 4. The costs of this application be in the cause.
2. The application is supported by the affidavit sworn by Sabaya Sheila the Plaintiff/Applicants' Advocate herein sworn on 10/03/2023. She deposed that the matter was fixed for hearing on 9/03/2023; that it was the first time the case had been set down for hearing and that it was mentioned virtually at 8:30am for time allocation; that she experienced technical challenges while joining the online platform and was only able to access the session at 9am; that by that time the matter had already been called out and



dismissed for non-attendance; that upon finding out that the suit had been dismissed she went to the open court and attempted to have the file recalled; that she also made a phone call to the 3rd Defendant's counsel who told her that he was already on his way to Eldama Ravine and could not attend court; that she then filed the instant application in good faith and without delay: she urged the court to allow the application to reinstate the suit herein and have it fixed for mention to take a hearing date.

Response

3. The Defendants/Respondents did not file any response to the application.

Submissions

4. The Plaintiff/Applicants filed their submissions dated 20/03/2023 on 21/03/2023. She apologized that she was unable to access the virtual court session at 8:30am and that even so the court would have in the interest of justice give time allocation for the suit and dismiss it when the Plaintiffs fail to attend.
5. She relied on the case of *In Fitzpatrick v Batger & Co. Ltd* [1967] 2ALL ER 657 and submitted that whether to dismiss a suit for non-attendance is a matter of judicial discretion that should be exercised judiciously. She further submitted that she was late by at most 30 minutes and the reason for non-attendance was a technological hitch. She added that the Defendants are not likely to be prejudiced by the delay.
6. In conclusion, she relied on the Court of Appeal case in *Eurobank Limited V Shab Munge & Partners* [2016] eKLR and urged the court to allow the application.

Analysis And Determination

7. This court has considered the application and supporting affidavit and the only issue for determination is whether the Plaintiff/Applicant's application is merited.
8. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
9. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court.
10. In the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR the court held as follows:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
11. Further in the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR the court held as follows:

“For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.”



12. In the instant case, the suit was dismissed on 9/03/2023 for non-attendance by the Plaintiff/Applicants. The Plaintiff/Applicant's counsel explained that she experienced technical challenges while joining the online platform and was only able to access the session 9am after the matter had already been called out and dismissed for non-attendance.
13. As I consider the application before me I must observe that the handling of litigation on the virtual platform has become the norm in our country following the arbitrary imposition of restrictions on human contact and movement by the Covid-19 pandemic. Though the risks of infection have faded away to a great extent with the subsiding of the pandemic the advantageous facet of the devastating pestilence was the expedited ushering of all sectors of the national economy, which had lagged behind, into the digital age. The legal profession was not left behind. Our justice system clawed back virtual litigation from the raging fire of the pandemic and has carefully nurtured it since. Every shift into a new era has its own share of teething problems, however, and questions have been raised in various fora as to whether a suit should be dismissed upon failure by counsel and parties to appear online during the call-over, as happened in the instant suit. Some, including a section of counsel, are of the school of thought that such a matter ought to be placed aside till it is called out later, still on the virtual platform. Others prefer the school of thought that the matter ought to be adjourned into open court, and orders of dismissal made there; others uphold the kind of action this court undertook, that is, issuance of orders dismissing the matter during call-over without any delay when counsel and client failed to attend.
14. It must be emphasised that the virtual platform adopted as a courtroom is for all intents and purposes a real courtroom just as a physical courtroom, and attendance and punctuality on the part of the counsel and litigants online is a must. A court must avoid putting aside a file for the reason that one party is absent, for that must necessarily appear to be partial treatment of one party at the expense of the party present and ready to proceed with the hearing, whether the hearing is confirmed as virtual or physical in open court. Other than an appearance of bias, the additional reasons for this approach are obvious: the ability of the court to apportion scarce and valuable judicial time to litigation and create a schedule for the day's work would be seriously incommoded, and the system would be prone to abuse by persons who are not ready to proceed who may deliberately avoid logging into the virtual platform.
15. I have delved into this sphere in this ruling in order to disabuse the applicants herein, who have alluded to injudicious exercise of discretion by this court in their submissions, of the notion that there was something irrational or capricious about the exercise of this court's unfettered discretion to dismiss their suit on 9/3/2023 during the virtual call-over when they and their counsel failed to attend court.
16. However, sufficient cause has been given and this court is satisfied that the failure to attend court was not intentional or deliberate on the part of the Plaintiff/Applicants and their counsel in this case and the same should be excused. The Defendants/Respondents have also not demonstrated any mala fides on the plaintiff's side or that they will suffer any serious prejudice other than a little delay in the conclusion of this litigation if the orders sought are granted. In saying this I am content that the instant application was timely brought. I am therefore persuaded the circumstances of this case justify giving the Plaintiff another chance to ventilate his claims on merit. In view of the foregoing, the Notice of Motion dated 10/03/2023 is merited, and I further proceed to make the following final orders:
 - a. That the Orders of this Court made on 9/03/2023 dismissing the Plaintiff/Applicant's Case are hereby set aside;
 - b. That the Plaintiff/Applicant's suit is hereby reinstated for hearing on its merits;
 - c. The Plaintiff/Applicant is directed to within 30 days of the date hereof set down this suit for hearing on its merits;



d. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

