



Mwongela v Gilbert & 2 others (Environment and Land Miscellaneous Application E023 of 2022) [2023] KEELC 18516 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E023 OF 2022**

CK YANO, J

JULY 5, 2023

BETWEEN

JOTHAM MWONGELA APPLICANT

AND

CECILIA KAMENWA GILBERT 1ST RESPONDENT

BARANABAS KIMANTHI 2ND RESPONDENT

ABRAHAM GILBERT 3RD RESPONDENT

RULING

1. The application before me is a notice of motion dated 7th day of February, 2023 brought pursuant to order 12 rule 7 of the civil Procedure Act 2021 and all enabling provisions of the law of Kenya, seeking for orders that:
 - i. That the application be heard on priority basis
 - ii. That the Honourable court be pleased to vary and set aside its orders made on 29th September, 2022 dismissing the applicant's application dated 5th July, 2022 and filed in court on 20th July, 2022.
 - iii. That the Honourable court be pleased to reinstate the said above application for inter parties hearing on merit.
 - iv. That costs be in the cause.
2. The application is premised on the grounds-;
 - i. That the application dated 5th July, 2022 came up for inter parties hearing on 29th September, 2022 when it was dismissed.



- ii. That the applicant's advocate tried in vain to access court via Microsoft hearing thus the failure to prosecute the application.
 - iii. That the matter was dismissed suo moto by the court in absence of both the counsel for the applicant and the respondents.
 - iv. That failure to be online/present in court when the matter was called was not designed or deliberate and the same is regretted.
 - v. That the respondents won't suffer any prejudice if the orders sought are granted as the same had not been opposed.
 - vi. That it is only fair, just and logical this application is heard and allowed to meet the ends of justice.
3. The application is supported by the affidavit of Mutura Mwenda Robbert advocate wherein he avers that on the material day his fellow Counsel Mr. Karatu and him attempted to be online to no avail. That his colleague and himself had earlier agreed to deal with the application through written submissions.
 4. The counsel further states that upon inquiry from the registry, he was informed that the application had been dismissed and they regret the said error.
 5. The counsel avers that he immediately lodged an application for reinstatement which was also dismissed on 19th January, 2023 due to the same technological errors and has now lodged the application herein on belief the same errors will not repeat and that he is keen to be present physically in court together with the applicant if the application is allowed.
 6. The application is opposed by the respondents through a replying affidavit by the 1st respondent dated 27th February, 2023 wherein she avers that it is almost six months since the said application dated 5th July, 2022 was dismissed and that the applicant is guilty of inexcusable, inordinate delay in bringing the present application. That the applicant has admitted having filed another application for reinstatement before the present one which was again dismissed on 19th January, 2023 almost a month before the present application was filed.
 7. The respondents aver that indeed the applicant is in the habit of absenting himself from the court to prosecute his application which was also the trend in the lower court and that all the applications filed in this case are only meant to hoodwink the court and delay the process of the court further. That the respondent will continue to suffer as they cannot enjoy the fruits of their judgment in the lower court yet the applicant seems to have lost interest in pursuing his application completely. That the applicant has not demonstrated reasonable grounds for the reinstatement of the application.
 8. It is the respondents contention that the application herein is frivolous, vexatious and malicious and that the same is brought to court to block execution of the judgment herein entered in favour of the respondents. That the applicant is indolent and discretion ought not to be exercised in his favour and that it is only just and fair that the application herein is dismissed.
 9. The court directed that the application be canvassed by way of written submissions which both parties duly filed.



Analysis and Determination

10. On the court's discretion under Order 12 Rule 7 *Civil Procedure Rules*, I am guided by the case of *Richard Ncharpi Leiyagu v IEBC & 2 others* [2013] on the proposition that the discretion to set aside an ex parte order is intended to avoid injustice, inadvertence or inexcusable mistake or error.
11. Under Order 12 Rule 7, the court has discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or non-attendance.
12. In *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, the court held the tests to apply in an application to reinstate a suit are "whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated."
13. The question herein is whether the applicant has demonstrated reasonable grounds for setting aside the dismissal order and for the reinstatement of the application and whether the respondents will suffer prejudice if the application is reinstated.
14. The court's main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the course of justice.
15. The applicant's counsel blames technological hitches and argued that he was not able to log in to prosecute his application.
16. In *Mutinda Mustila Malua v Ngunga Yatta Deputy County Commissioner Kitui West Sub County & 2 others* [2021] eKLR, 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.
17. In the instant case, the applicant has admitted having filed another application for reinstatement before the present one which was again dismissed on 19th January, 2023 almost a month before the present application was filed. What I find suspicious is the fact that his application was dismissed twice due to the same issue of failure to log in.
18. I also note that the application herein has been brought after a period of over five (5) months from the time the dismissal orders were made. It may therefore be held that the applicant is guilty of inexcusable and inordinate delay in bringing the present application. I further note that there is no evidence by the applicant's counsel to show that he tried to reach out to the court to express his predicament immediately the impugned orders were made.
19. I have however, noted the applicant's submissions that if the application is not reinstated, he will have been condemned unheard and that he would suffer grave injustice and prejudice. The respondent on the other hand submits that there was inordinate delay in bringing the application herein.
20. Article 48 and 50 of the *Constitution* guarantees every Kenyan right to access justice and a fair hearing. Further, Article 159 requires that justice shall be administered without undue regard to technicalities while Section 3, 4 and 13 of the *Environment and Land Court Act* and Section 1A 1B and 3A of the *Civil Procedure Act* expects the court to strive towards substantive justice.



21. Therefore, looking at the totality of the circumstances in this matter, it is my considered view that the route to a lesser risk of injustice is to allow the application but condemn the applicant to pay costs to the respondents.
22. Consequently, the application dated 7th February, 2023 is allowed. The orders made on 29th September, 2022 are set aside and the application dated 5th July, 2022 is reinstated for hearing and determination on merit.
23. Costs of the application are awarded to the respondents.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF JULY, 2023

IN THE PRESENCE OF

Court assistant – V. Kiragu

Karatu for respondents

No appearance for Mutura Mwenda for applicant

Applicant is present

C.K YANO

JUDGE

