



Nzinga v Ogembo & 2 others (Environment and Land Miscellaneous Application E041 of 2022) [2023] KEELC 18474 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E041 OF 2022**

CK YANO, J

JULY 5, 2023

BETWEEN

CHRISTINE TAABU NZINGA PLAINTIFF

AND

JAMES ONYONA OGEMBO 1ST DEFENDANT

JOHN M. MBIJIWE T/A BEALINE KENYA AUCTIONEERS ... 2ND DEFENDANT

MBAE MURIANKI 3RD DEFENDANT

RULING

1. This is a ruling in respect to the Notice of Motion dated January 31, 2023 brought pursuant to Section 3 & 3A, Section 63 (e) Order 50 Rule 1 of the *Civil Procedure Rules* seeking the setting aside of orders issued on January 19, 2023 and re-instatement of the applicant's notice of motion dated November 9, 2022.
2. The application is supported by an affidavit sworn by the applicant on January 31, 2023 and is premised on the grounds that-
 1. The applicant was not heard on January 19, 2023 due to unforeseen happenings.
 2. That the applicant is a medical doctor attached to Cottolengo Mission Hospital.
 3. That on that day, an emergency call of duty happened.
 4. That for interest of justice the applicant's application to be allowed and the court to excuse the non-attendance that happened on the said date.
3. In the affidavit in support of the application, James Onyano Agembo depones that he filed the application dated November 9, 2022 which was listed for hearing on January 19, 2023. That he is a medical doctor attached at Cottollengo Mission Hospital Chaaria and that on that day just before 8



- a.m. as he was preparing to come to court, he received a call that there was a theatre emergency at the hospital and he was needed there to do surgeries which were caesarian deliveries involving 4 expectant ladies and that he rushed to the hospital for the same and spent the rest of the day there. That he did not have time to write a letter explaining the same before 9 a.m. the court start time.
4. The applicant states that he managed to send somebody during the operation but who arrived at the court long after the court had adjourned for the day. That he was told by the court clerk that the matter had been dismissed for non-attendance and turned down the request to take the file back to the judge explaining that the orders had already been made in the file and advised the person to make an application for it to be reinstated if he so wished.
 5. The applicant further states that for the interest of justice he requests the Honourable court to vacate the orders made on January 19, 2023.
 6. The application was canvassed by way of written submissions. The applicant filed his submissions dated March 16, 2023 while the respondent filed hers dated March 10, 2023.
 7. I have considered the application and the submissions made. The issue for determination is whether the court should exercise its inherent power to set aside the orders of dismissal made on January 19, 2023 and reinstate the application dated November 9, 2022 for hearing on merit.
 8. The court's discretion is provided under Order 12 Rule 7 of the *Civil Procedure Rules* which states as follows-;

“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. In the instant case, the applicant avers that on the material day when the application dated November 9, 2022 was due for hearing, he received a call to attend to medical emergency of some patients at the Cottolengo Mission Hospital Chaaria, where he is working as a medical doctor. The applicant states that he sent someone to inform the court about his predicament but the person arrived after the application had been dismissed for non -attendance.
 10. The right to be heard is a well -protected right in our constitution and is also the cornerstone of the rule of Law. This right should therefore not be taken away by the stroke of a pen, especially where sufficient cause has been shown (see *Richard Ncharpi Leiyagu Vs Independent Electrol and Boundaries Commission & 2 others* [2013] EKL.R.
 11. Having looked at the circumstances of this case, and the reason given for non-attendance, the court is of the view that it would not be appropriate to oust the applicant from being heard on merit. The court is under a duty to make orders that will advance the interest of justice as the court exists to serve substantive justice for all parties to a dispute before it. It is trite that all parties deserve justice and their legitimate expectation is that they will be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the principle of natural Justice (see *Wachira Karani Vs Bildad Wachira* [2016]eKLR.
 12. Based on the foregoing, I am persuaded that the application dated January 21, 2023 has merit and consequently, the same is hereby allowed. The orders made on January 19, 2023 are hereby set aside and the application dated November 9, 2022 is hereby reinstated for hearing and determination on merit.
 13. Costs shall be in the cause.
 14. Orders accordingly.



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

IN THE PRESENCE OF

Court Assistant – V. Kiragu

Ms Mugo for respondent

Otieno C for applicant

C.K YANO

JUDGE

