



**Wainaina v Kiongo (Environment & Land Case E025 of 2023)  
[2023] KEELC 19901 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19901 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E025 OF 2023**

**JG KEMEI, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**TERESIA WANJIKU WAINAINA ..... PLAINTIFF**

**AND**

**SHADRACK KAMAU KIONGO ..... DEFENDANT**

**RULING**

1. The application 3/5/2023 was filed by the applicant seeking the following orders:-
  - a. Spent
  - b. That the orders dismissing the plaintiffs' notice of motion application dated 17/3/2023 be set aside.
  - c. That the plaintiffs' notice of motion application dated 17/3/2023 be reinstated.
  - d. That the preservative orders issued on 22/3/2023 be reinstated.
  - e. That costs of this application be in the cause.
2. The application is based on the grounds annexed thereto and the supporting affidavit of Austine Otieno Odoyo sworn on even date. The deponent averred that he is an Advocate of the High Court of Kenya with personal conduct of the matter on behalf of the plaintiff. He avers that the application dated 17/3/2023 was dismissed on 2/5/2023 for want of prosecution. That the reason for non-attendance of the hearing was the inadvertent, non-diarisation of the application in his office. That the Applicant is committed to prosecute the application and urged the Court to reinstate the said application so that it may be heard on merit.
3. The deponent avers that the applicant is apprehensive that the respondent is carrying out unlawful activities on the suit land following the vacation of the interim orders granted on 22/3/2022.



4. That failure to attend Court on 2/5/2023 was not intentional as the same was due to an oversight on the side of the Counsel for the Applicant. The court was urged not to visit the mistake of the Advocate on the applicant and that no prejudice will be occasioned to the Defendant if the application is allowed. That in any event, the respondent had not filed any response to the application as at the 2/5/2023 when the said application was dismissed.
5. It is evident from the record that despite service having been effected upon the Respondent on 4/5/2023 the Respondent failed to file a response.
6. The application is therefore unopposed.
7. The application was argued orally on 25/5/2023 in the absence of the respondent who was duly served.
8. It is the applicant Counsel's position that he failed to diarise the date of hearing of the application. I have perused annexure No. A002A and A002B which documents are extracts of the Counsels personal diary and the master office diary respectively and find that clearly, this suit being ELC No. 25 of 2023 is missing in both diaries.
9. Setting aside of dismissal orders is a discretionary remedy. The applicant must demonstrate sufficient and clear reasons to enable the court's discretion to flow in his favour. The reason having been advanced for non-attendance and prosecution of the application is that of inadvertent mistake on the part of the applicant's Counsel to diarise the application.
10. There is no evidence placed before this court that the action of the applicant's Counsel is intended to pervert the cause of justice and or delay justice. I find that the applicant has rendered sufficient reason to warrant this court to exercise discretion in her favour. I am constrained to reinstate the preservatory orders as the situation on the ground may have changed. The applicant is not without a remedy as she still has the opportunity to prosecute his application.
11. In the end the application having not been challenged and on the basis of the reasons given above the same is found to have merit.
12. Final orders: -
  - a. The application is allowed.
  - b. The application dated 17/3/2023 be and is hereby reinstated.
  - c. Prayer No d is declined for the reasons given in the ruling.
  - d. Cost of the application shall be in the cause.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**Odoyo for Plaintiff**

**Defendant – present in person**

**Court Assistant – Phyllis & Lilian**

