



Kenya African National Union v Inspector General Of Police & another (Environment and Land Case 15 of 2019) [2023] KEELC 20449 (KLR) (3 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 15 OF 2019
DO OHUNGO, J
OCTOBER 3, 2023**

BETWEEN

KENYA AFRICAN NATIONAL UNION PLAINTIFF

AND

THE INSPECTOR GENERAL OF POLICE 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The plaintiff filed this suit on 2nd April 2014, in the High Court at Kakamega as Kakamega HCCC No. 28 of 2014. It was later transferred to this court, hence its current number.
2. The matter was listed on several occasions. On 10th December 2019, the parties were granted a final adjournment, and the matter was scheduled for hearing on 2nd June 2020. It was later scheduled for hearing on 8th November 2021, in the presence of counsel for the plaintiff. Come 8th November 2021, counsel for the plaintiff did not attend court. Mr Daniel Y. Ahonya, who introduced himself as the Chairman of the plaintiff's Lurambi Branch was present in court. He sought an adjournment on the ground that the plaintiff's advocate on record was unwell. The court granted the plaintiff the last adjournment and scheduled the matter for hearing on 17th February 2022.
3. On 17th February 2022, counsel for the plaintiff sought an adjournment on the ground that he had another matter before the High Court and that Mr Daniel Y. Ahonya did not inform him of the date until two days to the hearing. He apologised and offered to pay the defendants' witness costs of KShs 21,000. The court gave the plaintiff the very last chance and granted it another last adjournment with further orders that it pays court adjournment fees and the defendants' witness costs of KShs 21,000 before the next hearing date which was then scheduled for 16th June 2022. Ultimately, the court did not sit on 16th June 2022 since the Judge was away on other official duties.



4. On 8th July 2022, the registry fixed the matter for hearing on 8th December 2022. The Deputy Registrar notified the parties of the new hearing date. None of the parties attended court on 8th December 2022. Having noted that the plaintiff was granted last adjournment on 17th February 2022, that court adjournment fees which were imposed on the plaintiff on 17th February 2022 remained unpaid and that the Deputy Registry had served parties with notice of the date of 8th December 2022, the court proceeded to dismiss the suit for non-attendance, with no order on costs.
5. The plaintiff later filed Notice of Motion dated 19th December 2022, which is the subject of this ruling. The application sought setting aside of the order made on 8th December 2022 dismissing the suit and that costs be in the cause.
6. The application is supported by an affidavit sworn by one Jonathan Weche Chacha who deposed that he is the Chairman of the plaintiff's Kakamega branch. He acknowledged that after several false starts, the matter was listed for hearing on the 8th of December 2022 with a warning that there would be no further adjournments and went on to state that on that said hearing date, as he was travelling from Kapsabet where he had gone to see his sick friend who was recuperating at home, the bus that he had boarded was detained by police manning a road block at the junction leading to Kaimosi Hospital. That he tasked his colleague one Daniel Yavatsa to attend court with a view to notifying the court that he was on his way but could be delayed.
7. Mr Chacha further deposed that the counsel on record informed him that he called Mr Tarus, who was on record for the defendants to inform him to request that the file to be placed aside as the plaintiff's counsel would be in court by 11.00 a.m. but on calling Mr Tarus, he was surprised to learn that he was also unable to attend court. He concluded by stating that due to Mr Yavatsa's confusion, he could not locate the court room and that by the time Mr Chacha arrived in court, he was shocked to learn that the case had been dismissed for non-attendance.
8. In response to the application, a replying affidavit sworn by Gilbert C Tarus, a Senior State Counsel, based at the Office of the Attorney General at Kakamega, was filed. He deposed that the application is replete with falsehoods, misinformation and concealment of facts intended to mislead the court. That the plaintiff and his advocates were aware that the matter was coming up for hearing on 8th December 2022 and therefore their non-attendance should not be blamed on the defence counsel. He further deposed that Jonathan Weche Chacha has not provided any supporting document to show that he is the Chairman of the plaintiff or that he had authority to swear the affidavit on behalf of the plaintiff. That Mr Chacha did not provide any evidence to prove his claims of travel and his vehicle being detained and that in any case, he ought to have given priority to the case instead of travelling to Kapsabet. He concluded by deposing that the excuses given by the applicant are not reasonable, thus not worthy of any discretion from this court.
9. The application was canvassed through written submissions.
10. The applicant argued that in line with Order 12 rule 7 of the *Civil Procedure Rules*, the court has power to exercise discretion on whether to reinstate a dismissed suit. Relying on *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, it argued that the mistake on its part was inadvertent and therefore excusable and that the court ought to ensure that an error or mistake on the part of a litigant does not cause it to suffer injustice. It therefore urged the court to allow the application as prayed.
11. The defendants filed their submissions on 23rd April 2023 and argued that the matter is nine years old having been first filed in 2014 and since then the plaintiff has never testified but has been giving several excuses for adjournment whenever the matter comes up for hearing. That despite being penalised to pay costs for non-attendance on 17th February 2022, the plaintiff not only failed to pay costs but also



failed to attend the subsequent hearing and that the plaintiff has not adduced any sufficient reasons for not attending court on 8th December 2022. Relying on the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, they contended that it was the plaintiff's duty to take steps to progress the case. They urged the court to dismiss the application with costs.

12. I have considered the application, the affidavits, and submissions. When considering an application such as the present one, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogoh & Another v. Shab* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
13. This is an old matter, having been filed a decade ago on 2nd April 2014. The plaintiff acknowledges that it has been indulged severally and that it was operating on a "very last adjournment."
14. The plaintiff has conceded that it was aware of the date of 8th December 2022 and the other orders that subsisted in the file. Despite being aware of its vulnerable circumstances and the requirement that court adjournment fees and witness costs, which were imposed in the presence of its counsel be paid by 16th June 2022, it neither paid the fees and costs nor attended court on 8th December 2022. No reason has been given by the plaintiff's counsel on record as to why he did not attend court or detail somebody to hold his brief knowing fully well that the plaintiff was on the edge of a precipice.
15. I also note that Mr Tarus has denied in his replying affidavit that he was contacted on the material date and that suggests that the plaintiff has sought to mislead the court. Further, the matter may not have necessarily been dismissed if the plaintiff's counsel attended court punctually on 8th December 2022 and offered acceptable explanations, including asking the court to wait for the arrival of Mr Chacha or any other witnesses. Yet, there is loud silence on the part of the plaintiff's counsel who has opted not to swear any affidavit.
16. Equally, Mr Chacha has not satisfactorily explained why given the unique circumstances of the case, he chose to visit a friend who was recuperating at home instead of heading straight to court first. I am not persuaded that any valid reason for the failure to attend court has been given or that any inadvertence or excusable mistake has been shown.
17. In view of the foregoing discourse, the plaintiff has not laid a basis to warrant to exercise discretion in its favour. Notice of Motion dated 19th December 2022 is bereft of merit and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mango for the Plaintiff

Mr Mogaka holding brief for Mr Tarus for the Defendants

