



**Njeri v Wambui & another (Environment and Land Case Civil Suit
1408 of 2016) [2023] KEELC 20503 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1408 OF 2016**

**J OMANGE, J
OCTOBER 2, 2023**

BETWEEN

MARGARET WANGARI NJERI PLAINTIFF

AND

GRACE WAMBUI 1ST DEFENDANT

NJONGA INVESTMENT COMPANY LIMITED 2ND DEFENDANT

RULING

1. In the Notice of Motion application dated the December 14, 2021 the Plaintiff/Applicant seeks the following orders:
 - a. That the honourable court be pleased to set aside the order striking out the suit herein for failure to extract summons to enter appearance within 30 days of the said order.
 - b. That leave be granted to the Plaintiff/Applicant to extract summons to enter appearance out of time.
 - c. Costs of the application.
2. The Application was supported by an Affidavit sworn by Lameck Jose Mboha the Applicant's advocate on record in this matter. He deponed that failure to extract the summons was not deliberate on part of the plaintiff as it had been orchestrated by failure of the registry to issue notice of the ruling date.
3. He averred that the Ruling was delivered in the Applicants absence and this was the reason she did not comply with the terms of the order. He urged the court to apply the oxygen principle and have the order set aside to allow the plaintiff extract summons and enter appearance and have the matter proceed and heard on merit for effective delivery of justice.



4. The 1st Respondent/Defendant opposed the said application through a replying affidavit dated July 21, 2022. She stated that the Application was made in bad faith as it had been filed one year after the delivery of the ruling implying the plaintiff had no interest in prosecuting the suit. This delay in prosecuting she said was unreasonable, unconscionable and inexcusable as the plaintiff had not adduced any good reasons for it.
5. She further deponed that the Plaintiffs/ Applicants disinterest in the matter is evident given that she did not swear the affidavit in support of the application but chose to rely on her advocates affidavit. The Plaintiff/ Applicant contended that dismissal of the suit would not be prejudicial to the plaintiff in any case.
6. The Defendant/1st Respondent argued that reopening the matter would prejudice her as she has already paid her advocates who had closed the file. She would thus incur advocates fees again. She prayed that the application be dismissed.
7. The plaintiff submitted that the 1st defendant had attached a copy of the invoice and not receipt of legal fees from her advocates. This did not amount to proof of payment as claimed in the 1st Defendants Replying Affidavit neither did it prove that the case file had been closed.
8. Counsel for the Plaintiff reiterated that she was not aware of the ruling date as no notice was given. She argued that being a land matter, it is in the interest of justice to have the matter heard and determined on merit.
9. The 1st defendant submitted that the plaintiff was well aware of the ruling date as per her email to the court registry requesting for the ruling date. She further reiterated the contents of her replying affidavit.
10. Counsel for the 1st defendant cited the case of *Ivita vs Kyumbu* (1984) in which the court stated that for a court not to grant orders for reinstatement of suits the defendant must demonstrate prejudice if the matter was reinstated. Counsel noted that reinstatement is at the court's discretion which discretion must be exercised judiciously.
11. Counsel emphasized the importance of courts ensuring that matters are concluded expeditiously and relied on the case of *Mobile Kitale Service Station Vs Mobil Oil Kenya Limited & Another* (2004) eKLR wherein Justice Warsame insisted on the expeditious disposal of cases and that injustice occasioned by delay should be a thing of the past.
12. Having looked at pleadings and submissions from both parties, the following issues arise for determination by the court; Whether the order striking out the suit on 18th November, 2021 should be set aside. Whether leave should be granted to the plaintiff to extract and serve summons upon the Defendants
13. Section 3A of the *Civil Procedure Act* gives the court inherent powers to make such orders as are necessary for the ends of justice. The section reads, "3A. saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."
14. The applicant has sought an order setting aside the striking out of the suit on the grounds that she was not aware of the Ruling date. The court record confirms that Ruling in the matter was initially set for November 12, 2020. The Ruling was delivered on December 3, 2020 in the absence of both parties. There is no indication that the parties were served with the Ruling notice of the new date. Thereafter the record shows that the 1st Defendant appeared before the Deputy Registrar on April 25, 2021 and July 6, 2021 and indicated that the Plaintiff had not been served. The Plaintiff had only 30 days to



extract and serve the summons from the date of Ruling. By the time the Plaintiff learned the Ruling had been delivered the 30 days had expired.

15. While the Plaintiff could have been more aggressive in following up on the Ruling, I find that it would be unjust to deny her an opportunity to present her case. Any prejudice the 1st Defendant will suffer can be compensated by way of costs.
16. The Plaintiffs application is allowed as follows;
 - a. The order striking out the suit is hereby set aside.
 - b. Leave is granted to the Plaintiff/Applicant to extract, file and serve summons to enter appearance out of time.
 - c. The summons to enter appearance should be extracted, filed and served within thirty (30) days from the date of the ruling. In default, the plaint shall stand struck out and the suit dismissed for want of prosecution.
 - d. The costs of this application be borne by the Plaintiff/Applicant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER 2023.

Judy Omenge

JUDGE

In the presence of: -

Mr. Said for 1st Defendant

Mr. Wanyoni for Plaintiff

Steve - Court Assistant

