



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sagoo & another v Mesa (Civil Case 71 of 2015)  
[2023] KEELC 21475 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21475 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE 71 OF 2015  
OA ANGOTE, J  
NOVEMBER 9, 2023**

**BETWEEN**

**RANJEET SINGH SAGOO ..... 1<sup>ST</sup> PLAINTIFF**

**ADRIAN SAGOO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MARIA DEL MAR BELLO MESA ..... DEFENDANT**

**RULING**

1. On 12<sup>th</sup> July, 2023, the Plaintiffs filed a Notice of Motion pursuant to order 12 Rule 7 of the Civil Procedure Rules and section 1, 1A and 3A of the [Civil Procedure Act](#) seeking the following orders:
  - a. The Honourable Court be pleased to set aside the order issued on 21<sup>st</sup> June, 2023 dismissing the Plaintiff's Application dated 23<sup>rd</sup> May, 2023 for non-attendance and reinstate the same for hearing.
  - b. The costs of the Application be provided for.
2. The application is based on the grounds on the face of the Motion and on further grounds adduced in the Supporting Affidavit sworn on 12<sup>th</sup> July, 2023 by Evans Wachira, the Advocate in conduct of this matter on behalf of the Plaintiffs. The Plaintiffs' counsel deponed that on 21<sup>st</sup> June, 2023, the matter came up for hearing of the Plaintiff's application dated 23<sup>rd</sup> May, 2023 before this court, where, due to his absence, the same was dismissed for non-attendance.
3. Counsel deponed that the reason for the non-attendance is that he received news of his father's death on the morning of 20<sup>th</sup> June, 2023; that he was responsible for transferring his late father's remains from Kijabe Mission Hospital where he had died to a mortuary near their home; that he was unable due to pressure of time to make adequate arrangements for another counsel to hold his brief for matters scheduled for the following day and that he attempted to log into the Virtual Court session in person



- while at Kijabe Mission Hospital but experienced technical challenges as a result of a weak cell phone signal and was unable to join court.
4. The Plaintiffs' counsel submitted that his non-attendance was not deliberate, and that he was still keen to prosecute the said application dated 23<sup>rd</sup> May, 2023 to its logical conclusion; that it is in the interest of justice and prudent that the application be reinstated as the parties are close family members; that neither party will suffer prejudice if the application is reinstated and that the instant application was made timeously.
  5. A Replying Affidavit sworn on 25<sup>th</sup> August, 2023 by Maria Del Mar Bello Mesa, the Defendant, was filed in response. She deponed that the application dated 23<sup>rd</sup> May, 2023 that is sought to be reinstated through the instant application was itself dismissed for non-attendance and want of prosecution; that the delays, tardiness, negligence and non-attendance by the Plaintiffs and their Advocate work against the court reinstating the application dated 23<sup>rd</sup> May, 2023 and that the conduct of the Plaintiff and his Advocate exhibit a lack of interest in prosecuting the application and the suit.
  6. The Defendant deponed that the main suit was dismissed for non-attendance and want of prosecution on 16<sup>th</sup> September, 2020; that the application sought to be reinstated came up for directions on 25<sup>th</sup> and 30<sup>th</sup> May, 2023 and was fixed for hearing on 21<sup>st</sup> day of June, 2023; that the Plaintiffs served his Advocate with the application and directions on hearing thereof which came upon 21<sup>st</sup> June, 2023 and that on the day fixed for hearing, the Plaintiffs and his Advocate were not in court.
  7. It was deponed that the reasons given for non-attendance on 21<sup>st</sup> June, 2023 are not sufficient; that the assertion that the said Advocate encountered a weak cellular signal is not backed by evidence that there was unstable network as was stated in *Sophia Chemasigen Kachuwai & Another v Union of Kenya Civil Servants & 2 Others* (2021) eKLR and that the Advocate had sufficient time to arrange for another counsel to hold his brief as he was the one who took the date and served it upon him, yet he did not attend.
  8. The Defendant further deponed that from their past conduct, the Plaintiffs and their Advocate on record cannot claim inadvertent mistake as they were aware of the date and chose not to attend; that the application is a knee-jerk reaction to the execution process for recovery of costs of the suit and that allowing this application would cause her hardship and great prejudice having incurred expenses in taxing the costs and adjusting her position aligning to the dismissal of the suit and the application to reinstate.
  9. It is the Defendant's case that the court's discretion ought to be exercised judiciously and not capriciously and not to assist the Plaintiffs who deliberately seek to obstruct and delay the course of justice and that the reasons given for non-attendance fall short of sufficient cause to warrant the exercise of this Court's discretion, and is an abuse of the court process.
  10. The Defendant averred that the suit had come to an end but the Plaintiffs were hell bent of sustaining it perpetually without actual interest in prosecuting it, evidenced by their deliberate failure to attend court when the suit and now the application came up for hearing and that there is no explanation for the period between the dismissal of the application on 21<sup>st</sup> June, 2023 and the date of filing the current application on 12<sup>th</sup> July, 2023.
  11. Both parties filed submissions and a list of authorities which I have considered.



## Analysis and Determination

12. This court has considered the instant application and the grounds relied upon by the parties in support and opposition of the same, as well as the Submissions and authorities filed. The only issue that arises for determination is whether the Plaintiffs have established sufficient cause to warrant a reinstatement of the application dated 23<sup>rd</sup> May, 2023.
13. In summary, the suit herein was commenced by way of a Plaint dated 30<sup>th</sup> December, 2014 filed in court on 3<sup>rd</sup> February, 2015. On 12<sup>th</sup> November, 2019, Counsel for both parties appeared before this court and took directions that the matter would proceed for hearing on 16<sup>th</sup> September, 2020. However, come that date, the Plaintiffs' Advocate was absent from Court. The Defendant's Advocate, being present in court applied to have the matter dismissed with costs, and the court allowed the application.
14. The Plaintiffs then filed the application dated 23<sup>rd</sup> May, 2023 seeking for orders of reinstatement of the suit for hearing. On 30<sup>th</sup> may, 2023 upon reading the application, this court issued directions that the application for reinstatement would be heard on 21<sup>st</sup> June, 2023. The Defendant averred that the Plaintiffs' Advocate served her Advocate with the application and the Order that issued the hearing directions.
15. On 21<sup>st</sup> June, 2023, the Plaintiff's Advocate was again not in court. Counsel for the Defendant once more asked for the application to be dismissed, and it was dismissed. The Plaintiffs have now brought the instant application to reinstate the application dated 23<sup>rd</sup> May, 2023 on grounds that the Advocate on record for the Plaintiffs was bereaved and that he could not make arrangements to have another advocate hold brief for him due to time constraints, and further, that due to his location on the said date, he could not log into the virtual court session due to the unstable cellular connection at the location he was.
16. The dismissal of a suit or application that is coming up for hearing for want of prosecution is allowed under Order 12 Rule 1 & Rule 2 of the Civil Procedure Rules, 2010. A party may however bring an application for reinstatement under Order 12 Rule 7 of the Rules which provides that:-

“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.”
17. The court has the discretion to allow an application for reinstatement of a dismissed suit or application. However, the court must caution itself not to exercise its discretion in a manner that will result in an injustice. This principle is expressed in *Shah v Mbogo & Another* (1967) EA 116, where Harris J. held that:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
18. These words are reiterated in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR, where the Court of Appeal stated that:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not



to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

19. Further, in the case of *Philip & Another v Augustine Kibede* 1982-88 KLR 103, the court expressed itself thus;

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline.”

20. In *Fran Investment Limited v G4S Security Services Limited* (2015) eKLR court expounded on the issue of balancing of the rights of parties to a suit in the following words:-

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality, should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the *Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.”

21. In ordinary circumstances, the reasons advanced by the Plaintiff's counsel, that of a weak and unstable network connection resulting in inability to log into court would not pass muster. Courts have held severally that for such an excuse to be believable, there needs to be availed sufficient evidence that counsel attempted to log in but was unsuccessful due to an unstable network connection or technical failures (see *Sophia Chemasigen Kachuwai & Another v Union of Kenya Civil Servants & 2 Others* (2021) eKLR and *Mutinda Musila Malua v Ngunga Yatta, Deputy County Commissioner Kitui West-Sub County & 2 Others* [2021] eKLR)
22. In this particular case, the Advocate on record has indicated that he was bereaved, having lost his father on 19<sup>th</sup> day of June, 2023, two days before the date fixed for hearing of the application dated 23<sup>rd</sup> May, 2023. He has annexed an obituary that points to this fact. In his Supporting Affidavit, counsel explains that he found out about his father's death on 20<sup>th</sup> June, 2023, a day before the date of the hearing.
23. Considering that the circumstances under which the Plaintiffs' Advocate was unable to access the court due to the failure of internet connectivity, arise out of the said bereavement, it would be inhuman to blame him for the non-attendance on the material day. Indeed, the loss of one's parent can take a toll on someone, to an extent of missing out on important appointments, including court sessions.



24. Another consideration in an application for reinstatement is the nature of prejudice, if at all, that will be suffered by the Defendant in the event of a reinstatement. It is not lost on this Court that even as the Plaintiffs attempt to convince the court that they are deserving of an order for reinstatement, the Defendant is equally required to inform the court the prejudice or injustice that will befall him because of an order of reinstatement.
25. In the instant case, the Defendant has not raised any tangible prejudice that a reinstatement will cause her. The court cannot assume or presume that the Defendant has or would suffer prejudice without the Defendant demonstrating the same. If the court were to do so on behalf of the Defendant, it would be descending into the arena in support of one party when it is expected to be the neutral arbiter.
26. A perusal of the Defendant's Replying Affidavit and Submissions shows that the Defendant only mentions that she has adjusted herself to the fact that the suit and the application were dismissed and that she has commenced execution proceedings. In all fairness, this, coupled with the expenses already incurred in the execution process, if at all, do not constitute loss or harm that cannot be compensated by an award in damages.
27. The Defendant has questioned the time taken by the Plaintiffs and their Counsel to bring the application for reinstatement. The application was dismissed on 21<sup>st</sup> June, 2023 while the instant application was filed on 12<sup>th</sup> July, 2023. There is only a period of 21 days between the two events. In the circumstances leading up to the said application, including the fact that the Plaintiffs' advocate had lost his father, this court is of the opinion that the application was brought within reasonable time.
28. In the interest of justice, and looking at the totality of the circumstances in this matter, it is the court's considered view that the route of lesser risk of injustice is to allow the application dated 12<sup>th</sup> July, 2023. Although the Defendant and her Counsel have set out the conduct antecedent of the Plaintiffs' and their Counsel to the instant application, the Plaintiff's counsel has expressed the desire and commitment to diligently prosecute the matter on behalf of the Plaintiffs.
29. In the circumstances, this court is inclined to give the Plaintiffs another chance to prosecute their application for reinstatement of the suit. The court is also satisfied that the loss which the Defendant might suffer as a result can be adequately compensated by an award of damages. For those reasons, the Plaintiffs' application dated 12<sup>th</sup> July, 2023 is allowed in the following terms;
  - a. That the order of this court of 21<sup>st</sup> June, 2023 dismissing the Plaintiffs' application dated 23<sup>rd</sup> May, 2023 be and is hereby set aside.
  - b. That the Plaintiffs' application dated 23<sup>rd</sup> May, 2023 is reinstated for hearing.
  - c. That the Costs of the application shall be borne by the Plaintiffs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

