



**Ogeta v Oriaro (Environment and Land Appeal E021 of 2023)
[2025] KEELC 4125 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E021 OF 2023**

AE DENA, J

MAY 22, 2025

BETWEEN

DANIEL OKELLO OGETA APPELLANT

AND

CAROLINE ADHIAMBO ORIARO RESPONDENT

JUDGMENT

1. The Applicant was the Plaintiff in Chief Magistrates Siaya ELC Suit No. 45 of 2022 while the Respondent was the defendant. In the suit the plaintiff alleged that the defendant had encroached by 18M into parcel number Siaya/Pap-oriang/437. He sought an order of permanent injunction against the defendant or its agents, employees from encroaching/trespassing, utilizing, cultivating ploughing possessing selling or doing any kind of activity on the illegally encroached part as well as general damages.
2. The plaintiff suit was subsequently dismissed for non attendance. The plaintiff then filed an application dated 9/8/2023 to set aside the order dismissing the suit on the basis that the plaintiff misheard the said hearing date and attended court on 26/07/2023 instead of the scheduled date of 27/6/2023. The application was opposed by the defendant and disposed of by way of written submissions. Vide a ruling delivered on 8/12/2023 the trial Magistrate struck out the application with costs for incompetence.
3. Aggrieved by the ruling above the Plaintiff filed the present appeal vide a Memorandum of Appeal dated 18/12/2023 on the following verbatim grounds'-
 1. That the learned Magistrate erred in law and facts by ignoring the arguments and submissions of the Appellant that failure to attend court was as a result of confusion in noting the dates
 2. That the learned Magistrate erred in law and facts by dismissing the application of the Appellant wholly



3. That the learned Magistrate erred in law and facts by ignoring the principal of justice as set out in the constitution of Kenya 2010
4. That the learned Magistrate erred in law and facts by ruling on the substantive suit without hearing the parties in the suit hence provoking the fundamental principles of the constitution of Kenya 2010.
4. The Appellant prays that the Appeal be allowed and the Ruling of the trial subordinate court be set aside with costs.

Submissions

5. On 3/02/2025 this court directed that the appeal be heard by way of written submissions. The applicants submissions are dated 7/02/2025 and the respondents 25/02/2025.

Appellants Submissions

6. It is submitted that on the 26/06/2023 when the appellant attended court he was directed to go to court 1 because court number 3 was not handling civil matters. He waited in court 1 but the case was not called out. That on inquiry at the registry as to when his case was going to be heard, he was informed by the staff that the CTS was down and advised to come on another date. He came back 2 days later and was informed of the dismissal of the suit on 27/6/2023 for non-attendance.
7. The appellant during the pendency of the suit this is the only day he missed court and which he attributed to the confusion on the dates. That he was self-presented and was certain of court processes and rules which when not adhered to could be prejudicial. The appellant prays the suit be reinstated and be placed before another court for hearing as he has lost faith in the specific trial court.

Respondents Submissions

8. The respondents submit that the appellant admitted that the suit was indeed set down for hearing on 27/6/2023 which he acknowledged. While the appellant attendant court a day prior to the hearing date he never sought the aid of the court customer care desk or the civil registry to check the status of his case. That the appellant was indolent and equity should not aid him for not only being indolent but delaying the course of justice. That court orders are meant to be obeyed and not for cosmetic purpose as they are not made in vain.
9. It is further submitted that the application was an abuse of the court process and article 159 of the constitution was never meant to overthrow rules of procedure and timelines set in litigation. A number of authorities were relied upon which the court has considered.

Analysis and Determination

10. I have perused the impugned ruling delivered on 8/12/2023 and my task is to determine whether this appeal is merited.
11. The appeal is against an order of the court dismissing an application to set aside orders striking out a suit for want of attendance. The Notice of Motion dated 9/8/2023 was brought under the provisions of section 3A of the Civil Procedure Act, Order 51 Rule 1, Order 12 Rule 7 of the Civil Procedure Rules.



12. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus:

“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.”
13. The power donated to the court to set aside is therefore discretionary.
14. The trial court in the impugned ruling rightly stated that the power to set aside its own orders was discretionary as long as sufficient cause is demonstrated to warrant exercise of such discretion. The trial court also noted the unfettered discretion to allow determination on merit. The trial Court additionally recognized the constitutional right to access to justice as guaranteed under article 48 and the right to be heard as cornerstone of the rule of law and governance. All this is aptly stated.
15. The trial court then noted that the Motion did not state the date of issue of the subject order, the particulars of the order being set aside and its date. That the trial court was basically not clear of which application it was dealing with or which orders were being sought to be reviewed. The court then proceeded to make a finding that being convinced by the respondents arguments ‘the orders been sought in the Notice of Motion to be vague and the application incompetent.’ The trial court struck it out with costs.
16. But I must set the record straight in terms of the dates in issue. It would appear the Notice of Motion put the date of the hearing of the main suit as 27/7/2023. The applicants supporting affidavit refers to the same date. The applicant depones that he inadvertently misheard the said date and instead attended court on 26/7/2023. The dates have been amended by hand where the letters ‘ly’ in the month July are amended by ink to ‘ne’ so as to read June.
17. My perusal of both the typed proceedings and the proceedings in the lower court file show that this suit was defended and upon compliance with pretrial protocols parties appeared before the trial court on 2/5/2023. On that date in the presence of both parties the suit was scheduled for hearing on 27/6/2023. The date was infact suggested by Counsel for the defendant which the plaintiff agreed with. On the said 27/6/2023 the plaintiff was absent and counsel on record for the defendant applied for the matter to be dismissed. The court dismissed the suit with costs for non attendance.
18. This court is aware that an appellate court must refrain from interfering with the exercise of discretion of the trial court unless the trial court considered some facts it ought not to have considered or that the court has been clearly wrong in the exercise of its discretion and that as a result there has been misjustice. This was the position taken in Mbogo & Another V. Shah [1968] EA 98.
19. In my view I think the courts action of striking out the application for vagueness was uncalled for in view of the courts own appreciation of discretion to set aside orders in favor of merit and the right of every person to be heard. My perusal of the application shows that the main prayer was to set aside the order dismissing the plaintiff/applicant suit with costs to the defendants/ respondents. This prayer was indeed replicated in the respondents’ submissions dated 8/11/23. The Respondents did not raise any issue about the vagueness of the application in terms of the orders that were being sought to be reviewed or set aside. From both the proceedings and the lower court file record there was only one event where orders were made dismissing the suit and thus eliminating any vagueness.
20. I have seen the case law cited by the respondents in buttressing the position that equity should not aid the indolent and that court orders ought to be obeyed. I did not see the indolence at the failure to attend court by dint of confusion on the dates and this has nothing to do with obedience or otherwise of court orders.



21. From the record of the trial court I note that the plaintiff has consistently been attending court on 6/10/22, 15/11/2022,24/01/2023,18/4/2023 and 2/5/2023. It is only on the 26/6/2023 that the record shows the plaintiff was absent and for me it is this history of consistency that the trial court ought to have considered positively in favor of the plaintiff.
22. I further note that on 26/7/2023 which is a month after, the plaintiff attended court. Looking at the dates in issue 26/6/2023 and 26/7/2023 the confusion is only on the month which any human being can confuse. It would raise eyebrows if the months were very far apart for example confusing June and August or even September. The plaintiff took steps and fixed the matter for mention on 8/8/2023 and filed the application as advised by the court. Clearly this does not align to a party who was indolent. I think there was sufficient cause to exercise the discretion in favor of the plaintiff.
23. In the circumstances thereof, it would be unjust and a miscarriage of justice to deny the Applicant a chance to advance his case when as demonstrated, he has expressed a desire to be heard on the matter and even filed the application to set aside the orders of the court and who has consistently been attending court prior to the dismissal . 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 strike of a pen, where sufficient cause has been shown. (See - Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others Civil Appeal No. 18 of 2013 [2013] eKLR).
24. Moreover courts exist to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as enunciated in Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR.
25. I have noted that the trial court also noted from the record that the defendant no longer resides in the disputed land and as result found that the horse has bolted. I think I do not need to belabor the point. What was before court was an application to set aside. It was an error for the court to venture into the merits of the case. This was an issue in my view to be addressed after reinstatement where the Plaintiff would have been given an opportunity to consider the matter even on a without prejudice basis in view of the nature of the reliefs and or prayers that were being sought in the plaint.
26. The upshot of the foregoing is that I find the appeal merited and I allow it in the following terms:-
 - i. The Ruling of the trial subordinate court be and is hereby set aside
 - ii. The orders dismissing the suit for non attendance are hereby set aside and the plaintiffs suit in ELC case No. E045 of 2022 is hereby reinstated
 - iii. The Plaintiff Applicant shall pay the Respondents thrown away costs of Kshs. 5, 000/- to be paid within 45 days of this judgement.
 - iv. The lower court file shall be returned to the relevant registry for appropriate action.

Orders accordingly

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF MAY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

22/05/2025



Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:
Mr. Daniel Okello Ogada the Appellant appearing in person
No appearance for Respondent
Court Assistant: Ishmael Orwa

