



**Kimani v Munye (Environment & Land Case 370 of 2017)
[2022] KEELC 3244 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 370 OF 2017**

JG KEMEI, J

JUNE 6, 2022

BETWEEN

PETER MWANGI KIMANI PLAINTIFF

AND

SERAH WANJIRU MUNYE DEFENDANT

RULING

1. The application is brought under order 12 rule 7, order 17, order 51 rule 1 and 15 of the Civil Procedure Rules, section 3A & 63 (e) of the Civil Procedure Act, article 50 (1) and 159 of the Constitution and all other enabling provisions of the law.
2. The Applicant sought orders reinstating the suit which was dismissed on the 8/4/2021.
3. The application is supported by the grounds annexed read together with the affidavit of the Applicant sworn on the 6/12/2021. He avowed that the suit was dismissed on the 8/4/2021 due to various reasons some of which are; COVID 19 Pandemic which led to the suspension of hearings in Court; was unaware that his erstwhile lawyers Messrs Ishmael & Co had ceased acting for her and that her case was unrepresented for a while; he learned of the dismissal of the case on the 1/12/2021 on the instruction of his current lawyers Messrs Mercy Kareithi & Co Advocates; was not served nor notified with the Notice to show cause dated the 2/11/2020; the last communication on the case was the hearing of the 19/11/2019 which he did not attend on account of ill health;
4. In addition, he pleaded with the Court that the mistakes of his Counsel should not be visited on him. That he should be accorded the opportunity to be heard now that he has a new Counsel and that in any event the Defendant also failed to attend Court on the 8/4/2021 and in his opinion stands to suffer no prejudice if the suit is reinstated.
5. Finally, that land being emotive, he stands to suffer prejudice loss and damage unless the Court grants his prayers in the suit. That the application has been filed timeously



6. The application was served upon the Respondent but did not file any response. The application is therefore undefended.
7. The germane issue is whether the application is merited.
8. The power vested in the trial court to set aside an order dismissing the suit for non-attendance is contained in the provisions of order 12 rule 7 of the [Civil Procedure Rules](#). It is a discretionary power that is exercised by the Court judiciously. The exercise of judicial discretion is dependent upon the factual circumstances of the case.
9. It is trite that the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. See *Mbogo & another v Shah* [1968] EA 93.
10. Before I delve into the merits of the application, allow me to peruse the file so as to appreciate the conduct of the Applicant in prosecuting the suit. The suit was filed on 24/3/2017. On the 7/6/2017 the defendant duly filed his statement of defence denying the Plaintiff's case. On the 2/5/2017 the Plaintiff filed a motion seeking injunctive relief restraining the Defendant against ploughing and interfering with the physical state of the suit land Ngairubi/ndiuni/66.
11. On the 21/11/2018 a notice to show cause was issued by the court under order 17 rule 2(10) of the [Civil Procedure Rules](#) requiring the Plaintiff to show cause why the suit should not be dismissed.
12. On the 30/4/2019 the Plaintiff appointed a new Counsel Messrs Ishmael & Co Advocates to act on his behalf. See notice of appointment of even date. Notwithstanding the change of Advocates not much in terms of prosecuting the case took place.
13. The said firm duly successfully sought for the reinstatement of the suit vide the notice of motion filed on the 30/5/2019.
14. On the 5/12/2018 Mr Gacheru holding brief for Mr Nderitu for the Plaintiff informed the Court that the Plaintiff filed a notice of intention to act in person and that the notice to show cause was duly served on him through the registered postal address. Having been satisfied that the Plaintiff was duly served noted that he was absent in court and proceeded to rightly dismiss the case under order 17 rule (2) (1) with costs being in the cause.
15. On application to reinstate the case, the court allowed the application on the 2/7/2019 in the following terms;

“The notice of motion dated the 30/5/2019 is not opposed. The same is allowed entirely and the Plaintiff to set the matter down for hearing expeditiously.”
16. Come the 23/9/2019 the firm of Ishmael & Co sought leave to cease acting citing lack of instructions from the Applicant. The application was allowed on the 17/2/2019.
17. On the 2/11/2020 the Court notified the Applicant to show cause why the suit should not be dismissed. The Plaintiff despite service did not respond to the application and after several hearing dates having been given, the suit was dismissed on the 8/4/2021 prompting the filing of this application.
18. The Plaintiff has blamed the COVID 19 Pandemic for the delay in prosecuting his case. It is to be noted that even during the pandemic Courts continued to handle matters online and there is no excuse why even after the full resumption of the Court the Applicant did not prosecute his case.



19. The Applicant has not placed any evidence to support ill health. In fact it is on record that he has the habit of changing advocates and not giving instructions on how to proceed. He is also swift in blaming them for inaction as he pleads with the court to reinstate the suit every time it is dismissed. A case in point is the replying affidavit by his Counsel Mr. Ishmael where he pleaded that the applicant had failed to give instructions and therefore unable to proceed with the matter. Sadly, the Applicant has used the very reason of mistake of Counsel to plead with the Court to reinstate his matter. It is a trend so well-rehearsed throughout the applications on record.
20. Is there delay in bringing the application? The last dismissal of this suit was on the 8/4/2021 and the application was filed on the 6/12/2021, a period of close to 7 months. It is trite that there is no hard and fast rule in calculating delay. It all depends on the circumstances of each case. In the circumstances of this case, the delay is not inordinate.
21. I have considered the prejudice that will be suffered if this case is reinstated and I find none because the Respondent did not oppose the application. Guided by article 159 (2) (d) of *the Constitution*, I find that the lower risk in this matter is to reinstate the case so that it may be heard on its merits. The reinstatement will however be on terms;
 - a. The plaintiff is ordered to comply with order 11 within 30 days from the date of this ruling and thereafter fix the matter for hearing by the end of the said 30 days.
 - b. In default of the above, the application shall stand dismissed with no further orders from this Court.
 - c. I make no orders as to costs.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kareithi for Plaintiff/Applicant

Defendant/Respondent – Absent but served

Court Assistant - Phyllis

