



REPUBLIC OF KENYA



Kipkebut v Reuben Kamau T/A Marock / Kamaur Investments & 7 others (Environment & Land Case 238 of 2018) [2022] KEELC 3708 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 238 OF 2018
FM NJOROGE, J
JULY 12, 2022**

BETWEEN

DR. FESTUS JK KIPKEBUT PLAINTIFF

AND

**REUBEN KAMAU T/A MAROCK / KAMAUR INVESTMENTS 1ST
DEFENDANT**

MARY CHEPKOSGEI T/A KAMAUR INVESTMENTS 2ND DEFENDANT

ELIJAH OLE SAAYA 3RD DEFENDANT

EDWIN LEKARIAP 4TH DEFENDANT

PETER LEPARSARE 5TH DEFENDANT

TOM LESALAJA 6TH DEFENDANT

REGISTRAR OF TITLES 7TH DEFENDANT

CHIEF LANDS REGISTRAR 8TH DEFENDANT

RULING

1. This is a ruling in respect of the plaintiff's notice of motion application dated January 31, 2022 in which he seeks the following prayers:
 1. ... spent;
 2. That this honourable court be pleased to set aside its order issued on January 25, 2022 dismissing the plaintiff's suit for non-attendance and reinstate it for hearing;
 3. That this honourable court be pleased to make any order it may deem fit to grant in the interest of justice;



4. That the cost of this application be in the cause.
2. The application is supported by an affidavit sworn on January 31, 2022 by counsel for the plaintiff. The grounds on the face of the application and the supporting affidavit are that the matter came up for a virtual hearing on September 28, 2021; that at the end of the session, counsel for the plaintiff indicated the next hearing date in his file as January 25, 2022 but inadvertently indicated February 25, 2022 at the back of his diary; that after securing a diary for 2022, his secretary transferred the dates from the back of his 2021 diary to the 2022 diary; that while doing so, she mistakenly indicated the hearing date in respect of the instant suit to be February 25, 2022 instead of January 25, 2022; that at the time the secretary was transferring the dates, the file was at their Kabarnet offices and she therefore did not have the benefit of cross-checking the date at the back of the diary with the date in the file; that all along counsel believed that that the matter was coming up for hearing on February 25, 2022 and informed the plaintiff so; that while he was at Eldoret High Court on January 25, 2022, he was informed by counsel for the defendant that the matter had been confirmed for hearing that day; that he then asked the advocate for the defendant to indulge him as he had mis-diarized the matter and the defendant's advocate told him to get an advocate to make the application for adjournment; that he was not able to get an advocate to hold his brief as most of them were either involved in virtual court proceedings or otherwise busy; that by the time he got counsel to hold his brief, the matter had already been dismissed for non-attendance of the plaintiff; that the plaintiff will suffer irreparable loss if the order dismissing his suit is not set aside as he has invested heavily on the suit property; that the defendants will not suffer any prejudice if the plaintiff's application is allowed and that it is in the interest of justice that the said application be allowed.
3. On February 17, 2022 the 1st defendant filed a replying affidavit sworn on February 10, 2022. He deposed that he had been authorized to swear that affidavit on behalf of the 2nd to 6th defendants. He stated that on September 28, 2021, the court scheduled the matter for hearing on January 25, 2022 in the presence of the advocates for all the parties; that on January 25, 2022 the plaintiff and his advocate failed to show up in court; that the plaintiff deliberately failed to attend court and that the explanation of misdiarising of the date is an afterthought crafted after the plaintiff realized that the matter had been dismissed for want of prosecution; that the circumstances expressed by the plaintiff's advocate are not sufficient and could have been adequately avoided; that the matter has dragged in court since the year 2018 and justice has been delayed as the plaintiff has not been keen to prosecute his case; that it is in the interest of justice that the court dismisses the plaintiff's application with costs.
4. The application was canvassed by way of written submissions. The plaintiff filed his submissions dated March 15, 2022 on March 22, 2022. He gave a brief background of the application and submitted that his advocate's failure to attend court on January 25, 2022 was as a result of misdiarising the matter and that his advocate had informed him that the matter had been fixed for hearing on February 25, 2022 instead of January 25, 2022. The plaintiff further submitted that his failure to attend court was a result of the information he received from his advocates and prayed that the court exercises its discretion in his favor. He relied on the case of *CMC Holdings Ltd v James Mumo Nzioka* and concluded his submissions by praying that his suit be reinstated as it will not prejudice the defendants who can be compensated with costs.
5. The 1st to 6th defendants filed their submissions dated April 5, 2022 on May 27, 2022. They submitted on whether a setting aside of order can issue. They relied on the case of *Crystal Motors (K) Ltd v Occidental Insurance Company Limited* [2017] eKLR and submitted that the matter came up for hearing on September 28, 2021 but was adjourned due to the absence of the plaintiff; that the court was fair in granting another date for hearing which was on January 25, 2022 but the plaintiff did attend court on that date; that the plaintiff is not interested in having the matter heard as he has not given a



sufficient explanation for failing to attend court; that the court's decision to dismiss the suit was proper and that the court is to be guided by order 10 rule 11 of the *Civil Procedure Rules* in setting aside ex-parte orders. The 1st to 6th defendants therefore sought that the plaintiff's application to be dismissed and that if the court would be inclined to grant the said orders, then they should be granted throw away costs of Kshs 45,000/= payable before the next hearing date.

Analysis And Determination

6. After considering the application, affidavits and submissions, the only issue that arises for determination in the instant application is whether the court should set aside its order issued on January 25, 2022 dismissing the plaintiff's suit and reinstate the suit for hearing.

7. The matter came up for hearing on January 25, 2022 and was dismissed for non-attendance of the plaintiff. The law that governs the setting aside of a judgement or dismissal order is order 12 rule 7 which provides as follows:

“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.”

8. The court exercises its discretion in considering whether or not to set aside an order of dismissal of a suit for non-attendance of the plaintiff. For the court to exercise its discretion in favor of an applicant, the applicant has to demonstrate that there is sufficient cause to set aside the order for dismissal and reinstate the suit. The court in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR cited with approval the decision of the Supreme Court of India in the case of *Parimal v Veena* where the court observed as follows:

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

9. In the present matter, the suit came up for hearing on January 25, 2022. Neither the plaintiff nor his advocate attended court but the 1st and 2nd defendants and their counsel as well as two witnesses were present and so the case was dismissed and a hearing date given for the counterclaim. The court noted that counsel for the plaintiff was present when the hearing date was taken.

10. The reason advanced by counsel for the plaintiff for his failure to attend court was that he had failed to properly diarize the matter as he had indicated February 25, 2022 instead of January 25, 2022 in his diary; that he only learnt from counsel for the defendants on January 25, 2022 and informed that the matter had been listed for hearing on that day and that by the time he could get counsel to hold his brief, the matter had already been dismissed. Counsel for the plaintiff also indicated that he had inadvertently misinformed the plaintiff about the hearing date and that is why the plaintiff was also not present in court. This court observes that human is to error and these things do occasionally happen in the corridors of justice and there is high probability of truth in what the plaintiff has submitted.



11. In addition, the plaintiff attached to his application a copy of his diary that indicated that the matter had been diarized for February 25, 2022. It is my view that in the circumstances of this case, it is in the interest of justice that the dismissal order be set aside and the matter set down for hearing. It is further my view that the defendants will not suffer much prejudice save a little delay if the instant application is granted.
12. In conclusion therefore, the plaintiff's application dated January 31, 2022 has merit and it is hereby allowed as prayed in prayer no (2) thereof with costs to the defendants. Mention shall be on September 27, 2022.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU

