



REPUBLIC OF KENYA



**Wafula v Sindani & 3 others (Environment & Land Case 149 of 2013)
[2022] KEELC 14510 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 149 OF 2013**

BN OLAO, J

NOVEMBER 3, 2022

BETWEEN

ESTHER NAFULA WAFULA PLAINTIFF

AND

MARK JUMA SINDANI 1ST DEFENDANT

STEPHEN NYONGESA KISUYA 2ND DEFENDANT

MISIKO N. NANDIEKI 3RD DEFENDANT

ROBERT MALABA NAMUNYI 4TH DEFENDANT

RULING

1. On March 1, 2021 when this suit came up for hearing, neither the plaintiff nor her counsel Mr Bulimo were present in court and no explanation for their absence was forthcoming.
2. Ms Nanzushi counsel for the 2nd, 3rd and 4th defendants was present also holding brief for Ms Ratemo counsel for the 1st defendant and on her application, the plaintiff's suit was dismissed with costs.
3. I now have before me the application dated November 9, 2021 by the plaintiff Esther Nafula Wafula premised under the provisions of order 12 rule 7 and order 51 rule 1 of the [Civil Procedure Rules](#) seeking the following orders:
 1. That the order of dismissal of this suit issued on March 1, 2021 be set aside and the suit be reinstated for hearing and determination.
 2. Costs be in the cause.
4. The application is premised on the grounds set at therein and is supported by the plaintiff's affidavit also dated November 9, 2021.



5. The gravamen of the application is that her counsel's clerk, though served with the hearing notice on December 21, 2020, unfortunately forgot to diarise it. Further, that the applicant has been unwell and has not been able to meet his counsel for sometime. That she is desirous of proceeding with this suit and in any event, on August 6, 2019 this court issued some orders which upon compliance will result in the dispute being settled. Annexed to the application is a consent order dated August 6, 2019.
6. The application is opposed by the Mark Juma Sindani and Stephen Nyongesa Kisuya the 1st and 2nd defendants respectively.
7. In his replying affidavit dated March 2, 2022, Juma Mark Sindani the 1st defendant herein (the pleadings refer to him as Mark Juma Sindani) has deponed, inter alia, that there is no evidence showing that his counsel was served with the hearing notice dated December 1, 2020 but since it was not his case, the dismissal of the plaintiff's suit on March 1, 2021 was quite in order. That there is a consent dated November 25, 2015 which still subsists. In paragraph 5 of the said affidavit, he makes the following averment which I cannot comprehend.
 5. "The plaintiff chewed her own order dated August 6, 2019 of which she was asking to set aside a dismissal order of which the court granted her."
8. I am not aware that a court order can be "chewed" He adds finally that the plaintiff is not serious with her case and this application should be dismissed.
9. On his part, Stephen Nyongesa Kisinya the 2nd defendant has averred in his replying affidavit dated January 25, 2022 that this case was filed way back in 2009 before being transferred to this court in 2013 but the plaintiff has never been keen to prosecute it and is taking the defendants in circles. That not only has the plaintiff failed to comply with the court orders as to directions but she also failed to attend court even when served. The plaintiff is not being honest when she claims that her counsel failed to diarise the case as no extract of the diary has been annexed to the application. That his case has been in court for more than 10 years yet litigation must come to an end. The plaintiff has had an opportunity to prosecute her case and the 2nd defendant will be highly prejudiced if this suit is reinstated to hearing. And even if the suit is reinstated to hearing, the plaintiff has been indolent having not complied with order 11 of the *Civil Procedure Rules*. The application should therefore be dismissed with costs to him.
10. The application has been canvassed by way of written submissions.
11. I have considered the application, the replying affidavits by the 1st and 2nd defendants and the submissions to counsel.
12. It is common ground that the plaintiff's suit was dismissed on March 1, 2021 after both she and her counsel failed to turn up in court on the date set for hearing. The plaintiff now seeks the reinstatement of the dismissed suit and has cited order 12 rule 7 of the *Civil Procedure Rules* which provides that:

"Where under this order judgement 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."
Emphasis mine.
13. Just as the dismissal of the suit under order 12 rule 1 of the *Civil Procedure Rules* is not automatic – see *Ivita v Kyumbu 1984 KLR 441* – it is clear to me that the use of the word "May" in order 12 rule 7 of the *Civil Procedure Rules* connotes that the reinstatement of a suit which has been dismissed for want of prosecution due to non-attendance of the plaintiff is not automatic either. The onus however, is on the part of the plaintiff to demonstrate, to the satisfaction of the court, that it is a proper case for the court to reverse its decision in dismissing her case due to non-attendance. In doing so, the court exercises its



discretion which must be done judiciously and for good reasons being an equitable remedy. It cannot be as a matter of course available to the plaintiff on a walk-in-walk out basis. While it is of course true that under article 50 of the *Constitution* every person has a right to be heard, where that opportunity has been availed but has been squandered, the party who feels aggrieved must show sufficient cause why the opportunity should be availed again. Each case must be determined on the basis of its own peculiar circumstances. But certainly, there must be evidence of good faith and full disclosure.

14. What then are the circumstances of this case?
15. To begin with, the plaintiff's suit was dismissed on March 1, 2021 and this application was filed on November 17, 2021 a delay of eight (8) months which I consider to be inordinate. The plaintiff has averred in paragraph five (5) of her affidavit that her counsel perused the file and informed her that the suit had been dismissed on March 1, 2021. She does not tell this court when that discovery was made. The plaintiff further adds in paragraph four (4) of the same affidavit that she has been un-well. She does not, however, state when she was un-well nor has she produced any medical evidence to support that claim.
16. In paragraph three (3) of her supporting affidavit, she has deponed that although her counsel was duly served with the hearing notice on December 21, 2020, the clerk did not diarise it. The court would have expected that averment to come from the said clerk or her counsel. That has not been done and neither has the name of the clerk been availed. Clearly, there is no full disclosure on the part of the plaintiff and this court must accept the averment of the 2nd defendant in paragraph sixteen (16) of his replying affidavit wherein he has deponed:
 16. "That the plaintiff is not being honest that her counsel failed to diarise the case since no extract of the diary was annexed to the application."
17. The record also shows that despite several reminders by the court directing the plaintiff and her counsel to comply with the provisions of order 11 of the *Civil Procedure Rules*, she had not done so by the time the suit was dismissed. The first order directing her to comply and file her statement and those of her witnesses was made on October 30, 2019. She did not comply and on February 12, 2020 when the file went before the deputy registrar for pre-trial directions, he made the following order:

"I had earlier noted the plaintiff is not serious with this suit. Let it be placed before the judge for directions." Emphasis mine.
18. That was the last straw on the camel's back and on March 1, 2021, the inevitable happened and the suit was dismissed. The deputy registrar had infact cautioned the plaintiff as far back as January 22, 2020 that if there shall have been no compliance on February 12, 2020, this file would be placed "before the judge for dismissal." Section 1A(3) of the *Civil Procedure Act* requires parties "to participate in the processes of the court and to comply with the directions and orders of the court." There has been flagrant disobedience of the directions and orders of this court on the part of the plaintiff and for no valid excuse.
19. Both the plaintiff and 1st defendant suggest that this suit is infact already settled by a consent order. If at all that is the position, then she would not be beseeching this court to reverse the dismissal order. Indeed if there has been any settlement, the parties should fall back to that consent order and disregard the order of dismissal dated March 1, 2021 as inconsequential. I have looked at the record herein and it is true that several consent orders were filed by the parties. However, those consents dated November 25, 2015 and October 17, 2016 were always subject to the fulfilment of certain conditions regarding



the surveying of the land. The last such order was recorded on May 13, 2019 in the presence of counsel of all the parties. It reads:

“The consent order dated October 17, 2016 is hereby adopted as an order at the court. The suit be marked as settled after the surveyor’s report is filed. Mention on June 11, 2019 to confirm receipt of the report.”

20. That report was never filed and on October 8, 2019, Mr Kundu counsel for the plaintiff addressed the court as follows:

“The mention is to confirm if the surveyor has filed a report following the order of August 6, 2019. I have spoken to him. He said there are issues on the ground that need to be addressed.”

21. I did not find it prudent to continue adjourning this case to await a report from the surveyor who appeared to be having challenges preparing one. I therefore made the following directions:

“My view is that the parties comply with pre-trial directions and fix this case for hearing. The said surveyor can be called as a witness for the parties. Pre-trial on October 30, 2019.”

22. As is now clear, no surveyor’s report was ever prepared nor filed. If any exists, it was not made available to the court and therefore the proposed consent was essentially still born.

23. It is also instructive to note that the dismissal order issued on March 1, 2021 was not the first such order. On October 5, 2016, the plaintiff’s case was dismissed again for want of prosecution. That dismissal order was later set aside vide a consent order dated October 17, 2016. The 2nd defendant has averred in paragraph eleven (11) of her replying affidavit that the plaintiff is “not serious with the case” and the 1st defendant has made the same assertion in paragraph six (6) of his replying affidavit. The plaintiff’s antecedents in the prosecution of her case clearly confirms lack of seriousness on her part. Surely a court’s patient and discretion cannot be limitless. Litigation must come to an end as rightly pointed out by the 1st and 2nd defendants.

24. The up-shot of all the above is that the plaintiff’s notice of motion dated November 9, 2021 is devoid of any merit. It is accordingly dismissed with costs to the 1st and 2nd defendants.

RULING DATED AND SIGNED AT BUSIA ON THIS 3RD DAY OF NOVEMBER 2022.

THE SAME IS DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 3RD DAY OF NOVEMBER 2022 IN KEEPING WITH THE COVID 19 PANDEMIC GUIDELINES.

B N OLAO

JUDGE

