



**Sairowua v Ologeso & another (Environment & Land Case
E017 of 2021) [2025] KEELC 3964 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E017 OF 2021
LN GACHERU, J
MAY 20, 2025**

BETWEEN

REPES SAIROWUA PLAINTIFF

AND

NAREYIOEN OLOGESO 1ST DEFENDANT

DAVID MUTUTO MUMO 2ND DEFENDANT

RULING

1. The matter for determination is the Notice of Motion Application dated 13th February 2025, brought by the 2nd Defendant/Applicant herein David Mututo Mumo wherein he sought for the following Orders: -
 - a. That the court be pleased to set aside the orders made on 10th February 2025 dismissing the 2nd Defendant/Applicant's Notice of Motion Application dated 2nd November 2024, which sought review of the Judgement and to reinstate the application for hearing on its merits.
 - b. That the costs be in the cause.
2. The instant Application is premised on the following grounds: -
 - a. That the Application dated 2nd November 2024, was scheduled for hearing on 10th February 2025.
 - b. The Plaintiff/Respondent had filed and served a Replying Affidavit dated 3rd February 2025.
 - c. On the date of hearing of the application in court, the applicant's counsel encountered connectivity problems as he was travelling to Kajiado ELC to physically attend to another matter being ELC No. E031 of 2023 Njipita Ole Kimpai & 4 Others vs Liquidator Keekonyokie Farmers Society & Kibubuki Ole Murkuku before Lady Justice L. Komingoi.



- d. That counsel was thus unable to attend to this application, and thus the said application was dismissed for want of prosecution.
 - e. The 2nd Defendant/Applicant is desirous of prosecuting his application on its merit, failure to which he stands to suffer prejudice.
 - f. The Applicant has raised an arguable issue in the Application which ought to be considered and matter slated for hearing.
 - g. That in the interests of justice, the said dismissal order of 10th February 2025 be set aside and the application seeking review of Judgment be reinstated for hearing and determination on merit.
3. The Application is also supported by the Affidavit of Victor Ayieko Advocate, who is in conduct of this matter on behalf of the 2nd Defendant/Applicant. He averred that the Applicant had filed a Notice of Motion Application dated 2nd November 2024, which was scheduled for hearing on 10th February 2025. However, on the material date, the advocate encountered connectivity issues, and was not able to attend court, and thus the said application was dismissed.
 4. He further averred that the 2nd Defendant/Applicant is desirous of prosecuting the said dismissed application on merit, and failure to reinstate it, he will suffer prejudice. Further, that it is in the interest of justice that the dismissed application be reinstated, and the dismissal order be set aside, and this dismissed Application be heard and determined on merit.
 5. The Application is opposed by the Plaintiff/Respondent Repes Sairowua, vide his Replying Affidavit sworn on 25th February 2025, who averred that indeed the Notice of Motion Application dated 2nd November 2024, was dismissed for want of prosecution. However, the Applicant has not attached the order that dismissed that Application.
 6. Further, that indeed his advocate has advised him that on 10th February 2025, when the matter was set down for hearing, the 2nd Defendant/Applicant failed to attend court for hearing, despite being aware that the said Application had been fixed for hearing.
 7. Due to that non-attendance, the application was dismissed for want of attendance. Further, that his advocate has advised him that under Order 17 of the Civil Procedure Rules, there is no provision for setting aside an order made by the court, and therefore the section of law cited by the Applicant is wrong. Further, that his advocate has advised him that if there is any mistake on the part of the advocate, then not all mistakes absolve parties from blame when that occurs.
 8. He also averred that the reasons advanced by the 2nd Defendant/Applicant for failure to attend court are not convincing, and it is fair and in the interest of justice that the Application be disallowed.
 9. The Applicant filed Supplementary Affidavit and reiterated that the Notice of Motion Application dated 2nd November 2024, was dismissed for want of prosecution as per the Screenshot of the CTS, and therefore, there was no need to attach the order for dismissal.
 10. Further, that the Civil Procedure Rules allow a party to apply to court after dismissal of suit for setting aside such orders, and it is upon the court's discretion to either set aside such orders if justifiable reasons are given or fail to set them aside.
 11. It was also deposed that a litigant should not suffer from the mistake of their Advocates, and that the Applicant herein is desirous of prosecuting his Application, and his right should not be prejudiced by the mistakes of his advocate, which were inadvertent. Further, that no undue prejudice will be



occasioned to the Plaintiff/Respondent if the orders sought are granted. He contended that the Application herein was filed without delay.

12. The Application was canvassed by way of written submissions. The 2nd Defendant/Applicant filed his submissions dated 12th May, 2025 through Ayieko Kangethe & Co. Advocates, and urged the court to allow the instant application. The Applicant relied on various decided cases among them; Utalii Transport Co. Ltd & 3 others vs NIC Bank & another [2014]eKLR where the court held;-

“The principles governing application for reinstatement of dismissed suits for want of prosecution are;

- i. whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;
- ii. whether the delay is intentional, contumelious and therefore inexcusable;
- iii. whether the delay is an abuse of the court process;
- iv. whether the delay give rise to substantial risk to fair trial or causes serious prejudice to the defendant;
- v. what prejudice will the dismissal occasion to the plaintiff?
- vi. whether the plaintiff has offered a reasonable explanation for the delay;
- vii. even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?”

13. Further, the 2nd Defendant/Applicant relied on the various cases, among them of; Philip Chemwolo & another vs Augustine Kubende 1982 -88 KLR 103, Faustine Njeru Njoka vs Kimunye Tea Factory Ltd [2022]eklr and Ogola & another vs Kahuro Civil Suit No.112 of 2004 [2024]KEHC 3958 [KLR] (civ) 18th April 2024); where the court held; -“... While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion or in other words , the factual basis for the exercise of the court’s discretion in their favour”

14. The Applicant urged the court to exercise its discretion and allow the instant application, and then proceed to reinstate the Notice of Motion Application dated 2nd November 2024.

15. The Plaintiff/Respondent filed his written submissions dated 17th March 2025, through Kamwaro & Co. Advocates, and urged the court to dismiss the instant application for lack of merit. While opposing the Application, the Plaintiff/Respondent relied on the following cases; Sophia Chemasigen Kachuwai & Another vs Union of Kenya Civil Servants& 2 Others [2021]eklr; Mutinda Musila Mulwa vs Ngunga Yatta Deputy County Commissioner Kitui West Sub –County & 2 others [2021]eklr and Ronald Mackenzie vs Damaris Kiarie [2021]eklr; where the court held;-

“... since the advocate addressed the court albeit late after the petition had been dismissed as a sign of his effort to reach court at the earliest opportunity possible”

16. The court has carefully considered the Instant Notice of Motion Application, the grounds in support, and in opposition and the rival written submissions and finds as follows;

17. The Notice of Motion Application herein is premised under Sections 1A, 1B and 3A of the [Civil Procedure Act](#). In opposition to the Application, the Plaintiff/Respondent averred that his advocate has



advised him that under Order 17 of the Civil Procedure Rules, there are no provisions for setting aside the dismissal order. However, the 2nd Defendant's application dated 2nd November 2024, was dismissed by the court on 10th February 2025, for non-attendance of court, but not for want of prosecution as provided by Order 17 of the Civil Procedure Rules.

18. Even if the application was dismissed for want of prosecution as provided by Order 17, of the Civil Procedure Rules, the application herein is anchored under sections 1A and 3A of the Civil Procedure Act, which provisions of Law spell out the overriding objective of the Act, which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes before the court. Further Section 3A gives the court unfettered powers to issue such orders that are necessary for the end of justice to be met, and to prevent abuse of the court process.

Therefore, the instant application is properly brought before the court through the right provisions of law.

19. Further the Plaintiff/Respondent averred that the 2nd Defendant/Applicant though seeking for reinstatement of the application did not annex the dismissal order referred to. However, in the Supplementary Affidavit, the deponent attached a screenshot of the CTS, which shows the outcome of the said Application, which application was set to be heard on 10th February 2025, and the said outcomes read; "Application dismissed".
20. Further, from the court record, it is also very clear that indeed on 10th February 2025, the court did dismiss the 2nd Defendant/Applicant's application dated 2nd November 2024, for non-attendance. Failure to attach the dismissal order is an omission, and this omission is a procedural technicality. This court is bound by Article 159(2)(d) of the Constitution to deal with matters before it without relying so much on procedural technicalities.
21. Further Order 51 Rule 10(2) of the Civil Procedure Rules provides that no application shall be defeated for want of form, which does not affect the substance of the said application. By hinging this Application under sections 1A, 1B and 3A of the Civil Procedure Act, the 2nd Defendant/Applicant has properly invoked the jurisdiction of this court and cannot be faulted.
22. From the court record, it is evident that on 2nd November 2024, the 2nd Defendant/Applicant filed an application for review of the judgment of this court dated 24th October 2023, and the consequential orders thereof. The said application was opposed by the Plaintiff/Respondent.
23. However, on the date of the hearing of the said Application, the 2nd Defendant/Applicant and his advocate failed to attend court. As provided by Order 12 Rule 3, of the Civil Procedure Rules, the court dismissed the application dated 2nd November 2024, for non-attendance of the applicant and his advocate.
24. Ordinarily, the 2nd Defendant/Applicant ought to have filed the instant application under Order 12 Rule 7 of the Civil Procedure Rules which provides as follows;

" where under this order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just".
25. However, the Applicant anchored his application under sections 1A and 3A of the Civil Procedure Act, which provisions of law are enough to allow the court consider the instant application for setting aside and/ or reinstatement of an application.
26. The 2nd Defendant/Applicant's counsel averred that he failed to attend court due to internet connectivity issue. The court cannot recall having seen the said counsel struggling to join the virtual



court. However, as it has been stated severally by various courts, the main concern of the court is to do justice to parties, and not impose condition or discipline parties. See the case of *Lochab Bro Ltd vs Peter Kaluma T/a and Lumumba, Mumma & Kaluma Advocates* [2013]eklr, where the court observed;-

“the main concern for the court is to do justice to the parties and the court will not impose conditions on itself to filter the wide discretion given to it by rules.”

27. As provided by Section 1A of the *Civil Procedure Act*, the court should facilitate just and proportionate resolution of civil disputes before it. Further Section 3A of the same Act mandates the court to issue orders that are necessary for the end of justice to be met, and to prevent abuse of the court process. What could be the necessary order herein?

28. In the case of *Esther Wamaitha vs Safaricom Ltd* (2014) KEHC 6699(KLR); the court held as follows; -

“The discretion is free and the main concern of the court is to do justice to the parties before it. (see *Patel vs E.A Cargo handling services Ltd*) the discretion is intended to be exercised to avoid injustice or hardship..... “

29. Bearing in mind the above provisions of law, the court finds that in the instant case, the court should strive to do justice to the parties and avoid injustice or hardship. The court can only avoid injustice by allowing the applicant to prosecute his application to its logical conclusion, and the same be decided on merit.

30. The 2nd Defendant/Applicant’s counsel, Mr. Ayieko averred that he failed to attend the virtual court because he was out of internet connectivity, as he was travelling to Kajiado ELC for physical hearing of another case. Much as this court finds that explanation not being a reasonable explanation as advocates have a duty to manage their diaries, the court finds that this instant application was filed without delay, and that the mistakes of a counsel should not be visited on a litigant. See the case of *Philip Chemwolo & Another vs Augustine Kubende* [1982-1988]KLR 103, where the court held;-

“I think a distinguished equity Judge has said:

‘Blunders 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 his case heard on the merits’.....I think the broad equity approach to this matter, is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

Further in the case of *Ngome -vs- Plantex Company Limited* [1984] KLR 792, Chesoni Ag. J.A. as he then was in allowing an appeal against an order refusing to set aside an *ex parte* order of dismissal of a suit held at page 798 as follows:

‘By dismissing the appellant’s application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion:”



31. Further, this court takes judicial notice of the handicaps occasioned by internet failure, and is also persuaded by the holding of the court in the case of Mutinda Musila Malua vs Ngunga Yatta Deputy Commissioner Kitui West Sub county & 2 others (supra) where the court held; -

“..... since the advocate addressed the court albeit late after the petition had been dismissed is a sign of his efforts to reach court at the earliest opportunity possible.”

32. Being persuaded as above, this court finds and holds that the 2nd Defendant/Applicant filed the instant application within the earliest opportunity, and he cannot be accused of any delay.

33. Having considered the instant application, the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, under which the application is anchored upon, and the cited authorities, the court finds and holds that it would be in the interest of justice to have the instant application allowed in terms of prayer 1, and the Notice of Motion Application dated 2nd November 2024, be and is hereby reinstated. The Court also directs that said application that has been reinstated be prosecuted expeditiously.

34. On the issue of costs, the court is bound by the holding of Gachuhi JA in the case of Haji Ahmed Sheikh t/a Hasa Haulier vs Highway Carriers ltd (1982-88) 1KAR 1184 where he observed as follows;

“Of course the applicant must be penalised in costs for the delay caused by the extension of time.”

35. Accordingly, the court directs the 2nd Defendant/Applicant to bear costs of this Application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 20TH DAY OF MAY, 2025.

L. GACHERU

JUDGE

20/5/2025

Delivered online in the presence of

Meyoki – Court Assistant

Ms. Wacera holding brief Mr. Ayieko for 2nd Defendant/Applicant

N/A for Plaintiff/Respondent

N/A for the other Defendants/Respondents

L. GACHERU

JUDGE

20/5/2025

