



**Wang'ang'a v Njeru (Civil Suit 1 of 2017) [2023] KEHC 1445 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL SUIT 1 OF 2017  
LM NJUGUNA, J  
MARCH 1, 2023**

**BETWEEN**

**JOHNSON MUGWE WANG'ANG'A ..... PLAINTIFF**

**AND**

**ISAAC MUCHIRA NJERU ..... DEFENDANT**

**RULING**

1. The application for determination before the court is dated July 19, 2022 wherein the applicant seeks for orders that :
  - i. Spent.
  - ii. The Honourable court be pleased to stay and set aside the virtual order dated November 15, 2021 which dismissed the Notice to Show Cause dated September 23, 2021.
  - iii. The Honourable court be pleased to order the reinstatement of the Notice To show Cause dated September 23, 2021 and thereafter issue directions as to its hearing.
  - iv. Costs of the application be in the cause.
2. The application is premised on the grounds on its face and further supported by the affidavit of Eddie Njiru advocate on record for the plaintiff/applicant.
3. The applicant's case is that his Notice to show cause dated September 23, 2021 was dismissed for the reason that he failed to attend the virtual court. The deponent avers that the non-attendance was occasioned by the unreliability of internet services which fact, he has urged this Honourable Court to take judicial notice of. He has prayed that the notice to show cause be reinstated and be heard on merits.
4. The respondent filed a replying affidavit sworn on the November 21, 2022 in which it was deponed that the notice to show cause came up for hearing on the October 15, 2021 when it was dismissed because neither the plaintiff nor his advocate was in court to prosecute the same.



5. That on the 7/12/2021, the Deputy Registrar wrote a letter to the counsel for the plaintiff explaining all the queries on the dismissal of the notice to show cause including the fact that counsel for the plaintiff was served with the notice to show cause on the 23/9/2021 via email from the court.
6. That on the 17/2/2022 counsel for the respondent was served with a hearing notice for the notice to show cause which had earlier been dismissed which they objected to, as the court had explained in its dismissal letter when the notice to show cause was dismissed on 15/11/202 for want of prosecution.  
That in its objection, the respondent argued that the only way out was for the applicant to apply for setting aside of the dismissal order.
7. The respondent avers that the explanation given for non-attendance being that of unreliability of internet leaves many questions unanswered inter alia; what exactly happened, whether the advocate attended court when his disconnection happened, how exactly the internet was unreliable and what attempts he made to contact the court.
8. The court gave directions that the application be canvassed by way of written submissions and both parties complied with the directions.
9. The plaintiff/applicant submitted that his application which has been brought under Order 12 Rule 7 seeks to reinstate the Notice To show Cause dated September 23, 2021 which was dismissed on November 15, 2021 for non-attendance during a virtual hearing. It was contended that a notice to show cause is an execution process which is initiated after the determination of a suit and therefore, the same ought not to be subjected to dismissal for non-attendance as if it were a suit. That even assuming the same was a suit, then Order 12 Rule 7 empowers this court with discretion to reinstate the dismissed suit in the interest of justice. Further, that the application herein if it were to be allowed, the respondent would suffer no prejudice given that the respondent is a judgment debtor and the ordinary course of justice required execution of the decree passed in favour of the applicant. It was thus prayed that the application herein be allowed as the respondent is solely interested in frustrating the applicant.
10. The respondent submitted that the applicant herein did not offer any sound explanation why the orders sought should be granted. That even though the court has discretion, the same should be exercised in accordance with the law and further, the applicant herein had previously made several applications before the lower court which were all dismissed. It was submitted that the only available option for the applicant is an appeal against the said orders and not the application herein. That ordinarily, this court cannot set aside an order that has been ruled upon in three different occasions without an appeal before it and in the same breadth, the same cannot be stayed without an appeal. This court was thus implored to dismiss the application herein as the same is deemed as improper in that the only option available for the applicant is appeal.
11. I have considered the application herein, the response thereto, and the written submissions by the parties and I find that the sole issue for determination is whether the orders sought herein should issue.
12. Of importance to note is the fact that the respondent in his submissions stated that the applicant herein previously made several applications before the lower court which were all dismissed. It was submitted that the only available option for the applicant is an appeal against the said orders and not the application herein.
13. In reference to the above, the court has independently perused the record and finds that the applicant herein had previously moved this court by way of a letter dated January 12, 2022 wherein he sought for orders that the Notice To Show Cause previously dismissed by the Deputy Registrar be reinstated. The respondent by way of a response raised a preliminary objection stating that the applicant chose to write



a letter to set aside the court's orders instead of making a formal application. Further, that the orders issued by the Deputy Registrar for the applicant to take out fresh Notice To show Cause was unfair given that the previous orders had not been set aside. This court after hearing the objection raised by the defendant reached a determination via a ruling dated July 13, 2022 that the applicant herein was free to make a formal application for reinstatement of the said Notice To show Cause.

14. In light of the foregoing, I find that the application herein is rightly before this court.
15. The orders sought in the application are discretionary in nature and the court has unfettered discretion to set aside an *ex parte* order where sufficient cause has been demonstrated. The Court of Appeal in the case of *CMC Holdings Ltd vs James Mumo Nzioki* Civil Appeal No 329 of 2001 [2004] eKLR, stated that this wide discretion of the court is intended to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. The test which the courts have set to determine whether or not to set aside ex-parte orders is "whether sufficient cause has been shown".
16. Under Order 12 of the *Civil Procedure Rules*, the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of the hearing date through no fault of its own, the court will exercise its discretion in favour of the party. Order 12 Rule 7 *Civil Procedure Rules* (*supra*) it is provided:

"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."

17. From the reading of the instant application, it is clear that the applicant herein sought to set aside the orders made by the court on November 15, 2021 dismissing the Notice To Show Cause dated September 23, 2021 and that the Notice To Show Cause be reinstated and be heard on merits. The grounds in support of the said application were that the said orders were made when the suit came up for hearing and in the absence of the advocate on record for the applicant.
18. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah vs Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that the discretion to set aside *ex parte* proceedings or decision is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error and the same is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. For a party to enjoy this discretion, he/ she must demonstrate a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani vs Bildad Wachira* [2016] eKLR Mativo J held that: -

"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

19. In the same breadth, this court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.



- 20. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just and expeditious resolution of disputes.
- 21. In my view, the applicant has demonstrated a sufficient cause upon which the court should exercise its discretion. Courts exist to serve substantive justice for all parties to a dispute before it. The only time when such justice can be served is to have parties present their issues and be heard on merit rather than being condemned unheard. [See Article 50(1) of the *Constitution of Kenya, 2010*]. It therefore follows that every person ought not to be shut out from accessing court or having his day in court.
- 22. As such, I hereby allow the instant application with no orders as to costs.
- 23. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF MARCH, 2023.**

**L. NJUGUNA**

**JUDGE**

.....**Plaintiff**  
.....**Defendant**

