



REPUBLIC OF KENYA

ENVIRONMENT & LAND COURT AT MILIMANI

ELC CASE NO. 8 OF 2021

[FORMERLY CIVIL SUIT NO. 231 OF 2008]

JULIUS WAWERUKARANGI.....PLAINTIFF

=VERSUS=

BENSON MBENI KIBETU.....1STDEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. Before this Court for determination is the Application dated 18th November 2021 filed under Sections 1A, 3A and 63E of Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules 2010 and all enabling provisions of the law. The Applicant is seeking for the following Orders: -

1. Spent.

2. THAT the court be and is hereby pleased to set aside its orders issued on 17th November 2021 dismissing the Plaintiff's suit for non- attendance and the suit herein is hereby reinstated.

3. THAT the suit against the 2nd Defendant be and is hereby marked as withdrawn with no orders as to costs.

4. THAT the suit be fixed for formal proof as against the 1st Defendant.

THE PLAINTIFF'S CASE

2. The grounds of the Application are contained at the foot of the said Application and the Application is further grounded on the supporting affidavit sworn by Harun Muturi Njoroge on 18th November 2021.

3. For clarity, the deponent to the supporting affidavit has averred as follows; -

(a) The application herein has been made promptly without any delay.

(b) On 17th November 2021 the Honourable Court dismissed the Plaintiff's suit for non -attendance.

(c) That at the time the matter was called out the Plaintiff's advocate was in the court's precincts but was addressing a virtual Court session in BRT 392 of 2021 Matthew Ndirangu & Another V Jeremy Muna where he was inter alia seeking extension of interim orders to prevent the eviction of the Tenant.

(d) That cognizant that the matter before this Court takes precedent, counsel requested for the matter before the tribunal to be called out first to give him an opportunity to present in Court when the matter herein was called out but the vice chairman did not grant the request.

(e) After finishing up in BRT 392 of 2021 Matthew Ndirangu & Another V Jeremy Muna and inquiring about the suit herein counsel was informed by the court clerk that the matter had been called out and dismissed for nonattendance.

(f) That all along counsel has been diligent in prosecuting this suit and has been attending Court whenever required to and

faithfully serving notices to the Defendant.

(g) The absence of counsel in Court when the matter was called out was inadvertent and highly regrettable.

(h) There is already an interlocutory judgment against the 1st Defendant that was entered on 16th September 2008.

(i) That dismissing the entire suit will deny the Plaintiff an opportunity to enjoy the said judgment.

(j) That the Plaintiff will suffer great prejudice if this matter is not reinstated.

(k) The Plaintiff stands to suffer irreparable harm if the suit is not reinstated seeing that he will lose his opportunity to take necessary steps of executing his judgment against the 1st Defendant.

(l) It is in the interest of justice that the suit is reinstated to give the plaintiff the chance to follow up and ensure the execution of the judgment against the 1st Defendant.

(m) No prejudice will be suffered by the respondents if the orders herein are granted.

(n) It is in the best interest of justice that this suit is reinstated, and the suit herein fixed for formal proof as against the 1st Defendant.

THE DEFENDANTS CASE

4. The application for reinstatement is unopposed.

SUBMISSIONS

5. Parties have not filed written submissions. The application was canvassed through a hearing in virtual court.

A. ISSUES FOR DETERMINATION

6. Having considered the Application, the following arise as the issues for determination before this court.

a. Whether the plaintiff has satisfied the court to move it to reinstate the suit

ANALYSIS

a. Whether the plaintiff has satisfied the court to move it to reinstate the suit.

7. Overriding objective in **Sections 1A and 1B of the Civil Procedure Act 2010** enjoins the court to ensure there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties.

8. It is within the general discretion of the Court to set aside any order issued by it ex parte, so long as sufficient cause has been shown for the exercise of such discretion.

9. In **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** the court held that: *“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”*

10. Taking cognizance of Article 50 of the Constitution on the right to be heard and hold that where a suit can be prosecuted and justice done in spite of the delay in its prosecution, a party should be given a chance to do so.

11. It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the course of justice. See **Shah & Another v. Mbogo [1967] EA 117 and Ivita v. Kyumbu [1984] KLR 44.**

12. In the premises and for the foregoing reasons, the court is satisfied that it is in the interest of justice that the instant application is allowed.

13. The foregoing being my view of the matter, I would allow the application dated 18th November 2021 and set aside the dismissal order of 17th November 2021 and order that the suit be reinstated for hearing and determination on the merits.

14. I hereby direct that this case be fixed for hearing or be settled within 90 days' failure to which these orders will be automatically vacated.

15. Accordingly, Order 2,3 and 4 are hereby granted. The suit against the 2nd defendant is hereby marked as withdrawn.

16. The suit is fixed for formal proof as against the 1st Defendant and is scheduled for Hearing on 15/2/2022.

Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021

MOGENI J

JUDGE

In the presence of:

Mr. Muturi for the plaintiff

No appearance for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Vincent Owour - Court Assistant