Apamo v Koskei (Environment & Land Case E140 of 2023)
[2025] KEMC 114 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEMC 114 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

ENVIRONMENT & LAND CASE E140 OF 2023

PA NDEGE, SPM

MAY 15, 2025

BETWEEN

MILLICENT SAVAI APAMO ..... PLAINTIFF

AND

JOSEPHINE CHEPKURUI KOSKEI ..... DEFENDANT

RULING

1. The subject of this ruling is a notice of motion application dated 10th April, 2025 said to be brought pursuant to Article 159 of *the Constitution*, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all enabling Provisions of the law.

2. The plaintiff/applicant is mainly seeking for orders to set aside the orders issued on 12th November, 2024 dismissing the suit for non-attendance and have it reinstated for hearing on merit.

3. The application is premised on the grounds thereon and supported by the affidavit of Linet Ogega, the applicant's counsel sworn on 10th April, 2025. The explanation given by the applicant's counsel for his non-attendance on 12th November, 2024 is that she logged into the court and could not hear the matter being called out and upon making an enquiry, she was informed to liaise with the court clerk as the case was not cause listed. Upon going to the registry, she was informed that the file had no date as per their record on the E-filing platform, which indicated that the case was last in court on 03/05/24 when the court directed that a fresh date be taken at the registry and all efforts to locate the physical file on that particular day were rendered futile. However, the court had already called out the matter and dismissed the Application for non -attendance. That the non-attendance was not deliberate.

4. It is the applicant's contention that the application has been made without unreasonable delay. That there is a danger that the applicant would suffer substantial loss should the application be dismissed as she stands to lose her parcel of land forming the substance of the case. That it is in the interests of

justice that the suit be reinstated so that the same may be heard on merit. That no prejudice or injustice will occur on the part of the defendant/respondent if this application is allowed.

5. The Defendant had never entered appearance in court.

6. The application was canvassed by way of written submissions which was duly filed by the advocate for the applicant and which I read and considered.

Determination.

7. I have carefully considered the application as presented, the replying Affidavit and the submissions made by counsel for the plaintiff. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit.

8. The Constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*. It is also the duty of the Court, to ensure that matters are concluded expeditiously without inexcusable delay. Section 1A and 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya, are relevant, with regard to that.

9. Section 3A of the *Civil Procedure Act* gives Court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay.

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

11. It is my view that such would be valid considerations in an application for dismissal of an application for non-attendance such as in the present case.

12. The factors considered or consideration for the purpose of reinstatement of suits are numerous, and were addressed in Ivita Vs Kyumbu (1984) Chesoni J (as he then was), where the court stated, "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the Defendant: so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

13. Further, I find instructive the expressions of the Court in CMC Holdings Limited vs Nzioki (2004) 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."

14. Accordingly, the Court would be interested in finding out the Plaintiff's explanation for not attending Court and whether any prejudice will be suffered by either the Plaintiff or the Defendants should the ex-parte orders be set aside and the application reinstated for hearing and disposal on the merits. In this case, the Plaintiff's advocate averred, in her Supporting Affidavit, that the matter came up for hearing on 12th November 2024.That logged into the court. However, the file was not called and upon making an enquiry, she was advised to liaise with the court clerk as the case was not cause listed. She thus proceeded to the open court to follow up with the registry as the file had not been availed to court. Upon going to the registry, she was informed that the file had no date as per their record on the E-filing platform, which indicated that the case was last in court on 3rd May 2024 when the court directed that a fresh date be taken at the registry and all efforts to locate the physical file on that particular day were rendered futile. However, the court had already called out the matter and dismissed the Application for non -attendance.

15. On the question of prejudice, it is instructive however, that in the case of Ivita vs. Kyumbu (supra) it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. However, the defendant had never entered appearance in court.

16. Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the defendant, and that to the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, were the suit was dismissed.

17. The foregoing being my view of the matter, I would allow the application dated 10th April, 2025 and set aside the dismissal order made on 12th November, 2024 and order that the suit be reinstated for hearing and determination on the merits.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF MAY, 2025

HON ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE.