Osuri v Atito & another (Environment and Land Case 546 of 2017) [2025] KEELC 5483 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5483 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND CASE 546 OF 2017

FO NYAGAKA, J

JULY 22, 2025

BETWEEN

HELLEN AROKO OSURI ..... PLAINTIFF

AND

GEORGE ATITO ATITO ..... 1ST DEFENDANT

NEWTON JUMA ATITO ..... 2ND DEFENDANT

RULING

1. Before this court is the Applicants' Notice of motion dated 30/03/2025 seeking the following orders;
    1. ...Spent
    2. That the Honourable Court to set aside the Order dismissing the application dated 5th December 2024 for non-attendance and reinstate the application for hearing.
    3. That costs of the application be in the cause.
2. The instant Application is indicated to have been brought under Order 12 Rule 7 of the *Civil Procedure Rules (2010)* and all other enabling provisions of the law.
3. The phrase "...all other enabling provisions of the law" is at best a hollow meaningless one. A party wishing to rely on it ought to indicate what these are and submit on their relevance to his application.
4. Nevertheless, the application is premised on the grounds on the face of it and the contents of the affidavit sworn by one Aziz M. Ngare advocate.
5. In his affidavit, the deponent stated that the matter had an application dated 5th December 2024 fixed for hearing on the 24th March 2025. On the said 24th March 2025, the deponent was admitted in court via the Teams Platform by 9:00 am under a device with the name showing as Aziz N. Musa. He annexed to the Affidavit and marked as AMN-1 a screenshot of the said page. Further, when the matter was

called out as he was trying to unmute himself, he mistakenly dropped the call. He made another request to be admitted back in court. As he was waiting to be readmitted, the matter proceeded in his absence and the application was dismissed for non-attendance and a message sent to his phone by the judiciary updating him of the dismissal.

6. He urged that the non-attendance was his mistake as counsel when he was handling his device and the applicant should not be made to suffer for his unintentional mistake. He prayed the court give him an opportunity to prosecute the application dated 5th December 2025 to its logical conclusion.

7. The Respondent opposed the Application vide a Grounds of opposition dated 8th April 2025 on the grounds that the Applicant has come to equity with unclean hands as the Application was dismissed for non-attendance at 9.10 am on 24th March 2025 whereas the annexed screenshot was at 10.22 am on 03/24/25. Further, that the applicant was neither present physically or virtually at the time the file was called for hearing. He. Additionally, stated that the applicant did not communicate to the respondents advocate and, that the applicant is guilty of laches and the application dated 22nd January 2025 does not have overwhelming chances of success.

Determination.

8. The sole issue for determination is whether the court should reinstate the application dated 5th December 2024, and if so, on what terms. The attendant other one is who to bear the costs of the application.

9. I have considered the pleadings and submissions of the parties and the law. The issue herein is that the applicant was prevented from addressing the Court or attending to his application by circumstances which occurred in error as he attempted to log address court.

10. The act and procedure of setting aside an order or judgment when a party fails to attend court is one that the *Civil Procedure Rules* committee foresaw and provided for. Order 51 Rule 15 of the *Civil Procedure Rules* provides that the Court may set aside an order made *ex parte*. Further, when the Rule is read with Order 12 Rule 3 which provides for the procedure to be taken at a hearing which provision should be read *mutatis mutandis* regarding hearing and attendance of application, and Order 12 Rule 7 of about setting aside orders made in absence of a party at a hearing, it is clear that it is possible for an order or judgment made *ex parte* to be set aside. However, there have to be cogent reasons given to the satisfaction of the Court that the application warrants it.

11. Order 12 Rule 3 provides that,

> "(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
>
> (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court."

12. I the instant case, I have, further examined the record of the court including the Case Tracking System (the CTS). It is apparent that the applicant was logged in on the material date of the hearing of the application and unfortunately, at the time the matter was proceeding he had no access to enable him to be heard. It is also apparent that he was logged back in after the court had dismissed the application.

13. Order 12 Rule 7 of the *Civil Procedure Rules, 2010* provides as follows: -

> " 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."

14. Arguments have been put forth by the Respondent that on the 24th March 2025 the applicant acted indolently. Further, that the Applicant came to equity with unclean hands because the application he sought to be reinstated was dismissed for non-attendance at 9.10 am on the material date yet he annexed a screenshot which showed that he logged in 10.22 am. Further, that the applicant ought to have been either physically or virtually present at the hearing. But I have looked at the totality of the evidence on attempts to log into court and noted that, indeed, the matter was called out fifty minutes into the start of the court session. By that time the applicant's learned counsel Mr. Asiz M. Ngare who was logged in had either been logged out lest connection as the system indicated that he had temporarily left the chat. I have examined the annexture AMN-1 being a screenshot of the page showing that learned counsel was logged in to the Court session at some point.

15. It is my considered view that there was an attempt by the said law firm to attend to the matter as required. Cause has been shown for setting aside the orders of dismissal. Indeed, the alleged act is a mistake of counsel which should not be visited on the client. I am alive that not all mistakes of counsel can be excused and not be visited on a client. Those which are deliberate and those that may show that counsel is bent on assisting his client to evade the course of justice or process or vex the Court are among many that courts ought not to excuse. It is in the interest of justice to allow the applicant an opportunity to be heard. In the premises, I order as follows;

    i. The orders issued on 24th March 2025 dismissing the application dated 5th December 2024 for non-attendance are hereby set aside and the application is reinstated for hearing on condition that the applicant comply with all, if any, of the directions of the court that were pending, with regards to the application.

    ii. The Application dated 5th March 2024 if fixed for hearing on 18th November, 2022. The Applicant to submit by end of August 2025 and the Respondents end of September, 2025.

    iii. Each party shall bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 22ND DAY OF JULY 2025.

HON. DR. *IUR* NYAGAKA,

JUDGE

At 12:05 am, in the presence of

Quinter Oginga Advocate for Mr. Asiz Advocate for Defendant/Applicant

G.S. Okoth Advocate for Plaintiff/Respondent