



**Chege & another v Ruguru & another (Environment & Land Case E014 of 2022) [2024] KEELC 697 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 697 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E014 OF 2022  
LN GACHERU, J  
FEBRUARY 15, 2024**

**BETWEEN**

**VIRGINIAH NJERI CHEGE ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL IRUNGU CHEGE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MILLICENT IRUNGU RUGURU ..... 1<sup>ST</sup> DEFENDANT**

**SAMSON IRUNGU MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated 14<sup>th</sup> December 2023, brought under Section 3A of the *Civil Procedure Act* and Order 12 rule 7 of the *Civil Procedure Rules*, the plaintiffs/applicants have sought for the following orders: -
  - i. That orders granted on 26<sup>th</sup> September 2023, be set aside and/or varied.
  - ii. The application dated 26 July 2023, be reinstated for hearing.
  - iii. That status quo be maintained on the suit property until the application is heard and determined.
  - iv. Any other order this Honourable court may deem fit to grant”.
2. The application is supported by the grounds stated on the face thereof and the Supporting Affidavit of Samuel Irungu Chege (the 2<sup>nd</sup> plaintiff herein), sworn on 14<sup>th</sup> December 2023.
3. These grounds are;
  - i. The Plaintiffs/Applicants are willing to prosecute their application;



- ii. That the 1<sup>st</sup> Plaintiff/Applicant fell ill when the matter was coming for hearing and 2<sup>nd</sup> Plaintiff/Applicant took her to hospital;
  - iii. That the mistake is highly regretted and they seek for a second chance; that no prejudice will be occasioned to the Respondent.
4. In his Supporting Affidavit dated 14<sup>th</sup> December 2023, the 2<sup>nd</sup> Plaintiff/Applicant, Samuel Irungu Chege, averred that on the material day of the hearing on 26<sup>th</sup> September 2023, he, together with the 1<sup>st</sup> Plaintiff/Applicant (who is his mother) was indisposed and he accompanied her to hospital, and thus they were not able to attend court. He annexed a letter from Muriranjas Sub-county Hospital dated 26<sup>th</sup> September 2023, attesting to the aforesaid hospital visit.
  5. He also averred that on the date of the hearing of their application dated 26<sup>th</sup> July 2023, they had not paid their Advocate, on record and they had planned to attend the hearing in persons on 26<sup>th</sup> September 2023, but for the illness of his mother, the 1<sup>st</sup> Plaintiff, they failed to attend Court.
  6. He contended that on 21<sup>st</sup> November 2023, he went to the Registry of this Court to find out about the position of his application dated 26<sup>th</sup> July 2023, whereby, he was informed that the aforesaid application was dismissed for non-attendance on 26<sup>th</sup> September 2023.
  7. Further, that his failure to attend Court on 26<sup>th</sup> September 2023, was occasioned by the illness of his mother, the 1<sup>st</sup> Plaintiff/ Applicant herein, which illness had a draining effect on the family's resources, such that there was no money to pay the Advocate's fees in relation to the hearing of 26<sup>th</sup> September 2023.
  8. He also averred that the Plaintiffs/Applicants stand to suffer irreparable loss if the application dated 26<sup>th</sup> July 2023, is not reinstated by this Court and heard on the merits. He urged the court to allow his application and reinstate their earlier application dated 26<sup>th</sup> July 2023.
  9. The Application is opposed by the 1<sup>st</sup> Defendant/Respondent, Millicent Ruguru Mwangi, through her Replying Affidavit dated 17<sup>th</sup> January 2024, wherein, she averred that she is authorized by the 2<sup>nd</sup> Respondent, who is her son, to oppose the instant application.
  10. The 1<sup>st</sup> Respondent averred that the matters which the Plaintiffs/ Applicants are seeking to canvass through the instant application were fully heard and determined with finality by this Court via a Judgment issued on 13<sup>th</sup> July 2023.
  11. She also averred that the subject application which the Plaintiffs/ Applicants are seeking to reinstate is the application filed on 26<sup>th</sup> July 2023, which application was seeking for stay of execution of the Judgment delivered on 13<sup>th</sup> July 2023. That by, 14<sup>th</sup> December 2023, when the instant Application for reinstatement was filed, it was about six months after the aforesaid Judgment of this Court was rendered; thereby, making this instant Application a misnomer and an afterthought.
  12. She further averred that on 26<sup>th</sup> September 2023, the matter was listed for hearing of the Plaintiffs' application for stay of execution of the Judgment dated 13<sup>th</sup> July 2023, and neither the Plaintiffs/ Applicants nor their counsel attended the aforesaid hearing, which absence led to dismissal of the said application for stay of execution.
  13. Further, that the Plaintiffs/ Applicants herein have not given this Court any plausible reason or ground for the non-attendance on 26<sup>th</sup> September 2023, and therefore the only reasonable explanation that can be drawn by this Court is that the Plaintiffs/Applicants had abandoned their application for stay dated 26<sup>th</sup> July 2023, and the instant Application is an afterthought.



14. Further, that during the hearing of the present suit wherein a Judgment was rendered on 13<sup>th</sup> July 2023, orders were issued by this Court staying proceedings in Murang'a Succession Cause Number E151 of 2022, which suit involves the same parties in the subject application. However, she averred that the said Murang'a Succession Cause Number E151 of 2022, is currently ongoing and the Plaintiffs/Applicants are seeking to stall proceedings in that suit for the second time and they should not be allowed to do so by this Court.
15. She contended that litigation must come to an end, and that the orders sought in the instant application are belated and the subject application itself is devoid of any legal merit or purpose.
16. It was her contention that since no evidence of illness has been exhibited to this Court by the Plaintiffs/Applicants and the whereabouts of the 1<sup>st</sup> Plaintiff/Applicant during the hearing on 26<sup>th</sup> September 2023, has not been explained to the satisfaction of this Court, then the instant Application should be disallowed.
17. The 1<sup>st</sup> Defendant/Respondent ultimately averred that the instant application is frivolous, incompetent and amounts to an abuse of the due process of the law, and the same should be dismissed with costs.
18. The Plaintiffs/ Applicants filed a further Affidavit on 5<sup>th</sup> February 2024, and annexed a copy of their application seeking leave to file an appeal out of time in respect of the Judgment of this court dated 13<sup>th</sup> July 2023, and they urged the Court to reinstate their dismissed application dated 26<sup>th</sup> July 2023.
19. The Application was orally argued in court, wherein the Plaintiffs/ Applicants through Samuel Chege, reiterated the contents of their Affidavit in support of the Application, by alleging that the 1<sup>st</sup> Plaintiff was sick on the date of the hearing of the Notice of Motion dated 26<sup>th</sup> July 2023, and thus the reasons for their absence.
20. Mr. Kirubi, for the Defendants/Respondents opposed the Application, and submitted that it was not explained why the counsel for the Plaintiffs/Applicants did not turn up in Court, even if the 1<sup>st</sup> Plaintiff was unwell on the material day, and 2<sup>nd</sup> Applicant had allegedly taken her to hospital.
21. He further argued that the attendance of the Applicants was not mandatory on 26<sup>th</sup> September 2023, when the Application came for hearing. That no proper explanation has been given for non- attendance and therefore, the instant application should be disallowed.
22. The 2<sup>nd</sup> Applicant Samuel Irungu Chege, responded that they had not paid their advocates her legal fees, and thus the reasons why she did not turn up in Court. They urged the court to allow their Application.
23. This Court has considered the pleadings in general, the instant application and the oral submissions by the parties in Court and finds the single issue for determination is;

#### **Whether the Plaintiffs/ Applicants are entitled to the orders sought?**

24. The instant application seeks for the reinstatement of the Plaintiffs/ Applicants' application dated 26<sup>th</sup> July 2023, seeking stay of execution of the Judgment of the Court dated 13<sup>th</sup> July 2023. This application was dismissed by this Court on 26<sup>th</sup> September 2023, due to the non-attendance of the Plaintiff/Applicants herein and/or their counsel. The Applicants had explained that their failure to attend court was due to the sickness of the 1<sup>st</sup> Plaintiff and that due to financial constraint, they had not paid their advocate and she failed to attend Court.



25. This application is anchored under Section 3A, & Order 12 Rule 7, of the *Civil Procedure Act* and *Rules*. Section 3A, donates the power to this Court to issue orders that are necessary for the end of justice to be met and to prevent abuse of the Court process. Order 12 Rule 7, grants the Court discretion to set aside orders of the court on such terms that it deems just to do so. The Applicants Application dated 26<sup>th</sup> July 2023, was dismissed for non-attendance, and they are therefore within the purview of Order 12 rule 7, in bringing their current Application. The said Order states; “Where under this Order Judgement has been entered or the suit dismissed, the Court on application may set aside or vary the Judgement in order upon such terms as may be just.”
26. It is trite that reinstatement of a suit is at the discretion of the Court, which discretion ought to be exercised in a just manner. This was held so in the case of *Bilba Ngonyo Isaac v Kembu Farm Ltd & Another* (2018) eKLR, where the Court reiterated the decision in *Shah v Mbogo & another* (1967), E.A 116, wherein the Court held;

“This discretion to set aside as exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.
27. It is not in doubt that this is a concluded matter, and the application herein is post Judgement application. Infact, this file ought to be a closed file. It is trite that it is the duty of the Court, litigants as well as their counsels to ensure that matters are concluded expeditiously and without delay. Sections 1A & 1B, of *Civil Procedure Act* implore Courts to facilitate expeditious disposal of matters, before them.
28. In line with the above Objective, when the Applicants and/or their counsel failed to turn up in Court on 26<sup>th</sup> September 2023, to prosecute their post Judgement Application without explanation, the Court had no option but to dismiss it.
29. However, the Plaintiffs/Applicants have come back to Court to seek reinstatement of the same. The Applicants have attached a letter from Muriranjias Sub County Hospital to confirm that the 1<sup>st</sup> Plaintiff was sick and attended hospital on 26<sup>th</sup> September 2023, when the Application was due for hearing. They further explained that they had not paid their advocate, and thus the reasons why the said advocate failed to attend Court. However, the said Advocate has not filed any Affidavit to that effect.
30. Be that as it may, this explanation sounds plausible. Though the instant application is opposed by the Defendants/Respondents, this Court finds that Section 3A of the *Civil Procedure Act*, gives this Court discretion over matters that are before it, including questions of whether or not to reinstate a dismissed suit/Application, which had been dismissed for non- attendance by the Applicants.
31. Order 12 Rule 7, gives Court discretion to set aside its exparte order upon an application, by and aggrieved party. The Court finds that the Plaintiffs/Applicants have given a convincing explanation as to why they failed to attend Court on 26<sup>th</sup> September 2023, wherein their Application dated 26<sup>th</sup> July 2023, was dismissed for non-attendance.
32. For the above reasons, the Court allows the Applicants’ application dated 14<sup>th</sup> December 2023, but directs that the said Post judgement application be prosecuted expeditiously without any further delay.



The Plaintiffs/Applicants to pay the Defendants/Respondents a throw away costs of 5000/= payable before the next hearing date.

33. Consequently, the Notice of Motion Application dated 14<sup>th</sup> December 2023, is allowed, on condition that Plaintiffs/Applicants pay throw away costs of 5000/= to the Defendants/Respondents before the said application proceeds for hearing.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

**L. GACHERU**

**JUDGE.**

Delivered online in the presence of:

1<sup>st</sup> Plaintiff/Applicant

Absent

2<sup>nd</sup> Plaintiff/Applicant

1<sup>st</sup> Defendant/Respondent

Mr Kirubi for the 2<sup>nd</sup> Defendant/Respondent

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**15/02/2024**

