



**Kigundu v Chebukaka & 3 others (Civil Case 239B of 2018)
[2024] KEELC 878 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE 239B OF 2018
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

JOHNSON KIGUNDU PLAINTIFF

AND

ADDISON KUTONDO CHEBUKAKA 1ST DEFENDANT

CATHERINE NJOKI NJENGA 2ND DEFENDANT

MARY NYAMBURA NJENGA 3RD DEFENDANT

THE CHIEF LANDS REGISTRAR 4TH DEFENDANT

RULING

1. What is before the court for determination is the Plaintiff's Notice of Motion application dated 10th November, 2022 seeking for the following orders:
 - a. Spent.
 - b. That the orders of this Honourable Court made on 9th November, 2022 dismissing the suit and proceedings be set aside.
 - c. That the suit filed herein on 23rd May, 2018 be reinstated.
 - d. That the costs of this application be provided for.
2. The application is supported by the Affidavit of Johnson Kigundu, the Plaintiff, who has deponed that he went to the Advocates office on 9th November, 2022 to attend the hearing of the suit; that the advocate logged into court virtually in his presence where the court directed that the hearing would proceed at 12.00 noon and that at the appointed time, the Advocate logged in to the platform virtually but was not admitted.



3. The Plaintiff deponed that after about an hour of waiting on the virtual platform and not being admitted, he and his Advocate decided to go to Milimani open court but by the time they arrived, they found that his matter had been dismissed.
4. The Plaintiff deponed that he and his Advocate were not informed that the matter would be heard in open court otherwise, he would have attended court physically since he was ready to proceed and that it is in the interest of justice that the proceedings herein and all consequential orders be set aside.
5. According to the Plaintiff, he has a strong and meritorious case against the Defendants and that he has always been desirous of proceeding with it on merit and expeditiously; that no prejudice would be occasioned to the Defendants if the orders sought are granted whereas he would suffer irreparable loss if the suit is dismissed; that the application to reinstate the suit had been filed immediately and without delay; and that it is in the interest of justice that he be heard and be allowed to prove his case.
6. Opposing the application, the 1st Defendant filed a Replying Affidavit in which he deponed that on the morning of the hearing, he and his Counsel on record logged onto the virtual court Platform for a time allocation and that the court directed that the matter would be heard in open court at 12.00 noon.
7. The 1st Defendant deponed that after the matter was called out and directions issued, himself and his Advocate were still logged into court when the Plaintiff's Advocate logged into court and asked for the matter to be called out; that Counsel for the Plaintiff was informed by the court that it had directed that the matter be heard in open court; that the Plaintiff's allegation that they were not informed the matter would be heard in open court are thus false and that the hearing did not proceed at 12.00 noon as had been directed, instead the hearing started at about 1.00pm and proceeded way beyond 1.30pm, and that if the Plaintiff and his Advocate rushed to court as alleged, they would have found the case in progress.
8. According to the Defendant, the Plaintiff's allegation that he has always been ready to proceed with this matter is also false. The 1st Defendant highlighted several instances when the matter came up for hearing, but the Plaintiff and his Advocate for one reason or another caused the matter to be adjourned and that specifically, on 10th November, 2020 when the matter was given a time allocation of 10.00am, the Plaintiff failed to show up for the hearing at 10.00am.
9. The 1st Defendant further deponed that the Plaintiff has a penchant to procrastinate proceedings as he has been doing in Criminal Case No. 1540 of 2017, where he is the accused and has been attempting to convince the court therein that he is of unsound mind; that the Plaintiff is a known fraudster who operates in Thome as evidenced in ELC No. 444 of 2017 where he was sued among other Defendants, which fraudulent scheme he replicated in trying to acquire the suit property herein.
10. The application was canvassed by way of written submissions which I have considered.

Analysis and Determination

11. The only issue for determination in this matter is whether this court should reinstate the Plaintiff's suit, which was dismissed for want of prosecution on 9th November, 2022 and set aside the ex-parte proceedings on the 1st Defendant's counterclaim. Dismissal of a suit that is coming up for hearing for want of prosecution is allowed under order 12 rule 1 & rule 2 of the *Civil Procedure Rules, 2010*. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court.



12. However, the Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This principle is expressed in *Shah vs Mbogo & another* (1967) EA 116, which case parties have both relied on, where Harris J. held that:

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

13. These words are reiterated in *Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated as follows:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

14. The above passages are clear that the court's discretion is not meant to assist someone whose aim was to delay the determination of the matter. In the instant Application, paragraphs (5), (6) and (7) of the Supporting Affidavit, read as follows:

“That in my presence my Advocate logged in court virtually and was informed that the matter would proceed at 12.00 noon; That at 12.00 noon my Advocate logged into the platform virtually ready for hearing but I was not admitted; That after I stayed in the virtual platform for one hour my Advocate and I decided to go to Milimani open court.”

15. In an interesting turn of events, Counsel for the Plaintiff in his submissions said that:

“When the matter was called out Counsel for the Plaintiff had problems logging in but when he eventually managed he mentioned the matter and was informed that the matter would proceed for hearing; The Plaintiff and his Advocate remained logged in only to realise the matter was being heard in open court.”

16. If indeed counsel for the Plaintiff logged in and was not admitted as he alleges, he should have called the other Counsel on record for the Defendants and explained the difficulties he was having or at the very least contact court personnel for assistance. In fact, it is common knowledge that although this court ordinarily mentions its matter virtually, the main trials are always conducted from the open court.

17. The position taken in the Plaintiff's submissions casts a shadow on the veracity of the Plaintiff's claim that his non-attendance was not deliberate.

18. The circumstances of this case are sufficient to persuade this Court that the reasons given for non-attendance by the Plaintiff and his advocate during the hearing of the suit are not plausible but rather an elaborate and deliberate ploy to obstruct or delay justice.



19. Indeed, the record shows that every time this matter came up for hearing, the Plaintiff and his Advocate, for one reason or another could not proceed. The record bears witness.
20. On 12th June 2019 when the matter first came for hearing, the court was informed that the Plaintiff's Advocate on record was indisposed and thus could not proceed. Counsel for the 1st Defendant informed the court that he had spoken to Mr. Ongoto Advocate the day before the hearing and he had indicated that he would be ready to proceed.
21. The Court directed that the matter would be heard at 11.30a.m. However, at 12.08 p.m, when the court re-convened for the hearing, counsel holding brief for Mr. Ongoto stated that he could not reach the Plaintiff. The hearing was adjourned and the Plaintiff condemned to pay costs.
22. The matter next came up for hearing on 10th November 2020 where the court was informed that the Plaintiff was ready to proceed and directions were given that the matter would proceed for hearing at 10.00a.m. When the time came for the hearing, the Plaintiff's Advocate was not in court. The matter was then adjourned to 22nd June, 2021.
23. Come 22nd June 2021, the Plaintiff's Advocate indicated that he was not ready to proceed because the Plaintiff was serving a civil jail in Industrial Area. No proof of his committal to civil jail was produced in court, but the matter was adjourned to 17th November, 2021.
24. On 17th November 2021, Mr. Ongoto for the Plaintiff sought an adjournment on grounds that that he could not proceed because he did not have the Plaintiff who had been sick for a while. No proof of illness was availed in court. However, the court allowed the application for adjournment and set the matter down for hearing on 18th May, 2022.
25. 18th May, 2022 came, and although the matter was adjourned on an application by counsel for the A-G, the Plaintiff and his Advocate on record were noticeably absent in court.
26. Finally, on 9th November, 2022, when the matter came up for hearing, the Plaintiff and his Advocate being fully aware of the hearing date were not in court. Indeed, the Plaintiff and his advocate did not show up at all despite the fact that the matter did not proceed until 12:35 pm, when the court dismissed the Plaintiff's suit for non-attendance and want of prosecution.
27. The reasoning behind dismissing suits for non-attendance and want of prosecution is founded on the principle of expeditious prosecution of cases by parties who come to court to seek justice. It is expected that once a party files a suit in court, he will efficiently and effectively fast track the hearing and determination of that case or at least attempt to do so. That is not what the Plaintiff did in this case.
28. The Court is not satisfied that the reasons given by the Plaintiff are sufficient to convince it to exercise its discretion to reinstate the suit and set aside the proceedings of 9th November, 2022.
29. For the above reasons, the Plaintiff's application dated 10th November, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 15TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Karani for 1st Defendant

No appearance for Plaintiff



