



REPUBLIC OF KENYA



**Melly v Yator (Environment & Land Case 28 of 2020)
[2024] KEELC 1399 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 28 OF 2020**

**EO OBAGA, J
MARCH 14, 2024**

BETWEEN

STEPHEN KPCHIRCHIR MELLY PLAINTIFF

AND

MOSES KIBIEGO YATOR DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 14.11.2023 in which the Plaintiff/Applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. This Honourable court be pleased to set aside, vary and or review its orders made on the 3rd of October, 2023 dismissing the plaintiff's suit for want of prosecution.
 4. An order do issue reinstating the plaintiff's suit herein and fix it for hearing on merit.
 5. The costs of this application be provided for.
2. The Applicant seeks the setting aside of the orders of this court given on 3.10.2023 dismissing his case for non attendance. The application is supported by a sworn affidavit by his counsel who deponed that on the material day, she attended court virtually where time allocation was given at 11.30a.m.
3. The Advocate states that as at the time which had been allocated, she was held up at the High Court in another matter. She called counsel for the Defendant/Respondent and asked her to indulge her for a few minutes. She states that she was ready with three witnesses but unfortunately, the three witnesses had gone to a wrong court. When counsel finally came to court, she found that the case had been dismissed for non attendance.



4. The Applicant argues that this is a part heard matter and that if the court's orders of 3.10.2023 were not set aside, it will greatly prejudice the Applicant.
5. The Applicant's application is opposed by the Respondent based on a replying affidavit of the Respondent sworn on 11.12.2023. The Respondent contends that the Applicant's application is defective and is devoid of merit and is only meant to attract the sympathy of the court.
6. The Respondent states that he was present in court at 11.20a.m and did not see any of the witnesses of the Applicant. He states further that her lawyer had a matter before Justice Nyakundi on that date and that when he went to that court to ask her lawyer to come to court for the hearing, he did not see counsel for the Applicant in that court.
7. The Respondent points at the fact that the Applicant's counsel responded to the issue of her witnesses at 12.00p.m. The Respondent's counsel had asked the Applicant's counsel whether she had her witnesses. The Respondent argues that the firm of Maritim & Co. Advocates has other advocates who would have come to court and that failure of Applicant's counsel to come to court is a sign of her failure to organize her diary.
8. The Respondent states that if the dismissal orders are set aside, it will prejudice him.
9. The parties agreed to put in written submissions. The Applicant filed his submissions on 23.1.2024. The Respondents filed his on 17.1.2024. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has shown sufficient reasons to warrant the court to exercise its discretion in his favour.
10. There is no contention that this is a part heard case. The plaintiff/Applicant has already testified. He is remaining with three witnesses to close his case. The reason for non attendance during the time allocated is that the Applicant's counsel was before Justice Wananda and Justice Nyakundi. The counsel kept communicating with the Respondent's counsel through WhatsApp. A copy of the cause list before Justice Wananda and Justice Nyakundi was annexed to the supporting affidavit. A screen shot of the conversation on WhatsApp was also annexed.
11. The WhatsApp chat shows that at 11. 41a.m, the Applicant's counsel asked the Respondent whether the case had been called out. At the same time the Respondent's counsel responded that the judge had just entered the court room. At 11. 43a.m, the Respondents counsel inquired from the Applicant's counsel whether her witnesses had arrived. There was no response until 12 noon when the Advocate responded in the affirmative.
12. At 11. 45a.m, the Respondent's counsel asked the court to dismiss the Applicant's suit as the applicant and his witnesses as well as their lawyer were not in court. The case was then dismissed for non attendance.
13. The Respondent's counsel did not inform the court that she had been in touch with the Applicant's counsel. The reason given for non attendance was excusable. The court has wide discretion to set aside a dismissal order. In the case of *Shah v Mbogo* (1967) EA 116, Duffus P. stated as follows: -

“Applying the principles that the courts discretion to set aside ex-parte judgments is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay or cause justice.”



14. In the instant case, the counsel for the Applicant was in another court. This fact was communicated to counsel for the Respondent as confirmed by the WhatsApp chat. The Respondent's counsel should not have insisted on having the Applicant's case dismissed without disclosing that she had communicated with Applicant's counsel. In the circumstances I find that the reason for non attendance is excusable. I allow the Applicant's application and proceed to set aside the order of 3.10.2023 dismissing the suit. The suit is reinstated for hearing. Applicant shall pay the Respondent's counsel thrown away costs of Kshs 15,000/= payable before the next hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF MARCH, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Rotich for Mr. Maritim for Applicant.

M/s Kimeli for Mr. Tororei for Respondent.

Court Assistant –Laban

