



**Waitathu Clan (Suing through John Mwangi Njagua & Peter Thuna Njoroge)
v Kimonjo Family Company & Partners Ltd & 3 others (Environment and
Land Case 46 of 2020) [2024] KEELC 1440 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE 46 OF 2020
LN GACHERU, J
MARCH 14, 2024**

BETWEEN

**WAITATHU CLAN APPLICANT
SUING THROUGH JOHN MWANGI NJAGUA & PETER THUNA NJOROGE)**

AND

**KIMONJO FAMILY COMPANY & PARTNERS LTD 1ST RESPONDENT
JASON MAINA MWANGI 2ND RESPONDENT
PETER MWANGI MAINA 3RD RESPONDENT
COUNTY GOVERNMENT OF MURANG'A (PREVIOUSLY KANGEMA TOWN
COUNCIL) 4TH RESPONDENT**

RULING

1. The Plaintiffs/Applicants vide a Notice of Motion Application dated 8th June 2023, and which is premised under Order 12 rule 7, Order 51 Rule 1 Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Act, have sought for the following Orders; -
 1. This court be pleased to set aside the dismissal orders made on 5th June 2023, and any other consequential orders thereto.
 2. This Court be pleased to reinstate the matter for hearing.
 3. The costs of this Application be in the cause.
2. The Application is premised on the grounds set on the face thereof, and on the Supporting Affidavit of Loise N. Miriti, Advocate, practicing in the Law Firm of M/S Karweru & Company Advocates, and sworn on 8th June 2023.



3. These grounds are;
 1. The Plaintiff's counsel in conduct of the matter was bereaved.
 2. The Plaintiff's counsel was not able to instruct an advocate to hold her brief under the circumstances.
 3. There will be no prejudice occasioned to the Respondents.
 4. That it is just and meet to so order.
4. The Applicants have sought for setting aside of the dismissal orders of 5th June 2023, for reason of non-attendance by Applicants and their advocate and for reinstatement of the dismissed suit.
5. On record is an Affidavit of Service sworn by Charity Wairimu Maina (Court Process Server) on 24th March 2023, wherein she averred that she sent out a Mention Notice issued by the Deputy Registrar of this Court dated 13th January 2023, to the Law Firm of Karweru & Company Advocates, through their known email address, that is, karweruadvocates@gmail.com on 20th March 2023.
6. The deponent confirmed receipt of the aforesaid Mention Notice which notified Counsels for all the parties that the matter would be mentioned before the Court on 5th June 2023.
7. In her Supporting Affidavit, Loise N. Miriti advocate, averred that the reasons for her non-attendance in Court on 5th June 2023, was bereavement, which is unintentional and was beyond her control.
8. She deposed that due to the aforesaid bereavement, she was unable to attend Court on 5th June 2023, when the case was dismissed. Further, that she was not in the right frame of mind to make the necessary arrangements to instruct another counsel to hold brief in the matter.
9. The deponent further stated the reasons why she did not attend Court was excusable and that the instant Application was brought without delay; Further, that the Respondents are unlikely to suffer any prejudice if the Court was to reinstate the suit and have the same heard on the merit.
10. The 4th Defendant/Respondent opposed the Application vide the Grounds of Opposition dated 6th September 2023, wherein it stated that the Plaintiffs/Applicants have not satisfied the requirements for reinstatement of suit and, moreover, they have not demonstrated the reason for the Plaintiff's/Applicant's absence in Court on 5th June 2023, when the suit was dismissed.
11. This Application was canvassed by way of written submissions. The Applicants' filed their written submissions on 27th November, 2023, and reiterated that reinstatement of the suit herein is in the interests of justice, and would not occasion any prejudice to the Defendants/Respondents herein.
12. Further they submitted that the mistakes or failings of their counsel should not be visited upon a them as clients, since they were not party to the events set out in the aforesaid Affidavit of Loise N. Miriti. The Applicants relied on the following case-law to support their Application: *Shah v Mbogo & Another* (1968), EA 116; *Philip Chemwolo & Another v Augustine Kubende* [1986] KLR; *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and Others & Another* [2016]eKLR; *Ivita v Kyumbu* [1984] KLR 441; *Wachira Karani v Bildad Wachira* Nyeri HCC No. 101 of 2011; *Moses Mwangi v Lutheran Church of Kenya Registered Trustees* Nairobi HCC No. 683 of 2009.
13. The 4th Defendant/Respondent filed its written submissions on 29th January 2024, and submitted that the Applicants have failed to satisfy the requirements for reinstatement of suits. It also submitted that the Applicants comprise of an entire clan and it has provided no reasons as to why there was not a single member of the aforesaid clan in court on 5th June 2023, when the suit was scheduled for hearing.



14. The 4th Respondent argued that the Court is interested in finding out the whereabouts of the Applicant on 5th June 2023, and would not be satisfied with information limited to the whereabouts of Applicant's Counsel on the afore-mentioned date.
15. It was further submitted that the 4th Defendant/Respondent was wrongly joined in the suit, as there is no cause of action attributable to it in the matter.
16. Further, it was submitted that the Applicants have not demonstrated that they are interested in pursuing the matter, and therefore, revival of the suit would result in wastage of the Court's time.
17. Having now carefully considered the instant Application and the rival written submissions, the court finds the single issue for determination is whether the application herein is merited.
18. Reinstatement of a suit is at the discretion of the Court, which discretion should to be exercised in a just manner. This was the holding of the Court in the case of *Bilha Ngonyo Isaac v Kembu Farm Ltd & Another* (2018) eKLR, where the Court cited with approval the decision in *Shah v Mbogo & Another* (1967), EA 116, wherein the Court held;

“This discretion to set aside an *ex parte* 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. 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.”

19. The Court in the case of *Philip Chemwolo & Another v Augustine Kubende* [1986] KLR held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

20. The Court too had an opportunity to make a decision on the issue of setting aside an *ex parte* order in the case of *CMC Holdings Ltd v Nzioki* (2004) 1KLR 173, where it held as follows;

“In law, the discretion that a court of law has, in deciding whether or not to set aside an *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would..... not be proper use of such 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 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 it might have well amounted to an excusable mistake visited upon the appellant by its advocate...”

21. The subject 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.



22. The Plaintiffs/ Applicants suit was dismissed for non-attendance, and therefore, they are within the purview of Order 12 Rule 7, in bringing the 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.”
23. The instant application is opposed by the 4th Defendant/Respondent, and this court finds that Section 3A of the Civil Procedure Act, gives the 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.
24. The Court has perused the Court record, and has noted that the Plaintiffs/Applicants filed this suit on 16th December 2020, which suit was opposed by the Defendants/Respondents herein.
25. Further, the suit had been fixed severally for Pre-trial directions, and all the time, the Plaintiffs counsel maintained that the Plaintiffs/ Applicants had not complied with Order 11 of the Civil Procedure Rules. Indeed, this court can rightly find and hold that the Applicants/ Plaintiffs have lost interest in the suit.
26. Indeed, the mention of 5th June 2023, was given by the court on 29th March 2023, when all the parties were absent. There is an Affidavit of Service sworn by Charity Wairimu Maina, the Courts Process Server, who confirmed having served all the Advocates for the Parties with the said Mention Notice.
27. The Plaintiffs/ Applicants counsel has not denied receipt of the Mention Notice. What is not clear is whether she informed the Plaintiffs/Applicants of the said mention date. She however claims that her absence was excusable since she was bereaved. There was no such evidence, but the court will not be hard on her to avail such evidence.
28. On 5th June 2023, on M/S Gachago H/B for Mr Kimwere for 4th Defendant/ Respondent was present in court. She informed the court that the Plaintiffs/ Applicants, and/or their advocate were absent, and they had also not complied with Pre-trial directions. She sought for dismissal of the Plaintiffs suit.
29. The Court on its part noted that the Plaintiffs/ Applicants had not complied with Order 11 of Civil Procedure Rules, were absent in court and the suit was filed in 2020. Indeed, that was more than 3 years, and the suit was a backlog. Further, the court held that the Plaintiffs had lost interest in the matter, and dismissed it for the Plaintiffs failure to comply with Order 11 of Civil Procedure Rules, and their non- attendance.
30. It is clear that the suit was dismissed for failure to comply with Order 11 of Civil Procedure Rules, because a party who takes 3 years to comply with Pre-trial directions is not serious with expeditious disposals of the filed suit. Section 1A, of the Civil Procedure Act implores the court to facilitate expeditious disposal of matters filed before it.
31. With the above background, this court can comfortably hold that the Plaintiffs/ Applicants are indolent litigants, who should not be allowed to reinstate a dismissed for non- compliance with Order 11 and non- attendance in court. However, in an application for reinstatement, the court should also consider whether there would be hardship or injustice occasioned to any of the parties. See the case of *Mbogo & Another v Shab*, EA 1968, which go further to establish that a court’s discretion to set aside an ex parte judgement or order, 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”.



32. Order 12 Rule 3(1), of *Civil Procedure Rules*, is very clear on what should happen if the Plaintiff fails to attend court, when the matter is set down for hearing. However, the court notes that on 5th June 2023, the suit was not set down for hearing, but was for mention. The Plaintiffs who had not complied with Order 11, failed to attend court and thus reasons for dismissal.
33. Order 12 Rule 7 of the *Civil Procedure Rules*, gives reprieves to an aggrieved party, who is dissatisfied by any ex parte order to apply to court for setting aside such order. That is what the Applicants have done herein. Further, the court has discretion to either set aside or not, but such discretion should be invoked judiciously. See the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, the Court held that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

See also in the case of, *Kenya Commercial Bank Ltd v Nyantange & Another* (1990) KLR 443 Bosire J, (as he then was) held that:

“Order IXA rule 10 of the *Civil Procedure Rules* donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

34. Considering the reasons given for non- attendance in court on 5th June 2023, are the Plaintiff/ Applicants deserving of the Orders sought? Although Applicant’s Counsel has not furnished this Court with evidence attesting to the bereavement alluded to, it is the finding and holding of the Court that the Plaintiffs/Applicants cannot be faulted for non-appearance of their Advocate in Court on 5th June 2023, when the suit was set down for a mention to confirm compliance.
35. The 4th Defendant/ Respondent had contended that the Plaintiffs/ Applicants comprise of members of a clan, and none of them was present in court, and so no plausible reasons were given for their absence in court on the material day.
36. However, the fact that the Applicant is a clan, as distinguished from a natural person, does not diminish the fact that litigants rely on their counsel on record to prosecute the matter on their behalf. There was no evidence that their counsel had informed them of the mention date. Without their knowledge of the mention date, this court cannot expect any of the member of the clan to have been in court.
37. Failure to inform the Plaintiffs/Applicant could have been a mistake on the part of their counsel. The court will rely on the case of *Belinda Murai & Others v Amos Wainaina* (1978) LLR where the court stated;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”



38. Further, it trite that mistakes of a counsel should not be visited on his client. See the case of *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR, where the court stated as follows;

“It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costs However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court.”

39. The Court will find that failure to attend court on the part of the Plaintiffs/ Applicants should not be used to penalize them. Further, the non-attendance of their counsel due to bereavement is excusable. However, what is not excusable is the Plaintiffs delay in complying with Order 11 of the *Civil Procedure Rules*. The Plaintiffs have failed to prosecute their case expeditiously. This court will grant them one more chance to comply. Failure to do so, the suit will stand dismissed for non-compliance of a court order.

40. For the above reasons, the Court allows the Applicants’ application dated 8th June 2023. Consequently, the ex parte order of 5th June 2023, which Order dismissed the Plaintiffs/Applicants’ suit is hereby set aside and/ or varied. The court proceeds to reinstate the Plaintiffs/ Applicants suit, with an order that the same should be set down for hearing expeditiously, and be concluded within the next 120 Days, from the date of this Ruling.

41. Further, the Plaintiffs/ Applicants to comply with Order 11 of *Civil Procedure Rules*, with the next 21 days, from the date hereof. Failure to do so, the order of dismissal will revert and remain in place automatically. This is a 2020, matter, and thus a backlog.

42. The 4th Defendant/Respondent attended court on 5th June 2023, and thus is entitled to throw away costs of 5000/=, payable before the date of the next court appearance.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF MARCH 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Ms Miriti for the Plaintiffs/Applicant

1st Defendant

Absent 2nd Defendant

3rd Defendant

4th Defendant

Joel Njonjo – Court Assistant.

L. GACHERU

JUDGE

