



**Olukokha & 3 others (And as representatives of Namasoli Community) v
Bishop Anglican Church of Kenya, Butere Diocese & 2 others (Environment &
Land Case E014 of 2021) [2024] KEELC 3926 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E014 OF 2021**

**DO OHUNGO, J
APRIL 30, 2024**

BETWEEN

**JEREMIAH E OLUKOKHA 1ST PLAINTIFF
KEPHER ALWANGA 2ND PLAINTIFF
JENIPHER MUSITA 3RD PLAINTIFF
FRANCIS ESHIWANI ABAKALWA 4TH PLAINTIFF
AND AS REPRESENTATIVES OF NAMASOLI COMMUNITY**

AND

**HON BISHOP ANGLICAN CHURCH OF KENYA, BUTERE
DIOCESE 1ST DEFENDANT
ANGLICAN CHURCH OF KENYA 2ND DEFENDANT
HOSPITAL ADMINISTRATOR, NAMASOLI HEALTH CENTRE 3RD
DEFENDANT**

RULING

1. This suit was dismissed for non-attendance on 26th October 2022. Later, the plaintiffs filed Notice of Motion dated 15th November 2022, which is the subject of this ruling. The application seeks reinstatement of the suit for its hearing and determination.
2. The application is based on the grounds listed on its face and is supported by an affidavit sworn by Dollan Kahuya Nabulindo, Advocate. She deposed that when the matter came up for mention on 26th October 2022, she had been unwell for two weeks and had been admitted in hospital for several days. She annexed a copy of treatment note and added that her staff did not inform her of the mention date.



- That she only learnt about the dismissal later from the plaintiffs and that mistake of counsel should not be visited upon an innocent party.
3. The first and second defendants filed a replying affidavit sworn by Silas Hopillo, Diocesan Administrative Secretary of the second defendant. He deposed that it was unfathomable that the plaintiffs' firm of advocates on record could not devise mechanisms to attend to the matter despite knowing that Ms Nabulindo had been unwell for two weeks. The affidavit is replete with arguments and submissions, contrary to Order 19 Rule 3 of the Civil Procedure Rules which provides that "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove." I have therefore not found it necessary to reproduce the arguments.
 4. The third defendant responded to the application through a replying affidavit sworn by Okwaro Winnie Anono, Advocate. She deposed that the plaintiffs never attended court from inception of the suit and that they were guilty of laches. She added that in the event the court is inclined to grant the orders, the plaintiffs should pay to the third defendant thrown away costs of KShs 30,000.
 5. The plaintiff also filed a supplementary affidavit sworn by Dollan Kahuya Nabulindo, to which she annexed a copy of a discharge summary.
 6. The application was canvassed through written submissions, which the plaintiffs and the third defendant duly filed. The first and second defendants did not file any written submissions.
 7. I have considered the application, the affidavits, and the submissions. The issue for determination is whether the orders sought should issue.
 8. The plaintiffs essentially seek setting aside of the order of dismissal of the suit that was made on 26th October 2022. There is no dispute that the plaintiffs' advocates were aware that the matter was coming up on 26th October 2022. The explanation offered for failure to attend court is that Ms Nabulindo who was handling the matter had been unwell for two weeks and had been admitted in hospital for several days. She further stated that her staff did not inform her of the mention date. The suggestion there is that her office was aware of the date, but the information did not reach her. Indeed, in the order of dismissal, the court stated that the plaintiffs were notified of the proceedings that were scheduled for 26th October 2022.
 9. The case was not dismissed arbitrarily. The record shows that prior to the dismissal, the plaintiffs did not attend court on 4th May 2022 and on 22nd June 2022. Simply put, they had not attended court since filing the suit on 29th November 2021.
 10. When considering an application for setting aside in circumstances where the applicant was served, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogoh & Another v. Shah* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
 11. Counsel for the plaintiffs has availed material indicative that she was unwell and hospitalized. I am aware that the third defendant has questioned the medical notes and has argued that they do not indicate the facility from which they emanate. He has further argued that the notes show that the counsel was admitted on 19th October 2022 and discharged on 22nd October 2022, well before the date



of dismissal. I have perused the notes and I have noted that the dates are as pointed out by the third defendant. Nevertheless, I appreciate that discharge from hospital does not mean that one is ready to resume duty immediately. Often, patients recuperate at home for some days after discharge. I am thus prepared to give the plaintiffs the benefit of doubt.

12. The present application was filed on 16th November 2022, some 20 days after the dismissal. I do not consider that delay to be inordinate. Regarding the question of respective prejudice each party is likely to suffer, the defendants have not demonstrated any prejudice that cannot be compensated by an award of costs. Overall, I am persuaded that the interest of justice will be better served by giving the plaintiffs an opportunity to have their case heard and determined on the merits.
13. I find merit in Notice of Motion dated 15th November 2022. The order of dismissal of the suit made on 26th October 2022 is hereby set aside. The defendants shall have costs of the application. The plaintiffs are warned to proactively prosecute the suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The First Plaintiff

No appearance for the First and Second Defendants

No appearance for the Third Defendant

Court Assistant: M Nguyayi

