



**Catholic Diocese of Nakuru Registered Trustees v Letizi & another (Environment & Land Case 62 of 2020) [2024] KEELC 4346 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4346 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 62 OF 2020  
FM NJOROGE, J  
MAY 28, 2024**

**BETWEEN**

**CATHOLIC DIOCESE OF NAKURU REGISTERED TRUSTEES ..... PLAINTIFF**

**AND**

**LA CARRUBBA LETIZI ..... 1<sup>ST</sup> DEFENDANT**

**TRIPALDI MASSIMILLIANO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for determination is dated 7/3/2024 and it has been brought under sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#); Order 12 rule 7 and Order 51 rules 1 and 15 of the [Civil Procedure Rules](#), 2010. The orders sought are framed as follows: -
  - a. Spent.
  - b. That the orders of this honourable court made on 4<sup>th</sup> March 2024 dismissing the Plaintiff/Applicant's claim be and are hereby set aside and the Plaintiff's claim be reinstated.
  - c. That the costs of this application be in the cause.
2. The grounds in support of the application were listed on the face of the motion as follows-
  - a. That the plaintiff instituted the subject suit by way of Originating Summons filed on 18<sup>th</sup> August 2020.
  - b. That the suit was scheduled for mention on 4<sup>th</sup> March 2024 for the purposes of fixing the matter for hearing on which date there was no appearance on the part of the Plaintiff.
  - c. That in view of the immediate foregoing, the plaintiff's claim in the suit was dismissed for want of prosecution and the counterclaim scheduled for hearing on 30<sup>th</sup> May 2024.



- d. That the non-appearance was occasioned by a technical fault on the part of the Plaintiff's counsel's gadget hence was not able to log in to the court session for the scheduled mention.
  - e. That the plaintiff remains and has always been keen on prosecuting the suit, which was instituted in the year 2020, to its conclusion.
  - f. That the Respondent herein stands to suffer no loss or prejudice on account of the orders sought herein being granted.
  - g. That it is in the interest of justice that the orders of this honourable court made on 4<sup>th</sup> March be set aside and the suit herein be reinstated and set down for hearing.
3. The application is further supported by the affidavit sworn by Charles Kimani, counsel for the Applicant, on the even date and also his supplementary affidavit dated 30/3/2024.
  4. The application was canvassed by way of written submissions. I only had the benefit of perusing the Plaintiff's submissions. I have carefully considered the same. The sole issue for determination is whether the orders made on 4/3/2024 dismissing the Plaintiff/Applicant's claim should be set aside and the Plaintiff's claim be reinstated.

### **Analysis and Determination**

5. The guiding provisions with regards to setting aside of ex-parte orders is to be found in Order 12 Rule 7 and Order 51 Rule 15 of the [Civil Procedure Rules](#) which provide: -

Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

The court may set aside an order made ex parte.

6. There is also no doubt that the power to set aside ex-parte orders is discretionary and such discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. (See *Shah v Mbogo & Another* (1967) E.A. 93)

7. In [Joseph Ndirangu Munene v Peter Macharia Muriru & another](#) [2021] eKLR, the Court explained: -

“Order 12 Rule 7 of the [Civil Procedure Rules](#) provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in [Patel...Vs...E.A Cargo Handling Services Ltd](#) (1974) EA 75, held that:-

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment 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 conditions on itself to fetter the wide discretion given it by the Rules.”

There is thus no doubt that in deciding whether or not to set aside an ex-parte order the Court is called upon to exercise its discretion. In exercising discretion, the Court is further called upon to determine whether there is sufficient reasons that has been given to warrant it exercise the said discretion.”

8. I have considered the reasons that were offered by the Plaintiff regarding their failure to attend court on 4/3/2024. I have asked myself whether failure to attend court on the basis of a technical hitch on



4/3/2024, constituted an excusable mistake on the part of the Plaintiff's counsel or was it meant to deliberately delay the cause of justice. The reason given by the Plaintiff that their counsel experienced a technical hitch, hence could not log onto the platform has not been sufficiently substantiated. However, I have considered the history of this litigation and since the record shows that the Plaintiff's counsel has on various occasions sought to have a hearing date as evidenced by the letters dated 2/5/2023 and email dated 1/8/2023, it is in the interest of justice that they be allowed to prosecute their case so that the same is determined on merit.

9. The outcome is that the application dated 7/3/2024 is hereby allowed. The costs of the application shall abide the outcome of the suit. The parties shall file a consolidated trial bundle duly indexed and paginated with the plaintiff doing so within 21 days from the date hereof and the defendant responding in the same manner within 21 days of being served with the plaintiff's bundle in readiness for hearing. The main suit shall be heard on 26/9/2024.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF MAY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

