



Namukana v Hon & 5 others (Environment and Land Miscellaneous Application 3 of 2023) [2024] KEELC 3679 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2023**

FO NYAGAKA, J

MAY 9, 2024

BETWEEN

ALBERT NAMUKANA APPLICANT

AND

THE HON 1ST RESPONDENT

BENEDICT BARASA 2ND RESPONDENT

ISAAC SANJA WABWI 3RD RESPONDENT

LAND REGISTRAR TRANS-NZOIA COUNTY 4TH RESPONDENT

COUNTY SURVEYOR, TRANS-NZOIA COUNTY 5TH RESPONDENT

THE HON. ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. By a Notice of Motion dated 07/02/2023 the Plaintiff moved this Court under Sections 3, 4 and 13 of the Environment and Land Act as read with Section 3A of the Civil Procedure Act, Order 15 Rule 7 of the Civil Procedure Rules, Articles 48, 50, and 159 of the Constitution of Kenya and “all other enabling provisions of the law.” He prayed:

1. spent
2. spent
3. That this honorable court replaced to reinstate this case and they seem be heard in open court.
4. That if it pleases this Honorable Court, upon reinstatement of this suit, the pleadings herein by the parties, as well as the written submissions therein be used by this Honorable Court to determine without necessarily hearing the parties.



5. Costs of this application be provided for.
2. The application was based on eight (8) grounds, one being that the applicant was acting in person. This matter was dismissed for non-attendance on 30/01/2023. The Applicant had therefore been using the ICT devices to log in (to what this Court understands as the Teams Platform for virtual Court sessions), however, on 30/01/2024, he was unable to be facilitated to use the same facilities because there were many other courts and parties being assisted. Hence, he elected to borrow a smartphone belonging to Mr. Kiboi, an officer of the court.
3. On the material date he logged into the virtual session using Mr. Kiboi's mobile phone number but an interruption of electricity disconnected him and made it difficult to log into the session again. The reason for his inability to attend the session was due to the internet breakdown, which was beyond his control. He made efforts to reach the judicial officer to have this matter handled in open court, but in vain. That it would not be fair for him to be condemned unheard, yet the application dated 16/05/2023 had merits. The court should do justice and take note of the peculiar circumstances of each case. The non-attendance was not deliberate or an attempt to obstruct or delay justice and the application was made in good faith.
4. The application was supported by the affidavit sworn by the plaintiff on 07/05/2023. In it, he restated the grounds in support of the application but in deposition form. Therefore, this court need not repeat the contents but will consider them as facts pleaded. Through his affidavit, he deposed further that the record would show that the Attorney-General, through the State Counsel, delayed this matter by filing documents. He deposed the parties had filed submissions except the Attorney General, and since that was the case, the Court should consider them for determination.
5. The application was opposed through affidavits sworn by Benedict M. Baraza and Isaac Sanja Wabwai on 15/02/2024 filed the following day. Benedict Baraza deposed that the applicant was present in court on 18/12/2023 when the Court directed that the Application subsequently dismissed be heard on 30/01/2024 but chose to ignore. Further, that the Applicant was a busy body, wasting the court's time and "forcing" him to incur unnecessary costs without justification. His excuse of using other people's phones was not warranted since it was his obligation to ensure that he attended court regardless of whether he had a smartphone or not. He deposed that the Applicant was aware that his case, in Land Case No. 71 of 2018 was dismissed by the Chief Magistrate Court because it lacked merit and had no chance of success on appeal. Lastly, that the Application was frivolous, scandalous and a waste of time which should be dismissed with costs.
6. On his part, Isaac Sanja swore that the applicant was aware of the hearing date but did not attend. His failure to do so was a mere excuse not to be entertained. That the application was an afterthought, which denied him and other respondents their opportunity to recover costs and the enjoyment of the fruits of judgment. That the applicant should have ensured that he attended court since he was learned enough to understand how the internet connections were used. He was aware that CMC Land Case No. 71, of 2018 was already dismissed as it lacked merit.
7. The parties elected not to submit and left it to the court to determine based on the contents of their Affidavits on record.
8. I have considered the matter before me, the law and the Affidavits both in support and opposition of the Application. I think only three issues lie before me for determination. The first one is whether the prayers sought are properly couched. Second, whether the application is merited. And thirdly, who to bear the costs.



9. In that regard to the first issue, this Court has analyzed the Application and the prayers sought in relation to the Court record. The Application stems from a dismissal of 26/05/2023 scheduled for hearing on 31/01/2024. The main prayer in the Application was for leave of the Court for him to appeal out of time against the judgment of honourable S. K. Mutai delivered on 05/12/2022. When the application was scheduled to be heard virtually, the Applicant failed to attend hence the dismissal and the instant application.
10. The instant Applicant prays for reinstatement “of this case” and that upon the “reinstatement of this suit, the pleadings by the parties...” be used to make a determination without necessarily hearing the parties.
11. From the record, the Application dated 26/05/2023 is not a suit. But going by the definition given under Section 2 of the Civil Procedure Act that a “suit” means all civil proceedings commenced in any manner prescribed,” and by virtue of Article 159(2)(d) of the Constitution of Kenya, 2010 and given that the Applicant is a layman in the sense of legal training, this Court is of the view that the Application though drafted in the manner it is sought the reinstatement of the Application dismissed on 30/01/2024. This Court therefore excuses the Applicant regarding the way the prayer is drafted.
12. On the merits of the Application the Applicant cited a number of provisions to base his application. He cited Sections 3, 4 and 13 of the *Environment and Land Act* as read with Section 3A of the *Civil Procedure Act*, Order 12 Rule 7 of the *Civil Procedure Rules*, Articles 48, 50, and 159 of the *Constitution*. It is instructive that litigants should not lump up provisions in litigation or proceedings for the sake of it. They should consider the relevance thereof and explain it to the Court. Needless to say, each provision of the law apply in every situation.
13. Regarding the provisions the Applicant cited, Section 3 of the *Environment and Land Court Act* is on the overriding objective of the ELC, Section 4 on the establishment of this Court, and 13 on the jurisdiction of the Court. Article 48 and 50 of the *Constitution* provide for access to justice and fair hearing. While these provisions import the idea that a party needs to be given the rights they envision, it is imperative that the Applicant gives the relevance of the same in regard to the circumstances of the case. For instance, it is not demonstrated by the Applicant that he has been denied access to justice or a fair hearing. Thus, these and the provisions previously are irrelevant.
14. This turns this Court to the provisions it considers relevant. Article 159(2)(d) of the *Constitution* is applicable as discussed when the Court determined the first issue. Section 3A is relevant since the inherent powers of the Court may be used herein to make orders that are just and in the interest of justice. Regarding setting aside an order of dismissal for non-attendance, Order 12 Rule 7 of the *Civil Procedure Rules* is the relevant one and is reproduced hereunder as follows:

“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.”

15. Under the said provision, the court has unfettered discretion to set aside an order it has made, if sufficient cause is shown by an Applicant. The principles governing setting aside such orders are well settled. In regard to that, in *Shah v. Mbogo & another* [1967] EA 116 the Court held thus:

“I have carefully considered, in relation to the present Application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte. This 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 a person



who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

16. This Court is guided by the holding in the above in regard to how to apply the discretion it has. It should exercise it judiciously and for purposes of avoiding injustice and hardship which may result from an excusable error. In the instant case, the Applicant deponed how he attended Court on the material date, he logged into the Teams Platform but the connection failed due to internet disruption caused by power failure. He frantically made efforts to log in to the extent of asking for assistance from a member of the ELC Registry staff whom this Court is aware of as one of integrity and often willing to go out of his way to assist litigants when faced with difficulty. On their part the Respondents opposed the application, finding joy in the predicament of the Applicant due to a situation that was beyond his control. They argued that the Applicant was a learned man who ought to know how internet works and to attend Court as required.
17. With due respect, I find the Respondents to be litigants who would be trigger happy to kill an innocent being (figuratively). Unless guided by evil desires no one should take advantage of the weakness, mistake or error of the opponent and score (a goal) to his advantage. This is one of those applications that the Court expected that the Respondents extend an olive branch to the adverse party and compromise or concede rather than making it a do or die and engage the Court in preparing a ruling over an obvious issue.
18. The right to be heard does not mean that one opposes or defends every other claim or issue leveled against him. Even the act or step of participating in giving an admission, a compromise or concession is itself an exercise of that right, and it is an honourable thing to do in life. It is for the reasons above that I find the Application merited and exercise my discretion to and I hereby do set aside the orders granted on 30/01/2024. The Application dated 16/05/2023 is hereby reinstated to hearing and is set for virtual hearing on 20/05/2024 at 08:30 AM.
19. Since costs follow the event and that being that the application has succeeded I will grant the same to the Applicant. Had the Respondents conceded to the Application I would have ordered the costs to be in the cause or even to them but here we are, with a Ruling!
20. Orders accordingly.

RULING DATED , SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 9TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

