



Mandago & 5 others v Tai & 4 others (Environment & Land Case E016 of 2022) [2024] KEELC 4638 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E016 OF 2022**

**EO OBAGA, J
JUNE 13, 2024**

BETWEEN

**PHILIP CHUMO MANDAGO 1ST PLAINTIFF
FRANCIS K. KUTTO 2ND PLAINTIFF
KIPKEMBOI SERONI 3RD PLAINTIFF
JULIUS KIBENEI NGETICH 4TH PLAINTIFF
ISAAC CHEPSIROR 5TH PLAINTIFF
L. K. SEREM 6TH PLAINTIFF**

AND

**MOSES KIPKEMBOI TAI 1ST DEFENDANT
SHIKUKU MAIYO KOSGEI 2ND DEFENDANT
JOHANA BARNO 3RD DEFENDANT
ANNE KOSGEY 4TH DEFENDANT
SILAS KOSGEY 5TH DEFENDANT**

RULING

1. This is a ruling in respect of a notice of motion dated 20.2.2024 in which the Plaintiffs/Applicants seek that the suit which was dismissed be reinstated and costs of this application be awarded to them. The Applicants' application is supported through the affidavit of their advocate who depones that on the date when the case had been set down for hearing, he was aware of the hearing but that he was arrested that morning and detained at Naiberi Police Station.



2. The deponent further states that his clients were waiting for him in his office and that he was released around 1.00p.m and he proceeded to court where he perused the court file where he discovered that the suit had been dismissed for non-attendance. He states that prior to his release from the Police station, he had tried to reach his office or any other counsel to hold his brief in vain. He further states that he was ready with the hearing on that date as all parties had complied with pre-trial procedures were it not for his arrest and detention. He states that it will be fair and just that the suit is reinstated and heard on merits.
3. The Applicant's' application was opposed through a replying affidavit sworn on 8.4.2024. The Defendants/Respondents contend that the Applicants' application is incompetent, and is an abuse of the process of the court. They state that the Applicants have not given sufficient reason why they did not attend court on 14.2.2024. They further state that the Applicants' advocate has not offered any evidence to show that he was detained as he alleges. They state that the Applicants' counsel has not exhibited any warrants of arrest or copy of occurrence book for that date.
4. The Respondents state that the Applicants have caused this case to be adjourned on numerous occasions and that they are out to frustrate them by abusing the court process. They urge the court not to assist them by reinstating the suit. They further state that whereas the Applicants' counsel has tried to explain his absence, he has not done so regarding the Applicants who were equally not in court.
5. The parties agreed to dispose of the application by way of written submissions. The Applicants filed their submissions dated 22.4.2024. The Respondent's filed their submissions dated 3.5.2024.
6. The Applicants submitted that this court has wide discretion to set aside a dismissal order. They cited the case of *John Mukube Mburu v Charles Mwenga Mburu* (2019) eKLR where the court quoted *Shah v Mbogo* (1979) EA 116 where it was held as follows:-

“...this discretion is intended 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 delay or obstruct or delay the cause of justice.”
7. The Applicant's also relied on the case of *Rachel Njango Mwangi (suing as personal representative of the Estate of Mwengi Kabaiku) v Hannah Wanjiru Kiniti & another* (2021) where the court held that:-

“For the court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.”
8. Finally, the Applicants relied on the case of *Nchapi Leiyagu v I.E.B.C & 2 others Civil Appeal No. 18 of 2013* (2013) eKLR where the court stated thus:-

“The right to hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”



9. The Respondents in their submissions relied on the case of *Utalii Transport Company Limited & 3 others v N.I.C Bank & another* (2014) eKLR where it was held thus:-

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”
10. The Respondents further relied on the case of *Gideon Sitelu Konchellah v Daima Bank Limited* (2013) eKLR where the court cited the case of *Mobil Kitale Service Limited v Mobil Oil Kenya Limited* where it was held as follows:-

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past... justice would be better served if we dispose of matters expeditiously... the overriding objective of this Act and Rules made thereunder is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by the Act.”
11. The Respondents also relied on the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in liquidation)* 2015 eKLR where it was held as follows:-

“The test to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate considering the prejudice that the defendant would suffer if restatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.”
12. Finally, the Respondents submitted that should the court allow the application, then the Applicants should be ordered to pay costs and getting up fees as was ordered in the case of *Gladys Njeri Kirungumi v Langata development company Ltd & another* (2016) eKLR.
13. I have considered the Applicants’ application, the opposition to the same by the Respondents as well as the submissions by the parties. The only issue for determination is whether this court should exercise its discretion in favour of reinstating the suit.
14. The Applicants’ counsel has stated that he was aware of the hearing date but he could not attend court as he had been detained at Naiberi Police Station on the morning of 14.2.2024. He tried to reach his office where his clients were but was unable to do so. He also tried to get hold of a lawyer to hold his brief but he was too unable to get hold of the lawyer.
15. The Respondents have argued that the Applicants’ lawyer did not exhibit warrants of arrest, occurrence book number or charge sheet. The Applicants’ lawyer has indicated that he was released without any charges having been preferred against him. He could not be expected to exhibit a charge sheet when there were no charges preferred against him.
16. On the issue of occurrence book, it is common knowledge that where police are out to harass or intimidate a person, they can book you in cells even when one has not been booked in the occurrence book. Even if the Applicants’ counsel was booked in the occurrence book, he may not have wanted to disclose the reason why he was detained. In the further affidavit which he swore, he stated that as an officer of the court, he cannot lie on oath.
17. The Respondents contend that the Applicant’s counsel did not explain why his clients were not in court. The counsel has already explained that he could not get through to his office or to a counsel who



would have held his brief. He may well have been denied access to his phone while under detention at the Police station.

18. The Respondents have blamed the Applicants for delaying the hearing of this suit by adjourning it on numerous occasions. I have looked at the record. The record shows that the Applicants have adjourned the case on one occasion and that was because they were served with documents by the Respondents late necessitating an adjournment to enable the Applicants to file a supplementary list of documents.
19. The Applicants blame the Respondents for again adjourning the case on 31.7.2023. This is not correct as the record clearly shows that the court was not sitting on that day. The matter was given a mention date of 28.9.2023 and this is when the hearing date of 14.2.2024 was given. On 14.2.2024 is the date when the suit was dismissed.
20. A perusal of the court record shows that the Applicants have always been keen to proceed. They have never exhibited intention to delay this matter. It is therefore clear that the Applicants have shown sufficient cause why they did not attend court. I consequently allow the application and proceed to set aside the order dismissing the suit which was made on 14.2.2024. This suit is reinstated for hearing on merits. The costs of this application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JUNE, 2024.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Onyango for Mr. Cheruiyot for Plaintiffs.

Mr. Kipkemboi for defendants.

Court Assistant -Laban

E. OBAGA

JUDGE

13TH JUNE, 2024

