



**Maulana v Rudeny (Environment & Land Case 114 of 2017)  
[2024] KEELC 6177 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6177 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 114 OF 2017  
FM NJOROGE, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**TIMA MAULANA ..... PLAINTIFF**

**AND**

**SAAB FUAD RUDENY ..... DEFENDANT**

**RULING**

1. For determination is the application dated 2<sup>nd</sup> April, 2024 brought under Order 12 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders:
  1. That this Honourable Court be inclined to reinstate the suit herein that was dismissed on the 16<sup>th</sup> day of November, 2021;
  2. That costs be in the cause.
  2. The application is supported by the grounds on the face of the application and in the supporting affidavit sworn by Mwanasomo Mzee Omar on the same date. She deponed that the Plaintiff purchased two portions of land hived from all that “Unsurveyed Residential Plot A” Malindi Municipality about 11 years ago and has been enjoying the access road cutting alongside the defendant’s plots which are adjacent to the Plaintiff’s.
  3. According to her, the Plaintiff has had several setbacks among them being the fact that she was out of this court’s jurisdiction hence not being able to prosecute her case. She further deponed that the Plaintiff lost her husband and as a result fell into a depressive state while at the time she was supposed to be supporting her children; that the Plaintiff has not lost interest in prosecuting her suit but the delay has been occasioned by circumstances beyond her control. She also asserted that the defendant has now embarked on digging up trenches to put up a perimeter wall. She stated that she and her family are bound to suffer if the exercise continues hence the need to have the suit reinstated forthwith to avert an injustice.



4. This court on the 5/6/2024 directed the Plaintiff to file submissions but none were filed. In addition, the Respondent has not filed a response to the application hence the application is therefore undefended.
5. I have considered the application, the supporting affidavit and in my view, the single issue falling for determination in the application is whether the applicant has satisfied the criteria upon which the court may exercise jurisdiction to reinstate a suit.
6. This court's jurisdiction to reinstate a dismissed suit is discretionary and that discretion must be exercised judiciously and on well settled principles in so far as any course of action the court takes will determine whether or not a litigant will be barred from seeking justice.
7. The present suit was dismissed for want of prosecution. I agree with the position in [\*John Nabashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)\*](#) [2012] eKLR, where my brother Justice F Gikonyo held that though there is no express provision under Order 17 [\*CPR\*](#) on the setting aside or variation of an order dismissing a suit, that does not deny the court the power to set aside or vary such order as it deems fit. In addition, it is noteworthy that under Order 12 Rule 7 [\*CPR\*](#), the court has discretion to set aside or vary an order for dismissal and reinstate a suit dismissed for non-prosecution or non-attendance.
8. In this court's view, the criteria to be applied in a reinstatement application is to consider whether there are reasonable grounds to reinstate the suit and also to consider the prejudice that the respondent may suffer perchance the suit is reinstated vis a vis the prejudice the applicant would suffer if the suit were not reinstated.
9. I have had the liberty to peruse the record to and make observations concerning the Plaintiff's conduct. I note that the suit herein was instituted on the 16<sup>th</sup> May, 2017 and injunctive orders issued and renewed several times and finally confirmed till the determination of the suit in a ruling of this court dated 21<sup>st</sup> September, 2018. When the matter was listed for pretrial directions on the 27<sup>th</sup> May, 2019, there was no attendance by both parties. Subsequently when the matter came up on the 16<sup>th</sup> November, 2021, the Plaintiff's advocate informed the court that their client had been out of the country and the suit was dismissed for want of prosecution.
10. In my view, the question herein is whether the applicant has demonstrated reasonable grounds for setting aside the dismissal order and for reinstatement of the case and whether the respondent will suffer prejudice if the suit is reinstated.
11. I have considered the reasons that have been advanced by the applicant for the delay in prosecuting her suit noting that this is a matter that was filed way back in 2017. I have similarly noted that the defendant has not filed a defence in this matter. In my opinion, the applicant/ Plaintiff appears to have gone into slumber once the injunctive orders were confirmed by the ruling of 21<sup>st</sup> September, 2018. It would appear that the defendant's actions on the property of digging up trenches with the intention of putting up a perimeter wall seems to have reminded her that they had a pending suit.
12. However, I have considered whether any party would suffer prejudice if this suit is reinstated and I find that since the Respondent did not oppose the application, the answer to that question is in the negative. Also, being guided by Article 159 (2) (d) of the [\*Constitution\*](#) to lean in favour of substantive justice compared to procedural technicalities, I find that the lower risk in this matter lies in reinstating the suit for hearing on its merits.



13. I have also taken note of the reasons advanced by the applicant and having regard thereof, I am inclined to allow her another chance to prosecute her case. The reinstatement however shall be conditional upon the applicant filing, in the form of a duly paginated and indexed bundle, all the documents and lists of witnesses as well as their witness statements that she desires to rely on at the hearing within 30 days from the date of this ruling. Thereafter, the matter shall be listed for a mention to confirm compliance and for the issuance of a hearing date on 30/10/2024. The costs of the application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI**

