



REPUBLIC OF KENYA



**Omoi & 4 others v Mogeni (Environment & Land Case 343 of 2016)
[2024] KEELC 6002 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 343 OF 2016**

**M SILA, J
SEPTEMBER 19, 2024**

BETWEEN

**GETEMBE OMOI 1ST PLAINTIFF
JOHN MOMANYI RAGIRA 2ND PLAINTIFF
SIMEON MOSE 3RD PLAINTIFF
SIMEON OBARI 4TH PLAINTIFF
MANGA RAGIRA 5TH PLAINTIFF**

AND

PAULINE KEMUMA MOGENI DEFENDANT

RULING

(Application to set aside order of dismissal of suit for non-attendance; reason given is that the hearing date was changed and counsel did not advise his clients to attend court on the new date and also did not attend court; no good reason presented as the court had discretion to change the hearing date and it was the duty of counsel and the applicants to appear in court on the new date; court however allowing the application on its own discretion but subject to payment of thrown away costs)

1. The application before me is that dated 6 August 2021 filed by the plaintiffs. For reasons that I am unable to comprehend, since it was filed on 20 August 2021, the application was never given a date and it first came to court on 11 March 2024 hence the delay in having it determined. The application seeks the reinstatement of the plaintiff's suit which was dismissed for non-attendance on 21 July 2021.
2. The supporting affidavit is sworn by George Joseph Mogaka Masese, counsel on record for the plaintiffs. He avers that the court on its own motion listed the case for hearing on 22 September 2021 and he advised his clients of that date. For that reason he did not inform his clients to appear in court on 21 July 2021. He deposes that it was 'illogical' for counsel for the defendant to serve his office



- with a hearing notice for 21 July 2021. He deposed that his client was ready to attend court on 22 September 2021 and therefore the order of dismissal of 21 July 2021 should be set aside and his clients' case reinstated for hearing.
3. The application is opposed through the replying affidavit of the defendant. She deposes that she is old, sickly and bedridden. She avers that the case came up for mention on 12 April 2021 and hearing was rescheduled to 21 July 2021 and the hearing date of 22 September 2021 was set aside. She avers that her counsel on record served M/s GJM Masese & Company Advocates, on record for the plaintiffs, with the hearing notice for 21 July 2021 and the hearing notice is attached. She believes that the order of dismissal was fair. She adds that the matter has been in court since 2016 and the applicants appear to have lost interest in the case.
 4. I directed the application to be canvassed through written submissions and I have taken note of the submissions filed.
 5. From the record, the matter appears to have come up for hearing several times with the plaintiffs not being present. I see that the case came up for hearing on 9 February 2021 when the court (Onyango J) gave a hearing date of 22 September 2021. For reasons which are not clear on record, the matter again came up before Onyango J on 19 February 2021 and another hearing date, for 12 April 2021, was given. On 12 April 2021 Mr. Omwega, learned counsel for the defendant was present but there was no appearance for Mr. Masese for the plaintiffs. Mr. Omwega informed court that he had been served by court with a hearing notice for 22 September 2021 and he was not in the circumstances ready to proceed. The court's record states that the judge observed that the date was changed by the Deputy Registrar and the court gave the date of 21 July 2021 with direction for the plaintiffs to be served with a hearing notice. The hearing notice was duly served on 13 April 2021.
 6. On 21 July 2021, only Mr. Magara was present holding brief for Mr. Omwega for the plaintiffs. Mr. Magara informed court that he had spoken with Mr. Masese who informed him that he was in Nairobi. He asked for dismissal of the plaintiffs' case and the court obliged. This application was thereafter filed.
 7. As I stated earlier, the application is more or less based on reason that the matter already had a hearing date of 22 September 2021. I am not particularly persuaded by this excuse. Does Mr. Masese mean to say that if a date has been given by court then the court cannot change that date? A court is at liberty to give a date and is also at liberty to change it. The control of the diary and scheduling of dates is a mandate and power given to the court. There is power to give a date and there is also power to change it. When the hearing date is changed it is upon counsel and parties to adjust their diaries accordingly not to refuse to come to court saying that there was an earlier date. If that was to be encouraged then the court will lose its control over the giving and rescheduling of dates which can only bring chaos to the administration of justice.
 8. I find it eye popping for Mr. Masese to depose that him being served with the hearing notice of 21 July 2021 was "illogical". What is illogical about being served with a hearing notice for a date that has been given by the court? In fact that was the logical and reasonable action to take. If Mr. Masese was not served he would have come to court to say that he was never served and the court could not have proceeded in absence of service. I do not see how Mr. Masese can now seek to have the service of the hearing notice upon his firm be turned to his favour and against the party who did the right thing; that would be ridiculous to say the least.
 9. It was the duty of Mr. Masese, as counsel on record, to appear before court on the date given and not take the court for granted and proceed on a frolic. The court was right in proceeding to decline to adjourn the matter.



10. I have every reason to decline this application. However, I observe that this is a case related to land and for proper closure it may be best to have the suit heard on merits. Out of the court's wide discretion as given in Section 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and not because of the flimsy reasons given by Mr. Masese, I will reinstate the case of the plaintiffs. However this will be subject to the plaintiffs paying thrown away punitive costs of Kshs 50,000/= to the defendant within the next 14 days. That is the best I can do for the applicants in the circumstances of this case if they really are interested in having their dismissed case heard. If the costs ordered are not paid within the stipulated time this case will stand dismissed pursuant to the order of 21 July 2021 and the respondent will have the costs of this application. If there will be compliance, the costs paid will suffice as the costs of this application to the respondent who had every reason to oppose the motion.

11. Orders accordingly.

DATED AND DELIVERED THIS 19 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Anyona for the applicants

Mr. Omwega for the respondent

Court Assistant – David Ochieng'

