



**Singh v Mohamed (Environment & Land Case E373 of 2022)  
[2024] KEELC 7293 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7293 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E373 OF 2022  
OA ANGOTE, J  
OCTOBER 31, 2024**

**BETWEEN**

**JAGNEET SINGH ..... PLAINTIFF**

**AND**

**MOHAMED ALI MOHAMED ..... DEFENDANT**

**RULING**

1. Before the Court for determination is the Plaintiff's Notice of Motion dated 29<sup>th</sup> February 2024 and brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 and Order 12 Rule 7 of the Civil Procedure Rules. The Plaintiff is seeking for the following orders:
  - a. Spent.
  - b. The Court be pleased to set aside and/or vary the order made on 28<sup>th</sup> February 2024 at around 11:07 a.m dismissing the Plaintiff's suit for none attendance by the advocate.
  - c. The Court be pleased to reinstate the Plaintiff's suit unconditionally.
  - d. The cost of this application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by Jagjeet Shira, the Plaintiff, who averred that the Plaintiff's suit was listed before Justice Wabwoto at 9:00 a.m on 28<sup>th</sup> February 2023; that he was at his advocates' chambers waiting to attend the hearing; that the matter was called out at around 9:35 a.m and both parties said they were ready to proceed and that it was agreed that the Plaintiff would be heard first on account of his health issues.
3. According to the Plaintiff, when the matter was called out at 10:45 a.m, his advocate informed the Court that they were ready to proceed; that his advocate started facing technical challenges when his microphone and camera refused to go on and that a couple of minutes later, the Plaintiff's advocate informed the Court that the issue had been fixed and was ready to proceed.



4. It is the Plaintiff's deposition that the the Judge informed the advocate that the case had been dismissed as the Defendant's advocate had informed the Court that the Plaintiff's advocate had disappeared and that other cases were ongoing when the suit was dismissed and as such the Plaintiff's advocate could have been heard.
5. The deponent averred that the Plaintiff's advocate tried to get in touch with the Defendant's advocate but his efforts were futile and that based on the foregoing, the suit should be reinstated unconditionally.
6. The Defendant filed a replying affidavit in which he deponed that the hearing was to be held virtually at the request of the Plaintiff's advocate and that at 10:45a.m, when the matter was called out, the Plaintiff's advocate was logged in but his camera was turned off.
7. It was deponed that the issue was brought to his attention by the Court; that he was given time to sort that issue out but the Court opted to proceed with another case as it was taking long and that after thirty or so minutes, the instant matter was called out again but the Plaintiff and his advocate were not logged in as expected.
8. The deponent stated that the Plaintiff's claims that they were trying to fix the camera are untrue as they were neither logged in nor waiting in the lobby. The deponent added that between the time the matter was called out for hearing and when it was dismissed, they did not receive any communication from the Plaintiff's advocate as alleged.
9. The deponent averred that since the matter was filed on 15<sup>th</sup> November 2022, the Plaintiff has been engaging in delaying tactics. The deponent noted that when the matter came up for hearing on 22<sup>nd</sup> November 2023, the Plaintiff's advocate stated that his client was hospitalized, and that when he was asked to present proof of the same before the Court, he stated that the dates on the documents in his possession were illegible.
10. According to the Plaintiff, the Court adjourned the matter to 28<sup>th</sup> February 2024 and stated that it was a last adjournment. It was deponed that the events of 28<sup>th</sup> February 2024 were another attempt by the Plaintiff to obtain an adjournment through the back door as the Plaintiff and his advocate were not online save for when the Plaintiff's advocate stated that they were ready to proceed and even then the advocate's camera was off.
11. The Defendant filed a second replying affidavit sworn by the advocate, Peter M Gichuru and dated 13<sup>th</sup> March 2024. He stated that he was informed by the secretary that the Plaintiff's advocate called long after the Court session had ended and requested the credentials for logging into Justice Wabwoto's Court.
12. In conclusion, the deponent stated that the purported failure of the camera was a ploy by the Plaintiff to get an unwarranted adjournment. It was his view that the Court had rightfully exercised its discretion in dismissing the suit.

### **Analysis and Determination**

13. The Plaintiff has stated that the suit was wrongfully dismissed for want of prosecution as there was no undue delay or lack of prosecution. He relied on Order 17 Rule 2 of the Civil Procedure Rules. It is my view that the above stated Order does not apply to this application because the Court record bears witness to the fact that the suit was dismissed for non-attendance, not for want of prosecution.
14. The instant suit was dismissed on 28<sup>th</sup> February 2024 following a request made by the Defendant's advocate. Before dismissing the suit, the Court noted that the case had a last adjournment. The Court



also noted that the Plaintiff was absent (when his case was called out) and no sufficient reason had been given for the absence.

15. Order 12 Rule 3 of the Civil Procedure Rules provides:

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

16. Order 12 Rule 6(1) provides as follows:

“Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.”

17. Order 12 Rule 7 provides:

“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.”

18. The import of the foregoing sections of the law is that while the Court had discretion to dismiss the suit, the Plaintiff has a right to apply for reinstatement of the suit and setting aside of the impugned judgment. The question now turns to whether the Court should actually reinstate the suit.

19. On the question of reinstating the suit, the Court in *Shadrack Mwirigi Baariu vs Marania Limited* [2018] eKLR stated as follows:

“The Claimant/Applicant seeks the reinstatement of his suit which was dismissed on 7th March 2018 at Meru. The matter was called out and there was no representative for the Claimant and neither was the Claimant in court. The Claimant’s motion is to the effect that the case was called out and when his counsel walked in at 9.09 am, he found the matter having been dismissed. The Respondent is opposed to the reinstatement.

In matters of this nature, the principles enunciated in a long line of precedents is worth mentioning. In the case of *Shah v Mbogo* (1967) EA 166 the Court of Appeal held that the principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are twin. Firstly, there are no limits or restrictions on the judge’s discretion to set aside except that if the judge 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 to it by the rules. Secondly, this discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. This was further reiterated by the Court of Appeal in the case of *Patel v E.A. Cargo Handling Services Ltd* (1974) EA 75 and myriad other notable cases too numerous to enumerate.”

20. The Plaintiff has deponed that the Court should exercise its discretion in his favour because there is sufficient reason to do so. The Defendant on the other hand has submitted that the Court should not exercise its discretion in the Plaintiff’s favour because his conduct is aimed at obstructing justice. There is need to look at the record to determine which of these assertion bears more weight.



21. It is not in contention that the matter came up for hearing on 28<sup>th</sup> February 2024. It is also not in contention that when the matter was first called out, the parties agreed to proceed with the hearing at 10:00a.m.
22. It is further not in contention that when the matter was called out later that morning, the camera of the Plaintiff/his advocate was not working. The Court noted that the matter had been placed aside to give the Plaintiff time to get a gadget with a working camera. At 10:55 a.m, the matter was called out again. The Plaintiff and his advocate were absent.
23. The Defendant’s advocate proceeded to request a dismissal of the suit. This was granted by the Court. The Plaintiff averred that when his advocate finally logged in, he was informed by the judge that the suit had been dismissed.
24. It is my considered view that the above course of events brings the instant application within the purview of “hardship resulting from accident, inadvertence, or excusable mistake or error.” The Plaintiff and his advocate were in Court (virtual) and ready to proceed when the matter was first called out. When the hearing was supposed to proceed, there was a technical error. The Court gave the Plaintiff time to fix the technical error.
25. The Court is under an obligation to conduct its business with due regard to the overriding objectives of the *Civil Procedure Act*. The obligation was still subsisting when the Court asked the Plaintiff/his advocate to fix the technical error. In my view, when the matter was called out at 10:55 a.m and the Plaintiff/his advocate were absent, the Court ought to have enquired about whether the technical issue had been fixed before proceeding to dismiss the suit ex-parte.
26. In view of the foregoing, I find that the order of the Court dismissing the suit for non-attendance has met the requirements of the second limb set out in the Shadrack Mwirigi Baariu Case (Supra) as it imposes undue hardship on the Plaintiff for a technical error that has not been proven to be wilful and is therefore in the circumstances of the case presumed to be accidental or excusable.
27. The first limb in the Shadrack Mwirigi Bariu Case (Supra) requires the Court to do justice to the parties. For the Plaintiff, this means that his case should be heard.
28. In view of the foregoing, I find that to do justice to both parties, the Plaintiff’s suit should be reinstated as the Court did not properly exercise its discretion in dismissing the same. However, it should not be reinstated unconditionally as prayed. The Plaintiff should pay the Defendant throw away costs for the time and effort incurred in attending the hearings on 22<sup>nd</sup> November 2023 and 28<sup>th</sup> February 2024.
29. For those reasons, I allow the application dated 29<sup>th</sup> February 2024 as follows:
  - a. The Order made on 28<sup>th</sup> February 2024 be and is hereby set aside.
  - b. The Plaintiff’s suit is hereby unconditionally reinstated.
  - c. Throw away costs of Kshs 30,000 to be paid by the Plaintiff.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Sansi for Applicant/plaintiff



Mr. Muchoki for Defendant

Court Assistant: Tracy

