



**Otara v Mukuriah & 4 others (Environment & Land Case
E031 of 2022) [2024] KEELC 6969 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E031 OF 2022**

**MAO ODENY, J
OCTOBER 24, 2024**

BETWEEN

AMOS. M. OTARA PLAINTIFF

AND

BONIFACE MUNYINYI MUKURIAH 1ST DEFENDANT

MINISTRY OF DEVOLUTION 2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU 3RD DEFENDANT

LAND REGISTRAR, NAKURU 4TH DEFENDANT

MINISTRY OF LANDS AND PHYSICAL PLANNING 5TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 24th June, 2024 by the Applicants seeking the following orders:
 - a. Spent
 - b. That the court be pleased to review and set aside its directions issued on 20th June, 2024 dismissing the Application dated 30th April, 2024 for non-attendance on the part of the Applicant’s Counsel.
 - c. That the Application be reinstated for hearing on merit.
 - d. That upon reinstatement, the application be allocated a hearing date on priority basis.
2. The application was supported by the annexed affidavit of Prisca Adomeyon sworn on 24th June, 2024 who deponed that applicant filed an application dated 30th April, 2024 which was slated for hearing on 20th June, 2024. She further deponed that she logged into the court link ready to proceed but could not



be heard due to gadget malfunction which is an ICT problem beyond her skills and urged the court to allow the application to reinstate the application for hearing.

3. The Plaintiff filed a Replying affidavit dated 19th July, 2024 where he deponed that when the suit was called out on 20th June, 2024 but his advocates could not see any State Counsel on the court's virtual platform. That the court inquired more than twice whether there was any State Counsel in court but there was no response.
4. It was the Plaintiff's case that if at all the State Counsel had any challenges as alleged, she would have contacted any of the advocates in the matter or on the virtual platform to notify the court of the challenge which she did not and urged the court to dismiss the application with costs.

Applicants Submissions

5. Counsel for the Applicants filed submissions dated 5th August, 2024 and identified the following issues for determination:
 - a. Whether there is a basis for the Court to exercise its discretionary power to set aside the order of 5th August, 2018 and reinstate this suit?
 - b. Whether the Court should set aside the Order for Dismissal?
 - c. Whether the Court should reinstate the Application?
6. On the first issue, counsel submitted that the Applicants have not deliberately sought to obstruct or delay the course of justice and therefore this court should exercise its discretion and reinstate the Application herein to avoid injustice resulting from an error of the advocates. Counsel relied on Section 3A of the *Civil Procedure Act*, Order 51 Rule 15 of the Civil Procedure Rules and the case of Mbogo v Shah [1968] EA 93.
7. On the second issue, counsel submitted that the non-attendance by the State Counsel was not deliberate and it was occasioned by an inadvertent error in gadgets where the counsel holding brief logged in court and could not be heard despite several attempts to seek audience.
8. It was counsel's submission that this oversight should not be visited upon an innocent litigant and relied on Order 12 Rule 3 of the Civil Procedure Rules and the cases of Fran Investments Limited v G4S Security Services Limited [2015] eKLR and Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others [2013] eKLR.
9. On the third issue, counsel submitted that upon learning of the dismissal on 20th June, 2024, she took immediate action and filed the Application to reinstate the application dated 24th June, 2024 which indicates an intention to honestly and faithfully prosecute this matter to its conclusion.
10. Ms. Adomeyon further submitted that this Court has the discretion to set aside the dismissal order and reinstate the Application in order to do justice to the parties before it. Counsel relied on the case of Magunandu Company Ltd v Joyce Wairumu Ngugi & another [2020] eKLR and submitted that the Application will not prejudice the Plaintiff in any manner that cannot be remedied.

Plaintiff's Submissions

11. Counsel for the Plaintiff filed submissions dated 26th September, 2024 and identified the issue for determination as whether the court should review and set aside the orders made on 20th June, 2024 dismissing the application dated 30th April, 2024.



12. Counsel relied on Order 51 rule 14 (3) of the Civil Procedure Rules and the case of Republic vs Chief of General Staff & another [2017] eKLR and submitted that upon being served with the replying affidavit, the Applicants did not file any further affidavit thus the averments in the replying affidavit have not been controverted at all.
13. Mr. Ratemo submitted that the matter was heard to conclusion with the full participation of the applicants and only judgment is pending hence a further delay in this matter would be prejudicial to the Plaintiff. Counsel therefore urged the court for costs and cited the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR.

Analysis and Determination

14. The issue for determination is whether the court should review and set aside the directions made on 20th June, 2024 dismissing the application dated 30th April, 2024 for non-attendance on the part of the Applicant's counsel.
15. The Application is brought under provisions of Order 12 Rule 7 of the Civil Procedure Rules which stipulates 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.
16. In the case of Shanzu Investment Ltd v Commissioner of Lands [1993] eKLR, the Court pronounced as follows:

“The Court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied must be done on terms that are just: Patel v EA Cargo Handling Services Ltd, (1974) EA 75, 76B, C (CA-K). The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The test for the exercise of this discretion are these: - First, was there a defence on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?”
17. Similarly, in the case of Josephine Lunde Matheka v Gladys Muli [2018] eKLR the court stated as follows:

“This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. See Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.”
18. In the case of Patel v. E.A. Cargo Handling Services Ltd [1974] E.A. 75 the court stated that:

“There are no limits or restrictions on the judge's discretion except that if he 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.”

19. The Applicants have informed the court that the non-attendance by the State Counsel was not deliberate as it was occasioned by an inadvertent error in gadgets where the counsel holding brief logged into the court link and could not be heard despite several attempts in seeking audience. The application was also filed timeously without undue delay. There is no evidence that the plaintiff will suffer any prejudice if the application is allowed
20. I have considered the application, the submissions by counsel, the relevant authorities and find that the application has merit hence is therefore allowed as prayed. Applicant to fix a date for hearing of the application dated 30th April 2024 within 7 days. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

