



**Mwinzi v Kamau & 2 others (Environment & Land Case 18 of 2011)
[2024] KEELC 13315 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 18 OF 2011
A NYUKURI, J
NOVEMBER 20, 2024**

BETWEEN

JOSHUA MUTEMI MWINZI PLAINTIFF

AND

PETER KIMANI KAMAU 1ST DEFENDANT

SIMON WAINAINA KIMANI 2ND DEFENDANT

GEOFFREY KARIUKI 3RD DEFENDANT

RULING

1. Before court is a notice of motion dated 6th June 2022 filed by the plaintiff seeking orders that the order made on 9th February 2022 dismissing this suit for want of prosecution be set aside and the suit be heard on merit. The application is premised on the supporting affidavit sworn by Joshua Mutemi Mwinzi, the plaintiff on 6th June 2022. The applicant's case is that he was not aware that the matter was coming up on 9th February 2022 when it was dismissed for want of prosecution due to the failure of his advocate to fix it for hearing. He urged the court not to punish him for his advocate's mistakes saying his advocate kept telling him to wait for him to act on the matter.
2. No response was filed in regard to the application.

Analysis and determination

3. The court has considered the application and the only issue that arise for determination is whether the applicant deserves orders setting aside orders dismissing the suit herein for want of prosecution.
4. Order 12 Rule 7 of the Civil Procedure Rules provides for the jurisdiction of this court to set aside or vary an order dismissing a suit for want of prosecution 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.

5. Therefore, where the plaintiff fails to attend court on the hearing date and the suit is dismissed for want of prosecution, the court has the discretion to set aside such dismissal orders on terms that are just. The applicant should therefore explain to the court's satisfaction the reason for non attendance.
6. In this case, this matter came up for hearing on 9th February 2022. The parties were served by the court bailiff to appear on that date. Counsel for the plaintiff was duly served, as the record shows. However, on 9th February 2022, the plaintiff and his advocate failed to attend court resulting in dismissal of the suit for want of prosecution. The plaintiff has explained that he was not aware of the hearing date as his counsel then on record did not inform him of the same. This position is not rebutted and therefore the court agrees with the plaintiff that failure by counsel to inform the plaintiff of the hearing date was a mistake by the plaintiff's advocate and the consequences of the same should not be visited on the plaintiff. On the hearing date, the defendants were also not in court and it is therefore clear that they will not suffer prejudice if the dismissal orders are vacated.
7. In the premises, this court finds that the plaintiff's application dated 6th June 2022 is merited and the same is hereby allowed as follows;
 - a. The orders made on 9th February 2022 dismissing the suit herein for want of prosecution are hereby set aside, and the plaintiff's suit is hereby reinstated for hearing and determination on merit.
 - b. There is no order as to costs.
8. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;**

Ms. Makau holding brief for Mr. Mutia for applicant

No appearance for respondents

Court assistant – Josephine

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