



**Kang’ethe v Nkirote (Environment & Land Case E012 of 2022)
[2024] KEELC 7383 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E012 OF 2022**

CK YANO, J

NOVEMBER 8, 2024

BETWEEN

DANPHONE KAMUNA KANG’ETHE PLAINTIFF

AND

JENNIFER NKIROTE DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 30th October, 2023 by the plaintiff/applicant brought under Order 12 Rule 7 Order 51 Rule 1 & 13 of the Civil Procedure Rules 2010 Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 and all enabling provisions of the Law. The applicant seeks that the Court sets aside, vary and/or review its orders made on 26th September, 2023 and reinstate the case for hearing on its merits and that costs of the application be provided for.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Danphone Kamuna Kangethe, sworn on 30th October, 2023. The applicant avers that on 26th September, 2023 the court dismissed the case for want of prosecution. That he was not present on the day of the hearing to give evidence because he was indisposed and the case was dismissed on that basis.
3. The applicant states that he is 73 years old and has been frail over a long period of time and that he is constantly ill and bedridden. The applicant has annexed a copy of his identity card marked “DKK1”.
4. The applicant avers that his advocates on record had informed him of the date of the hearing and he was prepared to attend court for the hearing of the same but unfortunately on 24th September, 2023 he suddenly developed illness due to his frail state and became bedridden. That through his son Pius Karanja Kamuna, he informed his advocates on record of his predicament and therefore his inability to be available for the hearing.



5. The applicant states that on 25th September, 2023, he sought treatment and has annexed a copy of the statement record marked “DKK2”. That his failure to attend court was neither deliberate nor intentional but was caused by his indisposition as stated above.
6. The applicant states that he is advised by his advocate that it is within the general discretion of the court to set aside any orders so long as sufficient cause has been shown for the exercise of such discretion. That the court will only exercise such discretion if to do so would serve a useful purpose.
7. The applicant states that in this matter, an exercise of discretion in his favour would serve the purpose of him prosecuting his claim for retention of a parcel of land he has been staying on for 42 years. That the defendant will suffer no prejudice as he too will participate in a case that is being heard on its merits. The applicant states that he is ready and willing to abide by any timelines the court may impose if he is successful in the application.
8. The applicant urged the court not to drive him out of the seat of justice.
9. The defendant filed a replying affidavit dated 27th November, 2023 in which she opposed the application. The defendant states that she is advised by her counsel that the said application together with the supporting affidavit annexed thereto is a waste of the court’s valuable time and is an abuse of the process of court and in any event spurious and unmeritorious hence the same ought to be struck out forthwith.
10. The defendant states that it is absolutely spurious that the applicant was under treatment and bedridden on the date the matter came for hearing. That the truth of the matter and from the documents annexed by the plaintiff/applicant as “DKK 2”, it shows clearly that the plaintiff was treated as an outpatient and issued with drugs on the 25th September, 2023 while hearing of the suit was scheduled for 26th September, 2023 hence the applicant was not bedridden on the day of the hearing as alleged in his application.
11. The defendant avers that the applicant’s counsel was given several chances to avail the witness which he failed to do which led the court to dismiss the suit with costs to the defendant.
12. The defendant states that she is advised by her advocates on record that dismissal of a suit for non-attendance by the plaintiff/applicant or for want of prosecution dismissing the suit with costs to the respondent on 26th September, 2023, the court became *funtus officio* and the court cannot re-open the said matter because once the court has made its final decision it has no jurisdiction to re-open the suit upon which its decision was made. That by asking the court to review the said decision and/or decree the plaintiff/applicant is asking the court to sit on its own appeal which is a scenario not allowed in law. That the court is *funtus officio* having dismissed the plaintiff’s suit and having concluded the matter herein and therefor the only remedy available for the applicant is an appeal.
13. The defendant states that, notwithstanding, the application does not fall within the statutory requirements for review under Order 45 Rules 1,2 and 3 which requires that there should be discovery of new and important matters or evidence, mistake or an error apparent on the face of the record. That the plaintiff/applicant has not shown diligence and interest since the filing of the suit as he did not appear in court occasionally when the matter was mentioned.
14. The defendant contends that the parcel of land is no longer in her possession as the legal representative of the deceased estate as the same was subdivided to all beneficiaries upon determination of Githongo Succession Cause No. 33 of 2019 and the said beneficiaries have taken possession of the subject land and they are not parties to the present proceedings and that no adverse orders should be made against parties not in the suit. The defendant has annexed a copy of the green card Marked “JN- 1.”



15. The defendant states that the plaintiff has not proffered any explanation as to why he did not attend court while he was well aware of the hearing date but chose not to attend court when required.
16. The defendant states that the application is irregularly in court and fatally defective since an applicant in an application for review ought to have annexed a formal extract decree and or order in respect of which the review is sought as a prerequisite. That no such decree or order has been annexed.
17. The defendant states that the application by the applicant is defective, bad in law and the same should be dismissed with costs to the defendant/respondent
18. By way of a rejoinder, the applicant filed a supplementary affidavit dated 22nd July, 2024. He states that he was taking the medicine that had been prescribed at the hospital and was bedridden as the doctor's orders on the treatment card were for him to avoid strenuous work for one week.
19. The applicant's contention is that the defendant is confusing the provisions of Order 17 Rule 2(1) with those of Order 17 (7), the latter which expressly gives the court jurisdiction to set aside an order of dismissal. That in the application he sets out the Orders of the Civil Procedure Rules Under which he brought his application and none of them referred to Order 45 quoted in the replying affidavit.
20. The applicant avers that it is not true that any person has taken possession of the piece of land he is residing on as he is still in situ in the premises.
21. The application was heard by way of written submissions which were duly filed by both parties and which I have read and considered and I need not reproduce them herein.

Analysis and Determination

22. I have carefully considered the application as presented, the replying affidavit and the submissions made by counsel for both the plaintiff and defendant. The only issue for determination is whether the orders dismissing the suit on 26th September, 2023, should be set aside and the suit reinstated for hearing on merit.
23. The constitutional underpinning on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*, which provides as follows:-

Judicial authority

- (1) Judicial authority is derived from the people and vest in, and shall be exercised by the courts and tribunals established by or under this constitution.
- (2) In exercising judicial authority, the court and tribunals shall be guided by the following principles-
 - (a) Justice shall be done to all irrespective of status
 - (b) Justice shall not be delayed:
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) Justice shall be administered without undue regard to procedural technicalities, and
 - (e) The purpose and principles of *the Constitution* shall be protected and promoted.
- (3) Traditional dispute resolution mechanisms shall not be used in a way that



- (a) Contravenes the Bill of Rights.
- (b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
- (c) Is inconsistent with this constitution or any written law.”

24. It is the duty of the court, litigants as well as advocates, to ensure that matters are concluded expeditiously, without inexcusable delay. Sections 1A and 1B of the *Civil Procedure Act* Cap 21, Laws of Kenya are relevant, with regard to this and they state as follows-;

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objectives specified in subsection (1).
- (3) a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objectives of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

1B. Duty of court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the court’
 - (c) the efficient use of the available judicial and administrative resources’
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

25. Section 3A of the *Civil Procedure Act* gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it or non attendance Section 3A reads-;

“3A saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

26. This matter had been fixed for hearing on 26th September, 2023. On that day, the plaintiff was absent and the plaintiff’s counsel sought for an adjournment on basis that his client was unwell. Since there was no evidence to support the alleged illness the court declined to grant the adjournment and subsequently dismissed the suit with costs to the defendant as provided under Order 12 Rule 3(1) of the Civil



Procedure Rules. Order 12 Rule 7 allows an aggrieved party to set aside an order of dismissal and reinstate the suit upon such terms as may be just. That is what the plaintiff/applicant has now done.

27. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac Vs Kembu Farm Ltd & another* [2018] eKLR (J N. Mulwa J) which echoed the decision of the court in *Shah Vs Mbogo & another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion;

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

28. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In *Mobile Kitale Service Station Vs Mobil Oil Kenya Limited & another* [2024 (Warsame J) where it was held:

“I must say that the courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

29. In this application the reason given by the plaintiff is that he was unwell. He has exhibited some medical documents. The reason put forward by the plaintiff to explain his non-attendance on the date of hearing corresponds with that given by his counsel at the time. In my view the explanation given is satisfactory. I will therefore exercise my discretion and set aside the orders made on 26th September, 2023 and reinstate the suit for hearing on its merits. In my view, no prejudice will be occasioned to the respondent as he can be compensated by way of costs. It is fair and just to allow the application so as to give the parties a chance to have the matter heard and determined on merit.

30. Consequently, the application dated 30th October, 2023 is allowed. Costs shall be in the cause.

31. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF NOVEMBER, 2024.

IN THE PRESENCE OF

Court assistant – Tupet

Ms Otieno for defendant

No appearance for Mungania for plaintiff

C.K YANO

ELC JUDGE

