



**Kanja & 4 others v M’kanake (Environment and Land Miscellaneous Application E001 of 2023) [2024] KEELC 13577 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13577 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023**

**CK YANO, J**

**DECEMBER 5, 2024**

**BETWEEN**

**REGINA KANJA ..... 1<sup>ST</sup> APPLICANT  
JOSEPH KIREMA ..... 2<sup>ND</sup> APPLICANT  
JOHN MUROKI ..... 3<sup>RD</sup> APPLICANT  
ELIZABETH KAGENDO ..... 4<sup>TH</sup> APPLICANT  
CHARLES MUTETHIA ..... 5<sup>TH</sup> APPLICANT**

**AND**

**JOYCE NCORORO M’KANAKE ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated 26<sup>th</sup> February, 2024, the appellants/applicants are seeking to have the order of the court made on 1<sup>st</sup> February, 2024 striking out the appeal set aside and reinstate the appeal for hearing on merits. The application is brought pursuant to order 51 Rule 1 and Order 12 Rule 7 of the *Civil Procedure rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Article 159 (2) of *the Constitution* of Kenya 2010 and all other enabling provisions of the law and is premised on the grounds listed thereon and further supported by the affidavit of Sally Nyambego Advocate sworn on 26<sup>th</sup> February, 2024.
2. The applicants state that on 1<sup>st</sup> February, 2024, this court struck out the appeal for non- attendance. The applicants aver that their counsel misdiarized the date given in court and as such was unable to attend court. That they have all along been willing to prosecute the appeal and regret the failure to attend court.
3. The applicants are pleading with the court to give them an opportunity to be heard to meet the ends of justice. That section 1A and 1B of the *Civil Procedure Act* and Article 159(2) of *the Constitution*



- embody the concept of rendering substantive justice in a just and expedient manner. That the court has discretion to set aside the impugned orders and it is only fair and just that the application be allowed to serve the ends of justice.
4. The applicants state that no prejudice shall be suffered by the respondent if the orders sought are granted, adding that the application has been brought without any unreasonable delay.
  5. The deponent explained that she did not diarize the date, hence did not attend court on 1<sup>st</sup> February, 2024. A copy of the diary has been annexed. Counsel for the applicants states that her reason for failure to attend court was as a result of her oversight.
  6. The application is opposed by the respondent through her replying affidavit dated 13<sup>th</sup> March 2024. It is the respondent's contention that the application lacks merit and is an abuse of the court process and ought to be dismissed with costs.
  7. The respondent avers that the application has been brought before court after approximately 27 days which the respondent termed too late in the day since the court justly dismissed the matter. The respondent further states that the applicants seek to reinstate a non-existent appeal. It is also contended that the supporting affidavit by Sally Nyambego is bad in law and should be struck out on the ground that it offends the provisions of Order 19 rule 3 and rule 9 of the Advocates Practice Rules which states that advocates should not be allowed to swear affidavits in contentious matters. The respondent further states that the defendants (sic) advocate has not filed any authority granting her power to swear any affidavit or pleading on behalf of the defendant(sic) herein, hence the affidavit of Laboso Sharon ought to be struck out as it offends the same rules.
  8. It is the respondent's contention that the application ought to be dismissed with costs as the applicants have failed to furnish sufficient cause as to why they themselves or their advocates on record failed to attend court on 1<sup>st</sup> February, 2024.
  9. The application was canvassed by way of written submissions. However, only the applicants filed their submissions dated 3<sup>rd</sup> September, 2024 through the firm of Kiautha Arithi & Co. advocates. The firm of Gikonyo & Ngugi Advocates for the respondent were duly served, but did not file submissions either within the time granted by the court or at all. The court has read and considered the submissions filed and I need not reproduce the same in this ruling.
  10. The court has considered the application, the response and the submissions filed. This matter was initially filed in the High court at Meru as misc. Civil Application No. E098 of 2023. On 5<sup>th</sup> March, 2023, the matter was transferred to this court and was registered as ELC Misc No. 1 of 2023. The record shows that on 18<sup>th</sup> January, 2024, the firm of Kiautha Arithi & co. Advocates for the applicants fixed the matter for directions before this court on 1<sup>st</sup> February, 2024. When the matter came up on that date, there was no appearance by any of the parties. The court proceeded and dismissed the matter for non attendance. Now the applicants have filed an application seeking to set aside the orders of dismissal and reinstate the matter for hearing on merit.
  11. Order 12 Rule 3 of the [Civil Procedure Rules](#) allows the court to dismiss a suit for non- attendance while rule 7 allows an aggrieved party to set aside that order and reinstate the suit or application upon such terms as may be just.
  12. In the instant case, the reason given by the applicants' counsel is that she did not diarize the date, hence the failure to attend court.
  13. I am persuaded that the applicants have proffered a satisfactory explanation for failing to attend court on 1<sup>st</sup> February, 2024. The respondent has also not demonstrated what prejudice she is likely to suffer



if the order of dismissal is set aside and the matter is reinstated for hearing and determination on its merits. On the contrary, it is the applicants who would be greatly prejudiced by being driven from the seat of justice without a hearing if the matter is not reinstated. I am also not persuaded by the respondent's argument that the affidavit sworn by Sally Nyambego Advocate for the applicants is bad in law. The rules cited allow advocates to swear affidavits on some matters, including one such as this. It is the advocate who took the date and failed to diarize and therefore, they are the only ones who could give an explanation for their non-attendance. I also find that the application was filed timeously as the dismissal order was made on 1<sup>st</sup> February, 2024 while this application was filed on 27<sup>th</sup> February, 2024, which is a period of about 27 days.

14. Consequently, it is my finding that the application dated 26<sup>th</sup> February, 2024 is merited. The same is allowed and the order made on 1<sup>st</sup> February, 2024 is set aside. The application dated 30<sup>th</sup> August 2023 is reinstated for hearing and determination on the merits.
15. Each party to bear their own costs of the application.
16. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024**

**C.K YANO**

**JUDGE**

In The Presence Of

Court Assistant – Lenah

Gikunda holding brief for Nyaga for applicants

No appearance for respondent

