



REPUBLIC OF KENYA



KENYA LAW
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**Sketty v Bwana & 10 others (Environment & Land Case
213 of 2019) [2023] KEELC 211 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 213 OF 2019
NA MATHEKA, J
JANUARY 25, 2023**

BETWEEN

MUNIR MOHAMED SKETTY PLAINTIFF

AND

MUDATHIRI SOMOE BWANA 1ST DEFENDANT

OMAR FARAJA ALIAS SACHMO 2ND DEFENDANT

FARUK REISAL 3RD DEFENDANT

MUSA FRANCIS 4TH DEFENDANT

YUSUF IMAM 5TH DEFENDANT

DAUD MAHMOUD 6TH DEFENDANT

HAMZA MOHAMED 7TH DEFENDANT

BASS ALI 8TH DEFENDANT

ALI DODO 9TH DEFENDANT

NASSIR KETE 10TH DEFENDANT

ADNAN SWADIK 11TH DEFENDANT

RULING

1 The application is dated August 31, 2022 and is brought pursuant to section A, 1B and 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya, order 51 of the [Civil Procedure Rules, 2010](#) seeking the following orders;



1. That the order of the honourable court made on May 26, 2022 dismissing the suit for non-attendance be reviewed, varied and/or set aside.
 2. That the suit by the plaintiff commenced by way of the plaint filed in court on November 29, 2019 be reinstated for hearing and determination on merits.
 3. That the costs of this application be in the cause.
- 2 It is based on the grounds that the order made by this honourable court on May 26, 2022 for the dismissal of the suit was made through no fault or wrongdoing on the part of the plaintiff, but was made on account of the non-attendance of the advocate on record for the plaintiff. That reason as to why the advocate on record for the plaintiff did not attend court on May 26, 2022 when the matter came up is because his advocates on record were not served with the date of May 26, 2022, and as such, were not aware that the matter had been scheduled to come up before court on the said date. That it is evident from the court record that on March 22, 2022, the matter came up before court for mention for directions whereupon the court rescheduled the matter to May 26, 2022 and directed the honourable deputy registrar to serve the said date upon the parties. That as at the time when directions were issued for service of the date upon the parties, the relationship between the plaintiff and his former advocates M/S Barayan & Associates Advocates had been severed. More particularly, the plaintiff was being represented by the firm of M/s J P Ngoya & Austine Advocates LLP. That consequently, the mention notice of May 26, 2022 was not served upon the firm of M/S J P Ngoya & Austine Advocates LLP, and as such, the plaintiff and his advocates were not aware of the proceedings of May 26, 2022, which then explains the absence from court on the subject date. That the plaintiff and his advocates on record only became aware of the dismissal of the suit upon the filing of the application dated August 22, 2022 which is seeking the leave of the court to amend the plaint on record. That failure to attend court on May 26, 2022 on the part of the plaintiff was not intentional, it was inadvertent, and an honest mistake which should not be meted upon the plaintiff. That the plaintiff and his advocates on record register their profound apologies to the court, and urge this honourable court to grant the plaintiff a chance to be heard and to vindicate his claim through hearing on merits. That the foregoing has rendered this application necessary, and this honourable court is awash with the discretion to issue the orders sought. That it is therefore in the interest of justice that this application be allowed.
- 3 This court has considered the application and the supporting affidavit. This suit was dismissed for non-attendance of the plaintiff/applicant when it came up for mention on the May 26, 2022. Thus, the relevant law governing setting aside judgment or dismissal is order 12 rule 7 of the [Civil Procedure Rules](#). It provides as follows;

Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”

- 4 It is crucial for the applicant to prove that non-attendance in court was not deliberate but occasioned by reasonable excuse or omission. It is however noteworthy that to grant or not to grant an order for reinstatement of a dismissed suit is within the discretion of the court. In the case of [Kenya National Private Service Workers Union v Security Guards Services Limited \(2019\) eKLR](#) the court stated that;

It is trite that, the court exists to do justice to all the parties and it has unfettered discretion to set aside its judgments upon terms. In [Shah v Mbogo and another \[1966\] EA 166](#), Harris J set out the guiding principle on a Judge’s discretion in setting aside a judgment, thus:

“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained exparte. This discretion is intended to be exercised to avoid



injustice or hardship resulting from accident, inadvertent 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.”

- 5 The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo (1979) EA 116* quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu (2019) eKLR*, where that court held that;

.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

- 6 In the instant case the plaintiff/applicant stated that the reason as to why the advocate on record for the plaintiff did not attend court on May 26, 2022 when the matter came up is because his advocates on record were not served with the date of May 26, 2022, and as such, were not aware that the matter had been scheduled to come up before court on the said date. That on March 22, 2022, the matter came up before court for mention for directions whereupon the court rescheduled the matter to May 26, 2022 and directed the honourable deputy registrar to serve the said date upon the parties. That as at the time when directions were issued for service of the date upon the parties, the relationship between the plaintiff and his former advocates M/S Barayan & Associates advocates had been severed. More particularly, the plaintiff was being represented by the firm of M/s J P Ngoya & Austine Advocates LLP. I find that the applicant has sufficiently demonstrated why he did not have representation when the court came up in court the second time. In the premises I allow the applicant’s application dated August 31, 2022 and set aside the order of May 26, 2022 dismissing the suit and is hereby reinstated for hearing on merit with no orders as to costs as the same was undefended.

- 7 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2023.

N A MATHEKA

JUDGE

