



**Ndambiri & another v Wawira & 4 others (Environment & Land Case 19 of 2021) [2023] KEELC 16070 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16070 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 19 OF 2021  
EC CHERONO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**EPHANTUS NJOGU NDAMBIRI ..... 1<sup>ST</sup> PLAINTIFF**

**HILDA WANJIRU IKAHU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ELENEO MUCHIRI WAWIRA ..... 1<sup>ST</sup> DEFENDANT**

**JAMES NDEGE NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**FELIX NDAMBIRI NJUI ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIRINYAGA ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, COUNTY GOVERNMENT OF KIRINYAGA .... 5<sup>TH</sup>  
DEFENDANT**

**RULING**

- 1 The application before me is the notice of motion brought under certificate of urgency dated September 20, 2021 brought by the plaintiffs'/applicants' seeking the following orders;
  1. (Spent)
  2. That this honourable court be pleased to set aside the orders made on September 20,2021 dismissing the application dated June 8, 2021 for non-attendance
  3. That this honourable court be pleased to reinstate the said application for hearing and determination on merits.
- 2 The application is supported by the affidavit of George Morara Gori and grounds apparent on the face of the said application. In his supporting affidavit, the learned counsel stated that the notice of motion



application dated June 8, 2021 had been fixed for hearing on September 20, 2021 but he got late and found the application had been dismissed. He stated that the reasons for being late was due to transport problem on the road leading to the court premises.

- 3 The deponent further deposed that his failure to attend court in time should not be visited on the plaintiff/applicant and that the respondents/defendants will not suffer any prejudice which cannot be compensated by an award of costs if the application is allowed.
- 4 The application is opposed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants who filed a joint replying affidavit sworn on January 31, 2022. According to the two respondents, the explanation given by counsel for the plaintiff/applicant is not plausible and convincing

### **Analysis and determination**

- 5 I have considered the application under review, the affidavits both in support and in opposition thereto and the rival submissions. This application is brought under order 12 rule 7 & 51 of the CPR as well as sections 1A 1B, and 3A CPA. order 12 rule 7 provides as follows;

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

- 6 From my interpretation of the law and the rules set thereunder, setting aside of a judgment or dismissal order entered or issued for non-attendance by either the plaintiff or the defendant is a discretion to be exercised by a judge upon satisfying himself/herself that reasonable explanation or grounds has been given for non- attendance when the judgment was entered or the dismissal order was made. On September 20, 2021, the notice of motion application dated June 8, 2021 came up for hearing. Being the hearing of an interlocutory application and the parties were represented by counsel meant that they need not attend court unless necessary or expressly directed by the court. In this case, the plaintiff/applicant was represented by mr. gori advocate who was absent during the hearing of the said interlocutory application. When the application was called out and only counsel for the defendants/ respondents was present and after calling out the matter inside and outside the court house and there being no response and no explanation for the absence of counsel for the applicant, this honourable court dismissed the same for want of prosecution. The learned counsel in his affidavit in support of this application has deposed that he got late to court due to closure of transport problem on the road. The learned counsel did not attach a copy of the closure of alleged road or better still, a photograph of any notice of closure. If the learned counsel was aware of the alleged problem, he should have avoided the same by either coming early or spending the night in a guest house near the court house.
- 7 Since the reasons for failing to attend court on September 20, 2021 is not satisfactory, the same is rejected. Bearing in mind that the application which was dismissed was interlocutory in nature and considering that the respondent will not suffer any prejudice which cannot be remedied by an award of costs, I find the said application dated June 8, 2021 merited and the same is hereby in the following terms;
  1. The orders made by this honourable court on September 20, 2021 dismissing the application dated June 8, 2021 for non-attendance/want of prosecution be and is hereby set-aside.
  2. That the said application be and is hereby reinstated subject to terms set out in paragraph 3 below.



3. The firm of Gori, Ombongi & Company Advocates to pay the 1<sup>st</sup> and 3<sup>rd</sup> defendants/ respondents thrown away costs assessed at Kshs 10, 000/= within 7 days from the date of this ruling.

**READ, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 28<sup>TH</sup> FEBRUARY, 2023.**

**HON. E.C CHERONO ELC JUDGE**

In the presence of;

Milcent Small H/B for Beaco for 4<sup>th</sup> Defendant

M/S Ndungu H/B for Mrs Makworo for 1<sup>st</sup> & 3<sup>rd</sup> Defendants

Plaintiff/Advocate-absent.

