



Gitau & another (Suing as Trustees of Full Gospel Churches of Kenya) v Ocholla & 2 others (Environment & Land Case 171 of 2018) [2023] KEELC 15850 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 171 OF 2018
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

**BISHOP GEOFFREY MUTHECA GITAU 1ST PLAINTIFF
BISHOP ELI ROP 2ND PLAINTIFF
SUING AS TRUSTEES OF FULL GOSPEL CHURCHES OF KENYA**

AND

**HON. OKOTH OCHOLLA 1ST DEFENDANT
THE ATTORNEY GENERAL 2ND DEFENDANT
REV STEPHEN MBOGO NJUE 3RD DEFENDANT**

RULING

1. Before this court for determination is the plaintiffs' (hereinafter applicants') notice of motion dated May 9, 2022 and brought under section 1A, 1B & 3B of the *Civil Procedure Act*, order 51 rule 1 and order 12 rule 7 of the *Civil Procedure Rules*, 2010. The Applicants are seeking for the following orders:
 - a. The Court be pleased to set aside the order made on 16th December 2021 dismissing the suit.
 - b. The Court be pleased to reinstate this suit and the same proceed for hearing and final determination on merit.
 - c. Costs of this application be in the cause.
2. The application is based on several grounds and the affidavit of Bishop Eli Rop, who deponed that the suit was filed on 13th April 2018; that the 3rd Defendant entered appearance and filed a Defence and that the 1st and 2nd Defendants did not file Defences.



3. According to the Plaintiffs, the matter was to be heard on 16th April 2020 but Covid-19 interrupted the Court schedule; that on 25th April 2022, the Applicants received a letter from the Court dated 4th April 2022 which indicated that the suit had been fixed for hearing on 16th December 2021 and that other than the said letter, no hearing notice was issued and that is why they did not appear in court.
4. The 1st Plaintiff deponed that the non-appearance was not deliberate as they did not know of the date; that the notice was served through jimwangiadvocates@gmail.com while the advocate's email address is jimwangiadvocate@gmail.com and that the matter should be heard on merit as some people have illegally encroached on a portion of the church's land.
5. The 3rd Defendant (hereinafter Respondent) filed a Replying Affidavit in which he deponed that the Applicants had lost interest in prosecuting the suit; that he had been following it up and served them with a hearing notice dated 7th December 2021 on the email address - jimwangiadvocates@gmail.com and that the judge exercised his jurisdiction judiciously in dismissing the suit for want of prosecution.
6. The Applicants while submitting relied on the case of *Pithon Waweru Maina vs Thuka Mugiria* [1983] eKLR where the cases of *Patel vs EA Cargo Handling Services Ltd* [1974] EA 75 and *Shah vs Mbogo* [1967] EA 116 were quoted. The Applicant urged the Court to exercise its discretion and reinstate the suit because they stand to suffer irreparable harm if that does not happen.
7. Additionally, it was submitted, the non-appearance of the Plaintiffs' representative was no fault of their own but a mistake on the part of the Defence counsel who sent the hearing notice to the wrong email address.
8. The 3rd Respondent submitted that the Applicant was duly served with the hearing notice on their email address and that the Court should dismiss the application as the Applicants had not proven any mistake, accident or error that would warrant the Court to exercise its discretion.

Analysis and Determination

9. The decision on whether a suit should be reinstated is a matter of judicial discretion and is dependent on the facts of each case. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

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

The courts have elaborated on what terms are just. In the case of *Patel vs EA Cargo Handling Services Ltd* [1974] EA which was quoted in *Pithon Waweru Maina vs Thuka Mugiria* [1983] eKLR, the court held as follows:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

10. In the case of *Shah vs Mbogo* [1967] EA 116 which was also quoted in the *Pithon Waweru* Case (supra) it was stated that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person



who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

11. The Applicants have invited the Court to exercise its discretion in reinstating the suit. I find that there is a just cause to reinstate the suit. The Applicants have proven on a balance of probabilities that their non-appearance on 16th December 2021 was due to an excusable mistake.
12. Indeed, it is not in dispute that the 3rd Respondent’s advocate sent the hearing notice to the wrong email address, that is jimwangiadvocates@gmail.com not jimwangiadvocate@gmail.com. The Applicants could not have been reasonably expected to receive a notice that was sent to the wrong email address.
13. That being the case, I allow the application dated 9th May 2022 as follows:
 - a. The order made by this court on 16th December 2021 dismissing the suit is hereby set aside.
 - b. The Court hereby reinstates this suit and the same shall proceed for hearing and final determination on merit.
 - c. Costs of this application be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Irungu for Mwangi for Plaintiff/Applicant

No appearance for Defendant

Court Assistant: June

