Njenga & another v Dean & 7 others (Civil Suit 213 of 2009)
[2025] KEHC 9219 (KLR) (Commercial and Tax) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9219 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 213 OF 2009

H NAMISI, J

JUNE 26, 2025

BETWEEN

JAMES RAYMOND NJENGA ..... 1ST PLAINTIFF

JAMES NJENGA MUNGAI ..... 2ND PLAINTIFF

AND

SALAV DEAN ..... 1ST DEFENDANT

MRS. SALAV DEAN ..... 2ND DEFENDANT

MR. Z. I DEAN ..... 3RD DEFENDANT

MRS. Z. I DEAN ..... 4TH DEFENDANT

MRS. NADAA DEAN BUTT ..... 5TH DEFENDANT

MRS. NAGIS DEAN ..... 6TH DEFENDANT

AZIZ HARDERAL JESSA ..... 7TH DEFENDANT

MARIANNE PREDIGER DEAN ..... 8TH DEFENDANT

RULING

1. By Notice of Motion dated 7 June 2024, the Applicants seeks the following orders:
   i. Spent;
   ii. That this Honourable Court be pleased to set aside orders issued on 23 July, 2021 marking this matter/file closed/dismissed and reinstate the suit herein, which was dismissed for non-attendance;

iii. That upon reinstatement, the said suit be certified as of utmost urgency and be heard on a priority basis;

iv. That costs of this application be provided.

2. The Application is premised on the following grounds:

i. That the Honourable Court dismissed the Applicant's Application for non- attendance on 23 July 2021;

ii. That when the date for hearing of the suit was given as 23 July 2021 Counsel for the Plaintiff/ Applicant who obtained the date and documents from Court, mistakenly wrote 23 August 2021 which wrong date was communicated to the Plaintiff/Applicant and the firm;

iii. That on the 23 July 2021 when the said application was due for hearing, neither the Plaintiff nor the lawyer was present in Court;

iv. That on the said date, written on the firm diary, the Applicants found the case not listed in which they took a prudent visit to the court's registry to trace the said matter but were informed that the Application was dismissed on 23 June 2021 for non attendance;

v. That failure to attend court on the material day on 23 July 2021 was due to inadvertence and occasioned by factors beyond the Applicant's Counsel control;

vi. That an order for dismissing/closing the Application was made on that day for non-attendance, and it was made through no fault or wrong doing on the part of the Plaintiff/ applicant;

vii. That the inadequacy/ and improficiency of the Counsel should not be visited upon the innocent Plaintiff/Applicant who is very much interested in expeditiously pursuing this matter to its logical conclusion;

viii. That the Plaintiff/Applicant at all times has been interested in prosecuting the matter to its conclusion; the Defendants have been the one's absconding Court attendance;

ix. That it is the interest of justice and equity that the order dismissing/closing the file/matter on 23 July 2021 be set aside and the same be reinstated for hearing/further directions by the Honorable Court on its merit;

x. That the Plaintiffs had been unwell during this period however on notice of the matter being dismissed they prompted for reinstatement of this suit as swiftly as possible;

xi. That the Respondent will not suffer any prejudice if the said Application is reinstated;

xii. That it is only in the interest of justice that this Application be allowed and the prayers sought granted ex debito justitiae.

3. The Applicants have filed a Supporting Affidavit, reiterating the grounds on the face of the Application.

4. The Respondents filed a Replying Affidavit vehemently opposing the Application, averring that the same lacks merit, is bad in law and an abuse of the court process. The Respondents averred that the delay is prolonged and inexcusable, and the Applicants have not provided any reasonable or sufficient explanation other than casual statements.

5. The Application was canvassed by way of written submissions.

6. The Applicant relied on the case of *Belinda Murai & Others - v- Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

7. The Applicant submitted that the Court must caution itself not to exercise its discretion in a manner that will result in an injustice. The Applicant placed reliance on the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice."

8. Lastly, the Applicant relied on the case of *Mwangi S. Kimenyi v Attorney General & Kenya Institute for Public Policy Search and Analysis (KIPRA)* (Miscellaneous Civil Suit 720 of 2009) [2014] KEHC 4220 (KLR) (Civ) (2 July 2014) (Ruling), where the Court stated thus:

> " Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that;
>
> 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
>
> 1) whether the delay has been intentional and contumelious;
>
> 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
>
> 3) whether the delay is inordinate and inexcusable;

4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and

5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

(22) Accordingly, I set aside the order issued on 29th February, 2012 dismissing this suit. The suit is re-instated; alive and kicking provided that the plaintiff complies with all preparatory or any peremptory requirements of the law in order to progress the case before the Industrial Court to which I commit the file for hearing and final disposal. The plaintiff is the author of the state of affairs in this case and so he shall pay costs to the Defendants. Accordingly, the case is transferred to the Industrial Court for hearing. It is so ordered."

9. I have carefully read the submissions by the Applicant as well as those by the Respondent. The issue for determination herein is whether the application is merited.

10. This suit was dismissed for non-attendance of the Plaintiffs/Applicants when it came up for hearing on 23 July 2021. The relevant law governing setting aside judgement or dismissal is Order 12 Rule 7 of the *Civil Procedure Rules*, which 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"

11. The decision of whether or not to allow an application for setting aside such orders is within the wide discretion of the Court. This discretion must be exercised judiciously, as was stated in *Shah -vs- Mbogo* [1979] EA 116, quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

> ".....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."

12. I have carefully considered the facts that were raised by the Applicants. The Applicants argued that their failure to attend Court on 23 July 2021 was that their counsel inadvertently diarised 23 August 2021 instead of July. When they went to the Registry on 23 August 2021 to inquire why the matter was not listed, they were informed that the matter had been dismissed for non-attendance. However, the Applicants have not presented any reason, sufficient or otherwise, as to why they took no action from the date of discovery until June 2024 when they filed the instant Application.

13. In exercising its discretion and deciding whether to grant the orders sought, this Court is guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed.

14. In my humble opinion, both the Plaintiffs/Applicants and their advocate demonstrated inexcusable laxity in prosecuting this case. It is the role of the Plaintiffs and their counsel to ensure that the case proceeds for hearing without wasting precious court time. In this instance, on discovery of the order

of dismissal, both the Plaintiffs and their counsel went to sleep. It wasn't until June 2024, almost three years later, they awoke from their slumber. This Court will certainly not aid the indolent.

15. The Application lacks merit and the same is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 26 DAY OF JUNE 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Advocate/ Applicant: Nyabuti h/b Dr. Khaminwa

For Client/Respondent: Mr. Magiya

Libertine Achieng ..... Court Assistant