



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chesang v Kurui (Environment & Land Case 2 of 2022)  
[2023] KEELC 955 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 955 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 2 OF 2022  
JM ONYANGO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**MAGDALINE JEPKOECH CHESANG ..... APPLICANT**

**AND**

**JOHN KIPROP KURUI ..... RESPONDENT**

**RULING**

1. The Applicant moved the court by way of Originating Summons dated February 17, 2022 seeking inter alia that a declaration do issue to the effect that the Respondent herein is holding the parcel of land known as LR No Koitoror/Tuiyoluk/Block 1( Koitoror)/297 also known as Soin Farm as a trustee for and on behalf of the Applicant.
2. Together with the Originating Summons, the Applicant filed a Notice of Motion seeking an order of temporary injunction against the Respondent restraining him from trespassing onto, selling, charging developing, transferring, leasing, sub-dividing and/or in any other manner dealing with all that parcel of land known as LR No Koitoror/Tuiyoluk/Block 1( Koitoror)/297 also known as Soin Farm pending the hearing and determination of this application.
3. She also sought an order of injunction restraining the Land Registrar Uasin Gishu from dealing with the register of LR No Cherangany/kondabulet/55.
4. In the alternative to the above-mentioned prayers she sought that there be an order of status quo both on the ground and in the register of land parcel number Koitoror/tuiyoluk/block 1( Koitoror)/297 also known as Soin Farm pending the hearing and determination of the Originating Summons filed herein.
5. When the application came up for inter partes hearing on 17<sup>th</sup> March, 2022, the Applicant's counsel failed to attend court through the virtual platform and the application was dismissed for want of



prosecution thus triggering the application dated 9<sup>th</sup> May, 2022 for reinstatement of the application dated February 17, 2022 which is the subject of this ruling.

6. The application is based on the supporting affidavit of Laureen Isiaho Advocate for the Applicant sworn on the May 9, 2022 in which she has deponed that she was unable to log into the online platform owing to a technical hitch. She then attended court physically but by the time she got there, the application had been dismissed for want of prosecution. She is of the view that her mistake should not be visited on her client. She also states that the application has been made promptly and states that unless the prayers sought are granted, the Applicant will be greatly prejudiced.
7. The application is opposed by the Respondent through his Replying affidavit sworn on at June 10, 2022. He depones that the application is defective as the Applicant lacks the locus standi to prefer the application and the Originating Summons as she is not the administrator of the estate of Kibor Kabarak deceased since no succession proceedings have been filed in respect of the estate of the deceased.
8. He depones that by virtue of being the registered owner of the suit property, his rights are protected under article 40 of the Constitution. He denies that the applicant has been in occupation of the suit property and states that she has not met the minimum threshold for the grant of an injunction.
9. The application was canvassed by way of written submissions and both parties filed their submissions.

#### **Applicant's Submissions.**

10. Learned counsel for the Applicant submitted that her failure to attend court was occasioned by a technical hitch which was beyond her control. She then opted to attend court physically but by the time she got to court, the application had been dismissed for want of prosecution.
11. She submitted that the mistake of counsel should not be visited on her client. It was her further submission that the order of dismissal denied the Applicant the right to be heard on merit on the application dated February 17, 2022. She was of the view that justice would be served if the application was allowed.
12. Counsel submitted that in his Replying Affidavit the Respondent did not oppose the application for reinstatement of the application dated February 17, 2022 as he merely challenged the Applicant's capacity to bring the suit and application.
13. Counsel urged the court to apply the principles for setting aside an order of dismissal set out in the case of Noor Mohammed Abdulla v Patel (1962) E.A 447 and Mbaki & others v Macharia & another (2005) 2 E.A 206.
14. She submitted that her failure to log into the virtual court session had been sufficiently explained and it constituted an excusable mistake. She relied on the case of Ongom v Owota where the court held as follows:

‘What constitutes sufficient cause to prevent a defendant from appearing in court and what would be fit conditions for the court to impose when granting such an order necessarily depends on the circumstances of each case’.
15. She also relied on the case of Registered Trustees of Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others Civil Appeal No 147 of 2006 where the court held that the words sufficient cause ought to receive a liberal construction in order to advance substantial justice.
16. She submitted that the right to be heard was the cornerstone of the rule of law and urged the court not to prevent the Applicant from being heard through no fault of her own.



### **Respondent's Submissions**

17. In his submissions, learned counsel for the Respondent completely steered clear of the application for reinstatement and only submitted on the application for injunction.

### **Issues for Determination**

18. The only issue for determination is whether the order of dismissal of the suit made on March 17, 2022 ought to be set aside so that the application dated February 17, 2022 can be reinstated for hearing.

### **Analysis and Determination**

19. The discretion of court to set aside an order of dismissal of a suit or Application ought to be exercised judiciously. The party seeking to reverse this order must therefore explain to the satisfaction of the court why he failed to prosecute his case in order for the court to exercise its discretion in his favour. The test for consideration in granting an order to set aside a dismissal order for want of prosecution was emphasized in the case *Boniface Kamau Njoroge v John Waweru Wanjobi* [2021] eKLR where the court held as follows;

“The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.”

20. In the instant suit, counsel for the Applicant has explained the reason for her failure to attend the virtual court session owing to a technical reason beyond her control. Having failed to log into the virtual session, she made her way to court to try to have the matter dealt with in open court but found when it had already been dismissed for non-attendance. I am satisfied that the failure to attend court was not out of negligence on the part of counsel. I also note that the application for reinstatement of the suit was made within a reasonable time and the Respondent has not demonstrated that they he would be prejudiced if the application is reinstated.
21. In the circumstances I find merit in the plaintiff's application. I therefore set aside the order of dismissal and reinstate the application dated February 17, 2022 for hearing on the merits.
22. The costs of the application shall be in the cause.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2023.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

Ms. Isiaho for the Applicant

Ms. Kimeli for Mr. Tororei for the Respondent

Court Assistant: Antony Oniala

