



**Achuo v Wanjiru & another (Environment and Land Case Civil Suit 1521 of 2016) [2023] KEELC 816 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 816 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1521 OF 2016  
OA ANGOTE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**VERONICA WANGUI ACHUO ..... PLAINTIFF**

**AND**

**NAOMI WANJIRU ..... 1<sup>ST</sup> DEFENDANT**

**GERALD THIONG'O KANYINGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the plaintiff's/applicant's Notice of Motion dated June 24, 2022 brought pursuant to the provisions of sections 3A and 63(e) of the *Civil Procedure Act*, order 12 rule 7, order 40 rules 1, 2 and 3 and order 51 of the *Civil Procedure Rules* seeking the following reliefs;
  - a. That this honourable court do set aside its orders made on June 23, 2022 dismissing the suit for non-attendance.
  - b. That the suit be reinstated.
  - c. That a hearing date of the main suit be issued.
  - d. That the costs of this application be provided for.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of John Mburu Nganga, an advocate with conduct of the matter on behalf of the plaintiff, who deponed that the matter was scheduled for hearing on June 23, 2022; that he was virtually present in court on the said date wherein he confirmed that he was ready to proceed with one witness and that the court thereafter indicated that the matter would be heard at 11:30 am.
3. According to counsel, he believed, on the basis of the notice on the cause-list stating that matters would proceed virtually, that the hearing would be conducted vide the Teams Platform and to that end, did



not physically attend court but waited on the platform; that the court on its part waited for him in open court and that in his absence, the court dismissed the matter.

4. The plaintiff's advocate deponed that his non-attendance was occasioned by the mistake aforesaid; that he had all the intentions of proceeding with the matter; that the court ought not to visit his mistake on the litigant and that the interests of justice dictate that the application be allowed.
5. None of the defendants responded to the application. None of the parties filed submissions.
6. Having considered the motion and the affidavit in support, the sole issue for determination is whether there are sufficient reasons to warrant the reinstatement of the suit.
7. The plaintiff/applicant seeks to have this suit reinstated after its dismissal on June 23, 2022 for want of prosecution and non-attendance. The law with respect to reinstatement of suits is found in order 12 rule 7 of the Civil Procedure Rules, 2010 which stipulates as follows:-

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

8. A reading of order 12 rule 7 aforesaid makes it clear that in an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the court. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice, but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the Court of Appeal held as follows:

“ 1. The discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. More recently the Court of Appeal in [\*Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others\*](#) [2013] eKLR, stated;

“ 1. 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 June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 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. The appellant and his counsel failed to attend Court on June 10, 2013; they, nonetheless, made it to court on June 11, 2013, and promptly offered an apology and explanation and offered to proceed with the petition on June 11, 2013, which date was reserved for the appellant's case....We are of the view that the learned judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. ”



10. It is trite that when a court is called upon to exercise discretion, it must do so judiciously. This was expressed by the Court of Appeal in *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR where the learned judges held as follows:

“ 1. ...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the court to do real and substantial justice to the parties in a suit...”

11. In exercising its discretion to reinstate a suit, the court must interrogate whether the applicant has demonstrated “sufficient cause” to warrant the exercise of the courts discretion in its favour. In defining what constitutes sufficient cause, the Court of Appeal in *Hon Attorney General vs the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (ur) stated as follows:

Sufficient cause” or “good cause” in law means:

“...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See *Black’s Law Dictionary*, 9<sup>th</sup> Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

12. So are the grounds proffered by the applicant reasonable and do they constitute sufficient cause warranting the grant of the orders sought? The plaintiff’s advocate herein states that his absence in open court on June 23, 2022 was occasioned by the fact that he, guided by the notice on the cause-list, believed that all matters were to be handled virtually and subsequently was at 11:30 am waiting on the online platform.

13. The court has perused the record. Indeed, Counsel was virtually present on June 23, 2022, and indicated his readiness to proceed with the hearing of the matter. The matter was given a time allocation of 11:30am.

14. The court has also perused the notice relied on by counsel. It states that the causelist will be handled virtually. The court takes judicial notice of the fact that since late 2020, the courts have been using a hybrid system for hearings due to the Covid-19 protocols. The practice of this court has been to virtually mention matters but proceed with hearings in open court. A little more diligence by counsel after waiting on the platform in futility would have alerted him to this fact.

15. The above notwithstanding, taking into account the circumstances of the case and noting that there is no evidence on record to show that the plaintiff had attempted at any time in the course of the proceedings to delay or to frustrate the prosecution of the suit, the court finds that the failure of the plaintiff and his counsel to appear in open court was a genuine mistake by counsel, which mistake should not be visited upon the litigant. As expressed by the Court of Appeal in *Philip Keipto Chemwolo & Another vs Augustine Kubende* [1986] eKLR;

“ 1. Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merits. I think the broad equity approach



to this matter is that unless there is fraud, or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

16. Flowing from the foregoing, it is the court’s considered view that the plaintiff should be given an opportunity to prosecute her case. For those reasons, the application dated June 24, 2022 is allowed in the following terms;
- a. The orders issued by this court on June 23, 2022 be and are hereby set aside.
  - b. The suit be and is hereby reinstated for hearing on merit.
  - c. Costs of the application shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**O A ANGOTE**

**JUDGE**

**In the presence of;**

**No appearance for plaintiff**

**No appearance for defendant**

**Court assistant - June**

