



**Kahoro v Gitahi (Environment & Land Case 3 of 2023)
[2024] KEELC 6843 (KLR) (Environment and Land) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 3 OF 2023
EK WABWOTO, J
OCTOBER 18, 2024
(FORMERLY MOMBASA ELC CASE NO. 267 OF 2015)**

BETWEEN

RUTH WANJIRU KAHORO PLAINTIFF

AND

GEORGE GITONGA GITAHI RESPONDENT

RULING

1. This court is called upon to set aside and vary its orders issued on 8th July 2024 wherein the suit was dismissed for non attendance on the part of the Plaintiff. A brief background of the proceedings herein culminating to this application is that, on 12th June 2024 when the matter came up for hearing, Learned Counsel Mr. Egunza for the Plaintiff sought and was granted a last adjournment and subsequently the matter was set down for hearing on 8th July 2024. The court also directed the Plaintiff to pay the Defendant's witness costs of Ksh 15,000/-
2. On 8th July 2024, there was no attendance nor any representation on the part of the Plaintiff and Learned Counsel Mr. Mwakireti who was present in open court with the Defendant moved this court for dismissal of the suit with costs. The court duly considered the application and proceeded to dismiss the suit with costs to the Defendant.
3. The Plaintiff being aggrieved by the said order moved this court vide an application dated 7th October 2024 seeking to set aside the orders of this court dismissing the suit and for reinstatement of the same. The Plaintiff's application was supported by an Affidavit sworn by George Egunza Advocate on 7th October 2024. The application is premised on several grounds on the face of the application.



4. The Defendant opposed the application vide a Replying Affidavit sworn by Francis Mwakireti Advocate on 14th October 2024.
5. It was deposed on behalf of the Plaintiff that on the day the suit was dismissed the Plaintiff's Advocate was in chambers and had logged in on the virtual platform but was only admitted at about 10.30am when the matter had already been dealt with and that mistake of the counsel should not be visited upon his client. Counsel also submitted that this being a land matter, the court should exercise its discretion and reinstate the suit. In respect to the failure to comply with the previous orders of this court, requiring the Plaintiff to pay Defendant's witness expenses costs amounting to Ksh 15,000/-, it was submitted that the Plaintiff is willing and ready to pay the same as may be directed by the court.
6. The Defendant in opposing the application deposed that the suit was fixed for hearing on 12th June 2024 when the Plaintiff's Advocate sought and was granted a last adjournment and directed to pay Defendant's witness expenses of Ksh 15,000/ and subsequently the matter was fixed for hearing on 8th July 2024 by consent of the parties. On 8th July 2024 the Plaintiff and her Advocate were absent despite being aware of the said date. The matter was called out several times by the court but they were not present and the same was dismissed. It was also averred that the Plaintiff had not complied with the court's previous direction requiring the payment of the costs of Ksh 15,000/-. It was also averred that from a perusal of the court record, the Plaintiff has never been serious in prosecuting the matter and failure to comply with the previous court's directions is a confirmation of the same.
7. Counsel for the parties also made oral submissions and cited various authorities and case law in respect to the application which the court has considered.
8. Having looked at the application and considered the submissions made by counsel for the parties, the singular issue that comes up for determination is whether the Plaintiff has managed to convince this court to set aside its orders of 8th July 2024 dismissing the suit and ordering for its reinstatement.
9. The decision of whether or not to allow an application for setting aside proceedings or an order of the court is within the wide discretion of the court. The discretion to be exercised judiciously as was stated in the case of Shah –vs- Mbogo (1979) EA 116. A basis for the exercise of the discretion has to be laid by the party inviting the court to exercise its discretion. In this instance, the question for the court to answer is whether the Plaintiff has satisfied the threshold by providing a rational basis for the court to set aside its orders dismissing the suit.
10. In the instant case, the Plaintiff has stated that the reasons for non-attendance at the hearing was due to the fact that the Plaintiff's Advocate had logged in on the virtual platform but was let in at about 10.30am. Counsel for the Plaintiff owned up to the mistake and urged the court not to visit the mistake on the litigants in the interest of justice and allow the application. While I sympathize with the Plaintiff, I fail to understand why they did not bother to move the court from 8th July 2024 until 7th October 2024. Counsel had more than enough time to do so. While counsel for the Plaintiff submitted that the delay was that he was not aware that the suit had been dismissed, it is worth noting that in this era of e-filing that was officially launched by the Judiciary on 1st July 2020 the e-filing court systems usually sends parties automated notifications either emails or Short Message Services (SMS) notifying parties of upcoming court dates and any changes in the schedule. Through the said platform parties also receive instant notification of any activities or updates on the Case Tracking System (CTS) in respect to their cases. Parties have always been urged time without number to embrace the said technology. The proceedings that Counsel for the Plaintiff seeks to set aside were definitely post the launch/ commencement of court's e-filing system. This court had also an opportunity to pronounce itself on the said issue in the cases of Maina v J.K. Horeria t/a Horeria & Company & another (Environment



& Land Case 1928 of 2007) [2023] KEELC 16919 (KLR) (23 March 2023) (Ruling) and Afyare Enterprises Company Ltd v Mugambi & 2 others; Mugambi (Interested Party) (Environment & Land Case 1626 of 2016) [2023] KEELC 17892 (KLR) (25 May 2023) (Ruling).

11. There is no case of genuine mistake or error on the part of Counsel which perhaps would invite sympathy of the court. As stated earlier the record of this court shows that the Plaintiff appears to have treated the matter with a lot of casualness. It demonstrates lack of commitment on the part of the Plaintiff to prosecute the matter. The law must be applied equally to both parties. Each of the parties was afforded the opportunity to present their respective cases. No reasons were also stated as to the absence of the Plaintiff nor her witness in court on 12th June 2024 and equally on 8th July 2024. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up and ensure that she attends court. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate. See also Ringera, J. (as he then was) in the case of Omwoyo –vs- African Highlands & Produce Co. Ltd [2002] 1 KLR:

“The plaintiffs advocate has made a passionate plea to this court that to dismiss the application would be tantamount to punishing the plaintiff for the mistakes of his advocate. That may very well be so. However, I am of the opinion that if a court has no jurisdiction to do something it cannot do so in what is said to be the interest of justice. The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court.”

12. This matter has been pending in court for over 8 years since its initial filing at Mombasa ELC before it was transferred to Voi. It is never the intention of courts to prolong cases for such lengthy duration. Courts of law exist to hear and determine disputes filed before them. They are not archives for proceedings.
13. Courts also have a duty to administer justice without delay as espoused in Article 159(2) (b) of *the Constitution*. Courts are required to hear and determine cases within set timelines in order to eliminate backlogs in our court and that is what the people of Kenya demand us to do. In doing so, courts do the very best to balance the scales of justice between expedition and justice. In the instant case, the Plaintiff had been given ample time to prosecute her case and even offered a last adjournment. Courts of law are not parking bays for suits neither are they waiting lounges for irresolute parties who are not keen in prosecuting their matters.
14. In conclusion, it is the finding of this court that the reasons given by the Plaintiff are not satisfactory, the Plaintiff has failed to meet the threshold for setting aside the orders of this court and this court is equally unable to exercise its discretion in granting the said orders.
15. Consequently, the application dated 7th October 2024 is unmerited and the same is dismissed with an order that each party bears own costs of the said application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 18TH OCTOBER 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Egunza for the Plaintiff.

Mr. Mwakireti for the Defendant.



Court Assistant – Mary Ngoira.

