



REPUBLIC OF KENYA



**Waqo v Mediamax Network Limited & another (Civil Case
204 of 2018) [2024] KEHC 9920 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 204 OF 2018

JN MULWA, J

JULY 31, 2024

BETWEEN

HALAKHE D WAQO PLAINTIFF

AND

MEDIAMAX NETWORK LIMITED 1ST DEFENDANT

SETH ONYANGO 2ND DEFENDANT

RULING

1. This is a Ruling in respect to the Plaintiff's Notice of Motion application dated 28/2/2023 brought pursuant to Section 1A, 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#). The Applicant seeks the following orders:
 1. That the Honourable Court be pleased to set aside the orders made on 14/10/2022 dismissing HCCC No. 204 of 2018, Halakhe D. Waqo v Mediamax Network Limited & Another for want of prosecution.
 2. That the Honourable Court be pleased to reinstate the suit and the same be heard on priority basis.
 3. That costs of this Application be provided for.
2. The application is predicated on the grounds set out on its face and supported by the annexed Affidavit of the Plaintiff, Halakhe D. Waqo.
3. The application was opposed by way of Replying Affidavit dated 25/03/2024.



4. The court has considered the orders sought, the Affidavit in support thereof, the Respondents' Replying Affidavit as well as the parties' respective submissions and flags issues that fall for determination thus:
 1. Whether the orders made on 14/10/2022 by this court ought to be set aside.
 2. Whether the prayer for reinstatement of the application is merited
 3. Who should bear the costs of the application."

Whether the order made on 14/10/2022 by this court ought to be set aside.

5. The Order made by this court on 14/10/2022 is annexed hereto to enable the court appreciate its contents.

Order 12 Rule 7 of the Civil Procedure Rules provides:

"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".

6. The principles upon which such orders may be set aside were set out in the case of Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where at paragraph 27 the court held that setting aside of orders would only be merited if: -

- a) There is non-disclosure of material facts
- b) Concealment of material documents
- c) Misrepresentation"

7. In the instant case the Applicant has proved that there was material non-disclosure of material facts, by not being given the opportunity to be heard. He has also proved that there were concealed material documents since the Notice to Show Cause was received three months later after the suit was dismissed.

In the case of James Kanyita Nderitu and Another v Marios Philotas Gbikas & Another [2016] eKLR where the Court stated as follows:

"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

Lastly the Applicant has shown that there was misrepresentation, whereby each party was given different dates for hearing. Its reasons for seeking the setting aside of the judgment herein are therefore valid for grant of the orders sought.

ii. Whether the prayer for reinstatement of the application is merited.

8. The Plaintiff's prayer for reinstatement is grounded on the averments of his counsel in the application that on 02/10/2019 the suit was coming up for hearing when he sought an adjournment to allow them to put in further witness statements. The court granted the adjournment and directed the parties to fix a hearing date. However, counsel for the defendant failed to send a representative to the court registry for date fixing which led to ex-parte hearing dates being taken. Further, there was a Notice to Show



Cause why the suit herein should not be dismissed for want of prosecution which was received three months later after the suit was dismissed.

9. Additionally, the Applicant submitted that the Plaintiff was condemned unfairly and unheard since the Notice to Show Cause was received three months later after the suit was dismissed. Further, he had not been indolent and faults the Respondents in his submissions that several chances had been granted to them but they failed to send a representative to fix the matter for hearing.
10. The principles governing reinstatement of a suit, were stated in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution* . Article 50 coupled with article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such a matter of reinstatement of a suit which has been dismissed by the court.”

11. In an application for reinstatement of a dismissed suit or application, an applicant seeks the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in 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.”

12. The court has sufficiently been persuaded that the non-attendance by the Applicant at the hearing of the suit was not a deliberate attempt to obstruct or delay justice.

The upshot is that the prayer for reinstatement of the suit is granted as prayed in the application dated 28th February, 2023.

Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31ST DAY OF JULY, 2024.

JANET MULWA

JUDGE

