



**Gulf Fabricators Limited v Great Lakes University Kisumu (Civil Suit E13 of 2022) [2024] KEHC 16546 (KLR) (24 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16546 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT E13 OF 2022  
MS SHARIFF, J  
DECEMBER 24, 2024**

**BETWEEN**

**GULF FABRICATORS LIMITED ..... PLAINTIFF**

**AND**

**GREAT LAKES UNIVERSITY KISUMU ..... DEFENDANT**

**RULING**

**A. Application**

1. The application before the Court, dated 16th March 2023, was filed by the Plaintiff/Applicant seeking the following orders: -
  - i. That the orders of 13th March 2023, which dismissed this suit, be set aside on such terms as may be just.
  - ii. That this suit be reinstated and fixed for hearing on its merits.
  - iii. That costs of the application be in the cause.
2. The application is based on the grounds that the Plaintiff's witness, who is diabetic, was bedridden on 13th March 2023, when the matter was scheduled for hearing.
3. Additionally, that due to the sudden onset of illness and failure to send someone to the doctor's office in time, the Plaintiff's witness could not obtain the medical documents for presentation in court.
4. The application is further supported by a sworn affidavit from Gordon Oruke Kaoko, the Applicant's director and the purported witness, in which he states that on 10<sup>th</sup> March 2023, he fell seriously ill leaving him weak and unable to perform physical tasks. That he was attended to by Dr Otedo Amos at home, who recommended bed rest.



5. That by the 13<sup>th</sup> March 2023, he was still sick and had not yet obtained medical documentation from the doctor, thus explaining his absence from court. He attached a letter dated 14<sup>th</sup> March 2023, signed by Dr Otedo confirming that he had developed diabetes mellitus on 10<sup>th</sup> March 2023, was weak and on bed rest.
6. In opposition to the application, the Respondent filed a replying affidavit dated 1<sup>st</sup> April 2023 sworn by Newton Mitoko. In this affidavit, the Respondent contends that Dr Otedo's letter dated 14<sup>th</sup> March 2023 does not establish that the witness was ill on 13<sup>th</sup> March 2023.
7. The Respondent further argues that given the seriousness of the illness, it is unusual that treatment was provided at home instead of a hospital. The Respondent also asserts that there is no proof that the doctor actually provided medical services, and in the unlikely event that treatment was given, there is no evidence of payment, which would be expected in public hospitals.
8. Additionally, the Respondent questions the plausibility of the Plaintiff's counsel only learning of the witness's sickness on the hearing date itself.
9. Both parties agreed to dispose of the application through written submissions.

### **B. Plaintiff/applicant's Submissions**

10. The Plaintiff urges the court to exercise its discretion in its favour. It cites the Court of Appeal case of *Shah v Mbogo & Another* (1967) EA 116 where it was held that the court's discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or inexcusable mistake or error, but it is not meant assist those who by deliberate evasion or otherwise seek to delay or obstruct the course of justice.
11. The Applicant contends that the witness's sickness was unforeseen, and therefore, it provides an excusable reason for the court to exercise discretion in its favour. Furthermore, the Applicant asserts that it has not caused any delay in the proceedings.
12. In further support of the application, the Applicant submits that striking out a suit should be the last resort, and should only be resorted to when it aligns with the ends of justice. The Applicant references the case of *John Nabashon Mwangi v Kenya Finance Bank Ltd* [2015] eKLR where the court cautioned against the dismissal of cases for want of prosecution, terming it a draconian act with the effect of driving a Plaintiff away from the seat justice.
13. Additionally, the Applicant argues that the Respondent will not suffer any prejudice that cannot be compensated through costs. The Applicant supports this argument by referencing cases such as *Joshua Chelelgo Kulei v Republic & Others* [2014] eKLR, in which the court stated:

“Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability.”
14. In conclusion the Applicant urges the court to overlook the technicalities that led to the dismissal of the suit in the first place.

### **C. Defendant/ Respondent's Submissions**

15. On its part the Defendant/Respondent urges the court to exercise its discretion judiciously not capriciously or whimsically citing the case of *Shah v Mbogo* [1976] EA 116.



16. It submits that, despite the overriding objectives, the principles set out in *Shah v Mbogo* requiring honesty and candidness remain applicable as evidenced by the cases of *Kenya Commercial Bank Ltd v Kenya Planters Co-operative Union* [2013] 1 EA 136 and *Hunker Trading Company Ltd v Elf Oil Kenya Ltd* [2010]eKLR.
17. Furthermore, the Defendant/Respondent submits that before setting aside an ex-parte decision, the court should first consider whether the pleadings raise any triable issues. It references the cases of *CMC Holdings v James Mumo Nzioki* (2004) KLR and *Patel v East African Cargo Handling Services Ltd* [1974] EA 75.
18. In addition, the Respondent contends that the reason of sickness, as presented by the Plaintiff, has not been substantiated. The Respondent points to discrepancies between the dates when the witness allegedly fell ill, as detailed in the supporting and supplementary affidavits. Specifically, the date of 7th March 2023, referenced in the supplementary affidavit, contradicts the assertion that the witness fell ill over the weekend. The Respondent further asserts that the Plaintiff had two witnesses, and if one was unavailable, the other should have been availed to testify.
19. The Respondent submits that they would be prejudiced if the suit is reinstated particularly given that it is statute-barred.
20. Regarding costs, the Respondent urges the court to exercise discretion in their favour, taking into account the circumstances of the case.

#### **D. Analysis and Determination.**

21. Having considered the motion, affidavits and rival submissions the sole issue for determination is whether the suit should be reinstated.
22. Order 12 Rule 7 of the *Civil Procedure Rules* under which the Application is brought 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”.
23. The orders sought herein are discretionary. In exercising this discretion, the court must be cautious not to occasion injustice, as was held in *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 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> 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.”
24. In support of reinstatement the Applicant’s witness stated that he was sick and bedridden and provided medical documents to support this claim.
25. In opposition, the Respondent contends that it is improbable that the Plaintiff’s counsel only became aware of the indisposition on the day of the hearing, given that the witness first fell ill on 7<sup>th</sup> March 2023.



26. The medical documents furnished by the Applicant have not been controverted or contradicted in any way. Therefore, I am inclined to exercise discretion in favour of the Applicant. Although the treatment documents do not indicate that the Applicant was under treatment on 13th March 2023, as the Respondent rightly pointed out, it is plausible that the Applicant was still weak and bedridden on that date.
27. However, there are doubts as to why the Applicant's advocate was unaware of the witness's condition, despite the sickness having started on 7th March 2023. The witness explains that he was too weak and disoriented to communicate with his advocate. While there is no evidence to substantiate this claim, I am guided by the spirit of the decision in *Shah v Mbogo*, where discretion should be exercised to avoid injustice and hardship. Consequently, I am inclined to indulge the Applicant.
28. It is evident that this was the first hearing, and no prejudice will be suffered by the Respondent that cannot be compensated by costs.
29. In the premises, I allow the Applicant's application, set aside the order of 13th March 2023 dismissing the Plaintiff's suit, and order that the suit be reinstated for hearing on its merits. The Respondent shall have costs of this application assessed at ksh 35000 payable within 45 days from the date hereof and in case of default execution to issue.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 24<sup>TH</sup> DAY OF DECEMBER 2024**

**MWANAISHA S SHARIFF**

**JUDGE**

