



Godana v Trident Insurance Company Limited; Mbithe (Interested Party) (Suing in her Capacity as Administratrix of the Estate of Alphonse Okumu Ojwang) (Civil Suit E022 of 2021) [2024] KEHC 16326 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E022 OF 2021
JK NG'ARNG'AR, J
DECEMBER 18, 2024**

BETWEEN

MOHAMED KHALIF GODANA PLAINTIFF

AND

TRIDENT INSURANCE COMPANY LIMITED DEFENDANT

AND

JUDITH MBITHE INTERESTED PARTY

**SUING IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF
ALPHONCE OKUMU OJWANG**

RULING

1. The Plaintiff filed a Notice of Motion application dated 1st October 2024 under Certificate of Urgency pursuant to Section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and other enabling provisions of the law.
2. The Plaintiff/Applicant seeks for orders that the order made by this honourable court on 25th September 2024 dismissing the Plaintiff's suit for non-attendance be vacates and/or set aside and the suit be reinstated together with interim orders pending hearing of the suit. That the main suit be set up for hearing forthwith and that costs of the application be provided for.
3. The application is premised on grounds on its face and the affidavit of Peter Omwenga that on 25th September 2024 when the suit came up for hearing, the same was dismissed for non-attendance before Hon. Justice J. Ng'arng'ar. That the non-attendance was caused by a massive power blackout within NSSF Building while the matters were ongoing. That due to the sudden power blackout, the Plaintiff's advocates were unable to promptly deal with the matter since the time they relogged into court, the same had already been dealt with. That the Plaintiff stands to suffer substantial loss, prejudice and



- harm if the suit is not reinstated and heard on merit. That 3rd parties have threatened to execute the Plaintiff. That the Respondents will not suffer any prejudice if the suit is reinstated as they will get an opportunity to ventilate the case on merit.
4. The Interested Party filed a Replying Affidavit sworn on 14th October 2024 that the application is bad in law, fatally defective and incurably incompetent and that the same should be dismissed with costs. That the application is an affront to Rule 8 of the Advocates Rules. That the Applicant has not adduced any sufficient grounds and evidence to demonstrate granting of the orders sought. That the motion offends the doctrine of res judicata as it is similar to the one dated 3rd May 2023 wherein similar orders were sought and granted on or about 22nd May 2023.
 5. That consequent to the said directions, the matter was listed before court on 27th October 2023, 20th November 2023, 24th January 2024, 27th February 2024, 7th May 2024, 9th July 2024, and 25th September 2024. That the Interested Party will suffer great prejudice when the orders sought herein are granted as it will further delay enjoyment of fruits of the judgment entered and delivered on 7th March 2022. That it is in the interest of justice that the application is dismissed with costs.
 6. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed submissions dated 22nd October 2024 that the suit was dismissed for non-attendance yet the person who made the application for dismissal was an Interested Party and not the Defendant. That the Interested Party has not stated anywhere in the Replying Affidavit that the facts stated in the Supporting Affidavit are false and hence the Reply is devoid of merit. That the May 2023 application had been dismissed for want of prosecution under Order 17 Rule 2 whereas the application herein was dismissed under Order 12 Rule 12. That the absence of both parties in the matter was proof enough that no Notice to Show Cause was brought to the attention of the parties while in the matter herein, there was a massive blackout hence the late login. That it is not deliberate that the Plaintiff was not in court when the matter was called out.
 7. The Plaintiff/Applicant relied on the holdings in the cases of Meru ELC Misc. Application No. E036 OF 2023, Reynolds Construction Co. NIG Ltd v Festus M'Arthi M'Mboroki, Nairobi ELRC No. 97 of 2019, Martin L. Barasa v Giza Systems Smart Solutions Ltd, Nairobi FCA No. 25 of 2020, HAM v SOS, Garissa HCCC No. 09 of 2012, Bare Ali Issack & Another v First Community Bank Limited, Petromin Limited v Kenya Revenue Authority (2020) eKLR, and Mwangi S. Kimenyi v Attorney General & Another (2014) eKLR.
 8. The Interested Party filed submissions dated 5th November 2024 that the Interested Party herein could not have been enjoined if they were not recognized by the rules and the court, and that it is flimsy for the Plaintiff/Applicant to proffer an argument that an application for dismissal was made by a party not recognized by rules. That in any event and given that on the day of the hearing the Plaintiff/Applicant concedes that he was not present in court, the outcome pursuant to Order 12 Rule 1 would still have been a dismissal of the suit herein.
 9. The Interested Party relied on the holding in the case of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others (2013) eKLR and Fran Investment Limited v G4S Security Services Limited (2015) eKLR and submitted that the court has discretion to allow the present application but the court has to consider the conduct of the Plaintiff/Applicant in the matter and balance it against the sole party who remains prejudiced by the existence of the present suit. That the court's records are very clear on the numerous occasions the Plaintiff/Applicant failed to attend court to prosecute the matter. That in an era of virtual court, the use of a mobile phone would have allowed the Plaintiff/Applicant to attend court albeit for a brief moment, and the least of all, request another



counsel to hold brief by placing the file aside. The Interested Party therefore prayed that the application be dismissed with costs.

10. I have considered the Notice of Motion application dated 1st October 2024, the Replying Affidavit sworn on 14th October 2024, and submissions by the parties. The issues for determination are whether the application is merited for reinstatement of the suit, and who should bear costs.

11. Order 12 Rule 7 of the Civil Procedure Rules on which the application is premised provides as follows:

-

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.

12. The decision on whether a suit should be reinstated is a matter of judicial discretion and depends on the facts of each case. The court in the case of *Ivita v Kyumbu* (1984) KLR 441 laid out the guiding principles when dealing with such an application to include reasons for the delay, whether the delay is prolonged and inexcusable, and whether justice can still be done despite the delay.

13. The Plaintiff stated that the circumstances leading to dismissal of the suit was non-attendance on 25th September 2024 caused by massive power blackout within NSSF Building while the matters were ongoing. That due to the sudden power blackout, the Plaintiff's advocates were unable to promptly deal with the matter as by the time they relogged into court, the same had already been dealt with. The Respondent has however raised the issue that the motion offends the doctrine of *res judicata* as it is similar to the one dated 3rd May 2023 wherein similar orders were sought and granted on or about 22nd May 2023.

14. This court has perused the two applications and established that the application dated 3rd May 2023 was dismissed for want of prosecution while the application herein was dismissed for non-attendance. This court finds that the circumstances leading to dismissal of the two applications are different and the doctrine of *res judicata* is therefore not applicable. This court also finds that the explanation by the Plaintiff/Applicant for non-attendance is satisfactory.

15. On whether the delay is prolonged and inexcusable, the court herein made the order dismissing the suit for non-attendance on 25th September 2024 while the application herein for reinstatement of the suit is dated 1st October 2024. The duration of around 6 days cannot be deemed to be prolonged or inexcusable.

16. The explanation given by the Plaintiff/Applicant and the time within which the application herein was made are sufficient for this court to find that the door of justice ought not be closed on the Applicant. It is in the interest of justice that the application herein is heard and determined on merit.

17. In the upshot, I allow the Plaintiff/Applicant's application dated 1st October 2024 and set aside the orders issued on 25th September 2024 dismissing the suit. The suit is hereby reinstated for hearing on merit. The Interested Party shall have costs of this application.

DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 18TH DAY OF DECEMBER 2024

.....

J.K. NG'ARNG'AR, HSC

JUDGE

