Directline Assurance Company Ltd v Macharia (Miscellaneous Application 36 of 2022) [2023] KEHC 325 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 325 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS APPLICATION 36 OF 2022

RM MWONGO, J

JANUARY 27, 2023

BETWEEN

DIRECTLINE ASSURANCE COMPANY LTD ..... APPLICANT

AND

STEPHEN MWANGI MACHARIA ..... RESPONDENT

RULING

1. The applicant has approached this court under the provisions of article 159(2)(a) and (d) of the *Constitution*, section 1A, 1B, 3A of the *Civil Procedure Act*, order 42 rule 6, order 43, order 51 rule 1 of the *Civil Procedure Rules*, seeking to set aside the proceedings in the lower court and to allow the applicant to ventilate its case there.

2. The orders sought are as follows:

    1. spent.

    2. spent.

    3. spent.

    4. This honourable court be pleased to set aside the proceedings in Baricho PMCC 162 of 2019 for May 11, 2022 and specifically the order closing the defence case and all the other orders consequential thereto.

    5. This honourable court be pleased to re-open the defendant/applicants case and allow them to call their witness and ventilate their defence.

    6. The costs of the application be provided for.

3. The application is based on the following grounds:

a) That the appellants/applicants wish to appeal against the order issued on May 11, 2022 by Honourable D lreri (Mr) (PM) in Baricho PMCC 162 of 2019 however the trial court declined to grant leave to do so.

b) That the honourable court dismissed the appellants/applicants counsel oral application for an adjournment in Baricho PMCC 162 of 2019 on May 11, 2022 for a further hearing of the defence case since the matter was not on the cause list for the day.

c) That unless this application is allowed, the matter herein may proceed for submissions on June 8, 2022 and judgment read thereafter thereby denying the appellants/applicants a fair and just opportunity to ventilate their case and condemning them unheard.

d) That the defendants filed their statement of defence, list of documents and witness statement all dated March 9, 2021.

4. In addition to the grounds, the applicant has deposed a 17 paragraph supporting affidavit, of which the following are the major averments:

1. That the matter was set for defence hearing on May 11, 2022 when the same was not listed and the file was sneaked into court and the court on its own motion closed the defence case.

2. That our clerk requested counsel in court to immediately hold my brief and seek for an adjournment of the defence case to a future convenient date, however the court declined the request for the said adjournment.

3. That the civil suit No 162 of 2019 Baricho, was part heard before Honourable A K Mwicigi who was on transfer. Directions as to further hearing before a different magistrate had not been taken.

4. That the defendants had filed and served their list of documents together with witness statements in regards to the witness to be called during trial and therefor it is in the interest of justice the defence ought to have been given a chance to defend their case.

5. That the suit was not listed before Hon Ireri, and the file was sneaked into court, a fact which the defendant communicated to the plaintiff's counsel via email before the actual hearing date.

6. That as a result of the suit not being listed, the defendants counsel and witness had to physically attend to a listed matter Machakos E35 of 2021 wherein the same witness was due to testify in the defence hearing, and as such, the defendant's witness could not attend physically to the matter in Baricho.

7. That the learned trial magistrate erred in law and fact by closing the defendant's case while the defence counsel had advanced valid reasons for not having their witness in court.

8. That the matter had proceeded part heard before Hon A K Mwicigi who had since been transferred from the station and the same was coming up for the first time before another magistrate and directions on how the hearing would proceed had not been issued.

9. That the defendants have an arguable case and it is only fair that the court allow the defence ventilate their case.

5. The respondent opposed the application *vide* his 12 paragraphs replying affidavit dated May 25, 2021 of which the following are the major averments: -

1. The genesis of this, the plaintiff had earlier closed his case on the May 19, 2021 after the defendant failed to attend court to table its defence.

2. That subsequently, the defendant filed an application before the lower court seeking to vacate the order marking the defence as closed which application was ultimately allowed with thrown away costs of Kshs 15000/= which was paid on November 16, 2021.

3. That the matter was listed for directions before the new trial magistrate on the March 9, 2022 which the suit was order4ed to proceed from where it had reached and parties took a hearing date of May 11, 2022 by consent.

4. That when the matter was called out for hearing the defendant was duly represented but its application for adjournment was declined upon the court noting that the defendant had delayed tendering of their defence for a period of over 12 months.

5. That the purported email was clearly sent mischievously at 4.52 pm and the reason given therein were laughable to say the least since the hearing date was taken by consent in court and due diligence would have been to call the court registry and verify the position. In any event the attached cause list has no subheading for the matters listed for hearing and that alone would have sent a clear signal to counsel that the list was not completed.

6. That it is sad that counsel is justifying her lack of due diligence to impute bad motive on the court that the file was sneaked into the court instead of owning up for the professional negligence committed.

7. That it is clear that even if the matter was in the cause list, the defendant witness would still not have attended court since it is demonstrated that she was in Machakos for another hearing yet this date was by consent and was a final opportunity given to the defendant to avail its witnesses after delaying the defence hearing for over one (1) year.

8. That in the event that the court is persuaded to allow the application it is only fair and just that the defendant be ordered to deposit the liquidated amount sought in the plaint of Kshs 733,159/= in court before being allowed to re-open its defence.

Parties' Submissions

6. The court directed the parties to file written submissions, which they did. the lower court file was also called up, and duly availed to this court.

7. The applicant's counsel submitted that the gist of the application is that when the matter came up on record, there was an application seeking to re-open the defence case. It was allowed on condition that Kshs 15,000 be paid.

8. The honourable court dismissed the appellants/applicants oral application for an adjournment in Baricho PMCC 162 of 2019 on May 11, 2022 for a further hearing of the defence case since the matter was not on the cause list for the day.

9. The applicant submitted that their application would not cause prejudice to the responds and should be allowed.

10. The respondent opposed the application and relied on his replying affidavit dated May 19, 2022. He submitted that the conduct of the applicant in the lower court was not serious. They closed their case on May 19, 2021. On May 11, 2022, the date was taken by consent. The cause list of May 11, 2022

did not show any hearing and counsel did not contact the court. The matter is a declaratory suit and the applicants are deliberately frustrating it.

11. The respondent submitted that in the event the application is allowed it is only fair and just that the defendant be ordered to deposit the liquidated amount sought in the plaint of Kshs 733,159/= in court before being allowed to re-open its defence.

12. The only issue arising is whether the defendant/applicant's case should be opened and allow them to call their witness and ventilate their defence.

Analysis And Determination

13. The main contention in this matter is that the lower court dismissed their oral application for an adjournment in Baricho PMCC 162 of 2019 on May 11, 2022 for a further hearing of the defence case. The applicant argues that the matter was not listed on the cause list for the day. Due to the non-listing, the applicant claims that the defendant's/ applicant's counsel and witness had to physically attend to a listed matter, namely, Machakos E35 of 2021 wherein the same witness was due to testify in the defence hearing in that case. As such, the defendant's witness could not attend physically to the matter in Baricho.

14. The respondent strongly opposed the adjournment on the ground that the hearing date had been taken by consent. He submitted that the conduct of the applicant in the lower court was not serious. The respondent closed their case on May 19, 2021. On the date was taken by consent to hear the defence case, May 11, 2022, counsel did not contact the court when he noted that their matter was not cause listed for the day.

15. The respondent submitted that in the event the application is allowed it is only fair and just that the defendant be ordered to deposit the liquidated amount sought in the plaint of Kshs 733,159/= in court before being allowed to re-open its defence.

16. Order 12 rule 2 of *Civil Procedure Rules* provide for the consequences of a defendant's failure to attend a hearing:

> " If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
>
> (a) that notice of hearing was duly served, it may proceed ex parte;
>
> (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or
>
> (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."

17. In essence the prayer sought by the applicant calls for exercise of this court's discretion in determining the same.

18. The applicants deponed in their supporting affidavit that the suit had not been cause listed for the day. They informed the respondent through an email on their intention to adjourn the matter.

19. In the case of *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR in which Madan JA (as he then was) defined what constitutes a mistake as follows:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

20. I have perused the lower court file. The applicant pointed out to court that they could not proceed as their witness was scheduled to appear in another matter in the lower court in Machakos E35 of 2021 Catherine Nduku Munguti v Directline Assurance Co Ltd. They an email they wrote to the respondent the previous day, May 10, 2021, informing them f their predicament

21. What they failed to do was to attach the cause list for the Machakos CMs court before the Baricho court. However, they attached the said cause list to their affidavit in support of their application herein.

22. the respondent insists that should this court be minded to allow the applicant's application, then the applicant should deposit the full liquidated claim in court. This is essentially a demand for security for the claim.

23. Security for claim is an interim measure utilised mostly in international arbitral proceedings that allows an applicant (either the claimant, or the respondent in respect of the counterclaim) to secure the amount that it is claiming against the opposing party before the issuance of the arbitral award. Similar to the case of security for costs applications, there must be solid grounds for securing the amounts claimed in advance of an award to that effect, based on the opposing party's alleged inability to pay the awarded damages.

24. Here, the respondent has not laid out a foundation for the said demand, and there is no legal provision for the same. That request cannot be granted .

25. Whilst it is true that a date taken in the diary or in open court creates obligations between parties that are relied upon and expected to be fulfilled, I am prepared to take judicial notice that cause lists are regularly used in all courts in Kenya, to notify parties of matters that will be coming before a court; for giving notice of changes such as whether a court is sitting or not; for indicating internet links for virtual courts; and generally for enabling essential user-communication. As such, failure by the court to cause list a matter should be taken into account by a court when exercising its discretion as to whether or not to grant an adjournment.

26. Certainly, that is the position in the High Court, under the Chief Justice's directions of 2022, which I am aware are not applicable in the lower court, but are set out here for illustrative purposes:

> " Practice Directions To Standardize Practice And Procedures In The High Court 2022.
>
> Preparation and posting of the cause list
>
> 25. (a) Cause lists for the month shall be prepared and posted online a week before the end of the month. There shall be an addendum cause list to cater for matters that are fixed after the main cause list has been posted and such addendum shall be published at least twenty-four hours in advance.

(b) The cause list may have a limited number of cases with a maximum of 5 main hearings, 5 applications and 10 mentions.

(c) Cause lists shall be structured by listing matters in the following order—

(i) mentions,

(ii) applications,

(iii) hearings,

(iv) rulings and judgments.

d) the cause list shall clearly indicate—

(i) the names of litigants and advocates

(ii) time for various activities

(iii) the court room number

(iv) whether the hearing is virtual or physical

(v) virtual links

(vi) court contacts

(vii) any other relevant communication"

27. To that end, i think that the present situation is one that can be cured by article 159(2) (a) of *Constitution of Kenya* that provides for administration of justice to all, without undue regard to procedural technicalities. Accordingly, I think the failure of counsel to attend court is excusable. There is no evidence that the applicant intentionally failed to attend court on the material date so as subvert justice as alleged by the respondent.

28. Accordingly, I allow the application in terms of prayers 3 and 4 of the motion dated May 19, 2021. However, given that the parties had consented to a hearing on the said date, the applicant will pay the thrown away costs of the respondent. Parties shall forthwith take dates in the lower court to expedite the matter.

29. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF JANUARY, 2023

R. MWONGO

JUDGE

In the presence of:

1. Ndegwa holding brief for Orenge for the Appellant/Applicant

2. Ndungu holding brief for Kiama for the Respondent

3. Mr. Joram, Court Assistant