



**Encapsulated Communications Africa Limited v Soulco Kenya Limited;
Nalyanga t/a Encapsulated Multi-Services (Third party) (Civil Suit 88 of 2017)
[2023] KEHC 121 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 88 OF 2017
A MABEYA, J
JANUARY 20, 2023**

BETWEEN

ENCAPSULATED COMMUNICATIONS AFRICA LIMITED PLAINTIFF

AND

SOULCO KENYA LIMITED DEFENDANT

AND

SIMON WESANZA NALYANGA T/A ENCAPSULATED MULTI-SERVICES THIRD PARTY

RULING

1. This is a ruling on the plaintiff's Notice of Motion dated 11/3/2022 brought under sections 3A and 80 of the *Civil Procedure Act*, Order 45 Rules 1 and 3(2) and Order 51 Rule 1 of the *Civil Procedure Rules*.
2. The plaintiff sought an order to review and set aside the peremptory order of this Court made 7/7/2021 and reinstate this suit for determination on merit.
3. The grounds for the application were that this suit was dismissed without the plaintiff's knowledge due to non-attendance by its advocate on record; that the plaintiff has a substantial claim against the defendant in the sum of Ksh 10 million and shall suffer great prejudice if the suit were to remain dismissed; that there are also triable issues between the defendant and the third party.
4. The plaintiff contended that it was unaware of the proceedings held on 7/7/2021 and 9/8/2021 until 22/2/2022 when its current advocate perused the court file and learnt of the orders on record. That the lapse in vigilance by the plaintiff's previous advocates should not be visited upon the plaintiff and that the defendant and third party will not suffer any prejudice.



5. The defendant opposed the application through its replying affidavit sworn on 28/4/2022 by its director, Nancy Githaiga.
6. She averred that the plaintiff's advocates were duly served but failed to appear; that in any event, the plaintiff being the litigant in pursuit of a remedy ought to be vigilant and follow up on its case.
7. That this suit was marked as closed on 9/8/2021 and the present application seeking its reinstatement was filed on 11/3/2022 with no credible explanation for the delay save for the advocate's non-attendance.
8. The defendant pleaded that it would be prejudiced as it would be difficult to secure witnesses and it would incur legal costs. It was therefore urged that the application should be dismissed.
9. I have considered the entire record. The issue for determination is whether this suit should be reinstated.
10. Under Order 12 Rule 3 of the *Civil Procedure Rules*, the court may dismiss a suit or application for non-attendance if there is no good cause to be recorded. Order 12 Rule 7 clothes the court with the discretion to reinstate such a suit or application upon such terms as may be just.
11. The court's jurisdiction is to be exercised judiciously within the known legal principles which in this case are: the length of time taken to apply for reinstatement, the reason for the failure to appear and the prejudice, if any, to be suffered by the opposite party.
12. In the present case, the suit was dismissed on 11/3/2021. The present application seeking reinstatement of the suit was made on 11/3/2022. Seven (7) months lapsed before the plaintiff was jolted into action and file the present application. I find that there was inordinate delay in bringing the present application. Further, there was no explanation for the said inordinate delay.
13. As for the reasons for the failure to appear and the prejudice to be suffered by the opposing parties, the plaintiff asserted that it was its previous advocate who failed to appear in court. That such failure should not be visited upon it.
14. The record shows that on 7/7/2018, the Court noted that there was a judgment on admission on record between the parties. However, the Court directed the Deputy Registrar to determine whether there was a pending claim from the plaintiff for determination on 9/8/2021. The plaintiff's Counsel was absent.
15. On 9/8/2021, the plaintiff's advocate was once again absent. The Deputy Registrar found that the plaintiff's counsel had been properly served but failed to appear. After the counsel for the defendant and 3rd party told the court that there was no outstanding issue to be determined, the Deputy Registrar found that the matter had been concluded and ordered the file to be closed.
16. It seems plausible that the plaintiff's advocate could have been aware of the proceedings on the aforementioned dates but failed to appear. This does not mean that the plaintiff was aware of its advocate's indolence. It is possible that the plaintiff was unaware of the fact that its then advocates did not appear in court. However, the plaintiff took a whopping 7 months to seek to know the status of its case.
17. There is a judgment on record and a consent dated 2/11/2018 between the parties. However, the plaintiff asserts that there is a pending claim for determination. The defendant argued that it would be prejudiced if this application was allowed as it would incur legal costs and would not be able to trace and call some of its witnesses.



18. This is a 2017 case. Once a litigant brings a matter to Court through an advocate, the case remains that party's case throughout. The responsibility remains that party's to prosecute the same to its logical conclusion. That is what Article 159 of the Constitution dictates when it calls for expedited justice.
19. Whatever goes on between that party and its advocate should not be the business of either the Court or the party sued. If an advocate bungles the case, that is a matter between the party and its advocate. It is unfair to drag a party to Court, hold the case over another party's head like a sword of Damocles and claim that it is the party's advocate. The time when parties had the leisure of prosecuting their cases at their whims is long gone. When an advocate errs, the instructing party has recourse against him not the Court or the opposite party.
20. In any event, there is nothing on record to explain why the plaintiff's former advocate failed to attend Court. I have always known it to be a requirement that in a case where a party seeks to lay blame on its advocate, such as the present one, the party should serve such an application upon such advocate. In the present case, there is no evidence that the said advocate was ever served with the application that heaps all blame on him.
21. I find that the defendant would suffer prejudice that it may well be unable to trace its witnesses. Let the plaintiff sort out its case with its former advocates.
22. Accordingly, I find the application dated 11/3/2022 to be without merit and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCI Arb

JUDGE

