



REPUBLIC OF KENYA



KENYA LAW
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**Murabwa v Kalo & 3 others (Civil Appeal E061 of 2021)
[2023] KEHC 1019 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E061 OF 2021
PJO OTIENO, J
FEBRUARY 17, 2023**

BETWEEN

MORRIS OTUNGA MURABWA APPELLANT

AND

EZEKIEL KALO 1ST RESPONDENT

JOHN DANIEL MAINA 2ND RESPONDENT

COMMISSIONER OF POLICE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(Being an appeal from the Ruling of Hon. H. Wandere (SPM) in Kakamega
CM's Civil Case No. 160 of 2009 delivered on 26th October 2009)*

JUDGMENT

1. On the 25/2/2019 (sic) the trial Court dismissed the Appellant's suit before it on the basis that parties had not attended court as ordered. The record reveals that the dismissal was on 26.2.2019 not 25.2.2019. That decision aggrieved the Appellant who then filed an application dated 17.7.2019 and sought that the dismissal order be set aside on the basis that the Plaintiff was indisposed and unable to attend Court and that he Plaintiff had closed its case and could thus not have been deemed not to have prosecuted its case. Those same facts were reiterated in the Affidavit in Support with a treatment chit being exhibited to show that the Appellant had been admitted on 23/2/2019 and discharged on the 25/2/2019 at Malava County Hospital.
2. The Respondent opposed the application by grounds of opposition dated 10.2.2021 in which it was contended that the application was incompetent for reasons that Order 10 Rule 11 was not applicable and that the same was bad for laches as the Appellant had not denied failing to attend Court on the appointed date.



3. Parties filed submissions in arguing the application which essentially regurgitated the facts without adding any applicable legal principles. Upon appraisal of the material presented before her the trial was not convinced that an order for setting aside had been merited and dismissed the application in the following words:-

“The Plaintiff has adduced evidence to show that he was indisposed on the 26th of February 2019. He has also submitted that his Counsel was also indisposed but unlike his case, there is nothing to show that Counsel was equally indisposed and not able to attend Court or engage another to hold his brief.

In conclusion, I find no good reason to sustain this case, the Notice of Motion dated 5th August 2019 is hereby dismissed with costs.”

4. The application, other than giving the reason why the Plaintiff was not in attendance, raised the fact that as at the date of dismissal, it had led evidence and closed its case. That was a very crucial matter the court had to give due regard to but which appears was never given any consideration.
5. While it is true that there was no allusion to any reasons why the Counsel did not attend Court, now that the client was indisposed, that alone did not change the fact that the Appellant, as Plaintiff, had led evidence and closed its case. In fact the only matter that could genuinely be set for hearing on the 26.2.2019 was the defence case. The Plaintiff's case had been taken and fully prosecuted hence if anybody was to be locked out for failure to attend Court, it ought to have been the Defendant with the Plaintiff.
6. The proper interpretation of order 17 Rule 1 is that it is intended to expedite conclusion of matter and to penalize the party and counsel who may wish to forestall the Court in achieving its overriding objectives by standing firm and discouraging unnecessary adjournment which delay administration and dispensation of justice. It is not intended to punish a party who has laid its case before the Court and only waits its adversary to also lay its case, by undoing or expunging the evidence in the Court file.
7. In so far as the Appellant had led its evidence and closed its case, the suit was then not available for dismissal but only the defence could be locked out by the Court proceeding to craft a Judgment based on the materials in the file. It is therefore the finding of the Court that in dismissing the suit that had been heard and the Plaintiff's case closed, the trial Court erred and when it sought to sustain the error by dismissing the application for setting aside, it erred for the second time.
8. The dismissal of the application to set aside is not justifiable on the reasons that the provision cited was irrelevant nor is it justifiable on the basis that Counsel did not offer a reason for failure to attend. Failure to cite a provision of the law or the correct provision of the law is never fatal to a merited application. The case belong to the parties and where a party demonstrates a plausible reason for default, the failure or undoing of Counsel should not be visited upon such a litigant especially where the case is fully prosecuted.
9. I find the appeal to be merited and I do allow it with costs which I do assess at Kshs. 30,000/=.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mukabwa for the Appellant



No appearance for Muleshe -for the Respondent

Court Assistant: Polycap

