



**Mogaka t/a Mogaka Bwongki & Co Advocates v Maimoon t/a Maimoon Medical Center
(Miscellaneous Application E067 of 2022) [2023] KEHC 24729 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E067 OF 2022
SM GITHINJI, J
OCTOBER 31, 2023**

BETWEEN

**VINCENT MOGAKA T/A MOGAKA BWONGKI & CO
ADVOCATES APPLICANT**

AND

YUNUS B MAIMOON T/A MAIMOON MEDICAL CENTER RESPONDENT

RULING

Coram: Hon. Justice S.M. Githinji

Mr Onyinkwa for the Appellant

Mr Mogaka for the Respondent

1. On 1st November 2022, the Respondent filed a reference before this court vide a Chamber Summons application dated 27th October 2022, challenging a ruling delivered by the deputy registrar, Hon. D. Wasike, on 26th October 2022. The ruling was on the taxation of the advocate-client bill of costs which she taxed at Kshs. 567,502/-. The application was then slated for mention to confirm filing of submissions on 15th March 2023 when it was dismissed for non-attendance.
2. This prompted the Respondent to file another application dated 23rd March 2023 seeking the following orders; -
 1. Spent.
 2. That this honourable court be pleased to re-instate the application dated 27th October 2022 and the orders of this court dated 4th November 2022.



3. That this honourable court be pleased to set aside its orders issued on 15th March 2023 dismissing the application dated 27th October 2022 and the discharging the Orders issued on 4th November 2022.
4. That the costs of this application be in the cause.
3. The application was supported by the affidavit of Onyinkwa Bernard sworn on the even date wherein he deposed that, failure to attend court on 15th March 2023 when the application was dismissed, was occasioned by challenges in logging into the court's virtual session. Counsel deposed that on the material date, he tried logging into the court's provided link but was stuck at the Microsoft teams lobby until the session ended abruptly. Upon enquiry at the registry, counsel was informed that their application had been dismissed for non-attendance despite having filed submissions on 24th January 2023.
4. In response, the Applicant filed a Replying Affidavit sworn on 25th April 2023 by Vincent Mogaka Nyaboga, the Applicant's advocate, who deposed that the application was oppressive, scandalous and brought in bad faith. That even in the circumstances, the Respondent has since failed to file submissions in support of the reference.
5. In addition, the Applicant filed an application dated 20th March 2023 under section 51 (2) of the Advocates Act seeking the following orders;
 1. That this honourable court be pleased to order that the taxed amount namely Kshs. 567,502/- in the certificate of taxation of costs dated 26th October 2022 and issued on 31st October 2022 be entered as judgment against the Respondent.
 2. That interest is paid on the taxed costs at the rate of- 14% per annum from the date of taxation till payment in full.
 3. That the decree be drawn and issued in respect of the said certificate of taxation and that the Applicant be at liberty to execute for recovery of the same in such a manner as in an ordinary decree of this court.
 4. That costs be provided for.
6. Following the court's direction, both applications dated 23rd March 2023 and 20th March 2023 were canvassed orally in court. I have carefully considered the submissions advanced by both counsels. I find that the issues for determination are; -
 1. Whether the application dated 27th October 2022 should be reinstated.
 2. Whether the certificate of taxation should be adopted as judgment of this court.
7. Under order 12 rule 7 of the Civil Procedure Rules, the court has discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or non-attendance. In John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation) (2015) eKLR, the court held that the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made, against the prejudice the plaintiff would suffer for that.
8. The question therefore is whether the applicant has demonstrated reasonable grounds for the reinstatement of the application dated 27th October 2022; and whether the respondent will suffer prejudice if the application is reinstated.



9. The court’s main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law that the discretion is to be exercised but not in a manner that would assist a person who has deliberately sought to obstruct the course of justice.
10. The Respondent blames technical hiccups related to the online platform, Microsoft Teams. In *Mutinda Musila Malua v Ngunga Yatta Deputy County Commissioner Kitui West Sub-County & 2 Others* [2021] eKLR, Angote J. reinstated a dismissed petition due to failure of internet connectivity, since the advocate addressed the court albeit late after the petition had been dismissed as a sign of his efforts to reach court at the earliest opportunity possible.
11. In the present case, counsel for the Applicant explained that shortly after the session ended while he was waiting to be let in, he sent a representative to inquire at the registry, when he was informed of the dismissal. What counsel failed to explain is why he took a period of about 12 days to seek reinstatement of the application.
12. The applicant submits if the application is not reinstated, it will be condemned unheard and that it would suffer grave injustice and prejudice. On the other hand, the respondent alleges that reinstating the application is prejudicial to the respondent who must be paid their legal fees.
13. Articles 48 and 50 of the *Constitution* guarantee every Kenyan a right to access to justice and fair hearing. Article 159 requires that justice be administered without undue regard to technicalities. Section 1A, 1B and 3A of the *Civil Procedure Act* expects the court to strive towards substantive justice.
14. Looking at the circumstances in this matter, my considered view is for the route that offers lesser risk of injustice, which is to allow the application for the applicant would be more prejudiced if denied a chance to prosecute the application dated 27th October 2022.
15. The outcome is that the orders granted on 15th March 2023 are hereby set aside. The Applicant had already filed their submissions and the Respondent should put in written submissions to the application dated 27th October 2022 within 7 days. Ruling on 21/11/2023.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31ST DAY OF OCTOBER, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Onyinkwa for the Client/Applicant
2. Mr Vincent Mogaka is for the Respondent

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S.M. GITHINJI

JUDGE

31/10/2023

