



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Keroche Breweries Limited v Coretta Limited (Civil Case 34 of 2014)
[2023] KEHC 26506 (KLR) (Civ) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 34 OF 2014

AN ONGERI, J

DECEMBER 15, 2023

BETWEEN

KEROCHE BREWERIES LIMITED PLAINTIFF

AND

CORETTA LIMITED DEFENDANT

RULING

1. The plaintiff/applicant filed an application dated 1/8/2023 brought under article 25(c), 48 and 50 of the [Constitution of Kenya](#), sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), 45 rule 1 and order 51 rule 1 [Civil Procedure Rules, 2010](#) seeking the following orders;
 - i. This application be certified as urgent and be heard *ex-parte* in the first instance.
 - ii. Pending hearing and determination of this application interpartes this honourable court be pleased to review its orders directing that the hearing of this matter has been closed and that a judgment of this court be delivered on August 4, 2023.
 - iii. This honourable court be pleased to arrest its judgment in the current suit slated for August 4, 2023 pending hearing and determination of this application inter partes.
 - iv. This honourable court be pleased to issue any further orders to meet the ends of justice.
 - v. The costs of this application be in the cause.



2. The application is based on the grounds on the face of it as follows;
 - i. That on June 20, 2023, the honourable court issued directions reserving this matter for judgment on July 21, 2023, where it was further reserved for August 4, 2023.
 - ii. That the matter was reserved for judgment for non-appearance, however prior to June 20, 2023, the plaintiff's erstwhile advocate diligently attended court without fail.
 - iii. That the last three times the matter was in court, on March 14, 2023 and on March 29, 2023, the plaintiff's advocate was in attendance however May 9, 2023, the Judge was away on official duties.
 - iv. That Messrs. Kabugu & Co. Advocates came on record for the plaintiff and filed a notice of change and upon perusing the file established that for failure to attend the matter on June 20, 2023, the matter was reserved for a judgment.
 - v. That the plaintiff's constitutional right to a fair hearing have been threatened for they did not have an opportunity to be heard or tender its evidence.
 - vi. That no prejudice will be occasioned to the defendant and it is in the interest of justice that the suit be opened allowing the plaintiff to avail its witness and evidence in chief.
3. The application is supported by the replying affidavit of Nicholas Kipchirchir Kechir sworn on 1/8/2022 which reiterates the above grounds.
4. The defendant/respondent David Kimani Muthondu filed a replying affidavit dated 3/8/2023 opposing the application. In it he deponed that the plaintiff's advocates have no capacity to file the present application. The judgment dismissing the plaintiff's suit against the defendant was delivered on 14/3/2023, no consent or leave to come on record has been sought as required under order 9 rule 9 of the [Civil Procedure Rules, 2010](#).
5. The matter was fixed for hearing on 14/3/2023 however on that day the plaintiff counsel applied for an adjournment but the court declined and directed that the hearing proceeds virtually at 10.30 am. When the case was called the counsel for the plaintiff was not present. He deponed that the court proceeded and on application by the defendant, the plaintiff's suit was dismissed with costs for failure to attend under order 12 rule 3 (1) of the [Civil Procedure Rules, 2010](#)
6. The parties filed written submissions as follows; the plaintiff submitted that Messrs Kabugu & Co. Advocates came on record for the plaintiff *vide* a notice of change of advocate attached to a consent as pursuant to order 9 rule 9 of the [Civil Procedure Rules, 2010](#). The plaintiff upon perusal of the file had established that the matter was reserved for judgement for failure of appearance during the proceedings and thus acquired the services of the firm of Messrs. Kabugu & Co. Advocates.
7. It was the plaintiff's submission that article 25 (c) of the [Constitution](#) of Kenya provides for the right to a fair trial, article 48 provides for the access to justice for all persons and article 50 provides for fair hearing. That further in [Patriotic Guards Ltd v James Kipchirchir Sambu](#) [2018] eKLR the Court cited



the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR where the Court highlighted,

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

8. The plaintiff submitted that no prejudice will be occasioned to the defendant and it will only be in the interest of justice if the suit is opened allowing the plaintiff to avail its witnesses and evidence in chief. In the event the suit is not reopened that plaintiff stands to suffer substantial loss as well as costs and interest following the mistake of the erstwhile advocate.
9. The defendant on the contrary submitted that although the firm filed a consent with the previous firm of advocates, to come on record no leave has been sought either in the present application or separately. On 20/6/2023, when the said firm attempted to seek leave to file submissions in opposition to the defendant's counterclaim, this Court duly informed the said firm of advocates that they had no right of audience before the court following a successful challenge by the defendant's advocate.
10. The Defendant submitted that the Court having dismissed the Plaintiffs suit, the instant application is incompetent as the firm of Kabugu and Company Advocates has failed to comply with the mandatory requirements set out in order 9 rule 9 of the *Civil Procedure Rules*. The instant application should therefore be dismissed with costs to the Defendant. In support the Plaintiff relied on the decision in *John Langat v Kipkemoi Terer & 2 others* [2013] eKLR where the court held as follows;

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgement. He annexed the consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not affect the change of advocates "without an order of the court. No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent. ”

11. The instant application having been filed by a Firm without any right of audience is fatally defective and for dismissal as the Plaintiff has had every opportunity to regularize its appointment but has failed to do so. the defendant argued that it is not enough for the plaintiff to simply blame its advocates as the case belongs to it and further admitted to being aware of the reserved hearing date. The plaintiffs have failed to diligently prosecute its case and cannot therefore ask the court to review its ruling.
12. The sole issue for determination in this application is whether the order of this court dated 4/8/2023 should be set aside.
13. The court has discretion to set aside ex parte proceedings upon considering certain conditions.
14. In the case of *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or



error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

15. I agree with the plaintiff’s submissions that the mistake of the advocate ought not to be visited upon a party.
16. I find that the failure by the plaintiff to prosecute their case was occasioned by the misstate of the advocate.
17. I set aside the exparte proceedings herein and direct that the suit starts *denovo*.
18. The plaintiff to pay the defendants thrown away costs of ksh.20,000 before the suit is set down for hearing.
19. The suit to be prosecuted within 60 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

NAIROBI HIGH COURT CIVIL CASE NO. 34 OF 2014	0
---	---

