



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 635 OF 2010**

**EDWARD NGERA MWANGI.....1<sup>ST</sup> PLAINTIFF/DECREE HOLDER/RESPONDENT**

**PHILLIS ROSE WAMBUI THUO.....2<sup>ND</sup> PLAINTIFF/DECREE HOLDER/RESPONDENT**

**-VERSUS-**

**VERONICA NDINDA KIMENDE.....DEFENDANT/JUDGMENT DEBTOR/APPLICANT**

**RULING**

1. The defendant/judgment debtor/applicant brought the Notice of Motion dated 14<sup>th</sup> December, 2021 supported by the grounds presented on its face and the facts stated in the affidavit of Veronica Ndinda Kimende. The defendant sought for the order to reinstate the defendant/applicant's application dated 6<sup>th</sup> April 2011 for hearing which was dismissed on 29<sup>th</sup> November, 2021 for non-attendance.
2. The respondent put in a replying affidavit sworn by advocate Purity K. Mbabu on 12<sup>th</sup> January, 2022, to oppose the Motion.
3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. In her affidavit filed in support of the motion dated 14/12/2021, Ms. Veronica Ninda Kimende, stated that she filed an application on August 18, 2021, which was heard by Hon. Justice Chitembwe and dismissed on November 3, 2021, and that the plaintiff's lawyer requested a mention date before the DR, which was granted on November 23, 2021, as well as a hearing date for her application filed on April 6, 2011, which was prosecuted and granted on November 29, 2021.
6. She avers that she received notice that her application dated 6 April 2011 had been dismissed with costs for lack of attendance, and that the file had gone missing on 16 November 2021 when the matter was coming up for directions on her other application dated 8 November 2021, and that she would have to appear in court on 23 November 2021 during the next mention date when the file was found.
7. The applicant further avers that she perused the file and discovered that the matter was listed before me on November 29, 2021, and that it was her expectation that the matter would be listed before Hon. Chitembwe, who was handling the other matter, and that she received no notice from the registry that the file would be transferred to me.
8. She depones that if her application is not reinstated, her constitutional rights will be violated, and that the plaintiff will not be prejudiced in any manner if the application is reinstated.
9. In reply thereto, Ms. Purity K Mbabu states that this application is without merit because the applicant has not shown/ demonstrated sufficient cause or good reason for failing to appear in court on November 29, 2021 to prosecute the said application, which had been unprosecuted for ten years and required vigilance to prosecute because she was aware of the hearing date.
10. She avers that the cause list was posted on Kenya Law and that the defendant needed no notice other than the unambiguous one on the cause list.

11. She further avers that the applicant lacks clean hands, is not honest and is out to waste judicial time and that her negligence is inexcusable in the circumstance of the matter.

12. I would ordinarily allow a party the leeway to present their case where it is clear that there is a mistake of counsel, or that the party was prevented in one way or another, out of matters beyond his control, to attend court. But what I have here is the epitome of a party who filed an application ten years ago but does not appear keen to prosecute it.

13. In the case **Shah -vs- Mbogo & Another (1967) EA 1116**, the court stated on the matter of its discretion, that

**“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from 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.”**

14. A Court's discretion to set aside its ruling/Judgment is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court.

15. A court's discretion must be exercised judiciously based on facts and the law. The party seeking to reinstate the suit must also demonstrate good faith the case, what unavoidable circumstances meant. Had the matter been brought up then, may be, the result would have been different, once again, in the court's discretion.

16. When the matter came up on 29<sup>th</sup> November 2021, it emerged that the explanation being given by plaintiff for non-attendance on that material day is that her matter was come up before justice Chitembwe for hearing but ended up being placed before me.

17. On the hand the respondents avers that the defendant lacks clean hands, is not honest and is out to waste judicial time and that litigation must come to an end.

18. I am in agreement with the respondents that it is always prudent for litigation to come to an end when all parties have been heard on merit and substantive justice administered. This application has been unprosecuted for 10 years which should have called for vigilance to prosecute as the applicant was aware of the hearing date.

19. I find that the application has no merit and I dismiss the same with costs to the respondents/plaintiffs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2022**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the 1<sup>st</sup> Plaintiff

.....for the 2<sup>nd</sup> plaintiff

..... for the Defendant