



**Kiilu v Mutua (Miscellaneous Civil Application 124 of 2021)
[2022] KEHC 3060 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION 124 OF 2021
GV ODUNGA, J
JUNE 27, 2022**

BETWEEN

PATRICK KATHANZU KIILU APPLICANT

AND

ANN NZULA MUTUA RESPONDENT

RULING

1. By a Notice of Motion dated 24th February, 2022, the applicant herein seeks the following orders:
 1. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.
 2. That this Honourable Court be pleased to review the Ruling/Order delivered on the 24th February, 2022 dismissing the Applicant's Application dated 28th August, 2021 and filed on 02nd September, 2021.
 3. That this Honourable court be pleased to re-instate the Application 28th August, 2021 and filed on 02nd September, 2021.
 4. That this Honourable court be pleased to allow the Applicants to put their submissions on record.
 5. That this Honourable Court be pleased to make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice;
 6. That the costs of this Application be in the cause.
2. According to the Applicant, his Application dated 28th August, 2021 and filed on 02nd September, 2021 seeking to re-instate the application for stay of execution dated 21st July, 2021 and filed on 26th July, 2021 came up for directions on 10th November, 2021 whereby this Court directed that the same



- be dispensed by way of written submissions and scheduled the delivery of the ruling for 24th February, 2022.
3. According to the applicant, his submissions dated 28th January, 2022 were subsequently dispatched on 07th February, 2022 via the court email address-highcourt.machakos@gmail.com. And the hardcopies were filed on 11th February, 2022. However, both the hard and soft copy of the submissions were not placed on the court file and as such, the Ruling was delivered by which the Court dismissed the Applicant's Application dated 28th August, 2021.
 4. The Applicant was apprehensive that unless the orders made on the 24th February, 2022 dismissing the Application dated 28th August, 2021 are reviewed and the Application dated 21st July, 2021 and filed on 26th July, 2021 seeking to stay execution on the Court's judgment dated and delivered on 11th June, 2021 against the Defendant/Applicant is reinstated, heard and determined on merits, the Plaintiff/Respondent would proceed with the execution and the Applicants would suffer irreparable loss and damage.
 5. According to the Applicant, the Application was made expeditiously without any unreasonable delay and no prejudice would be occasioned to the Plaintiff/Respondent that cannot be cured by way of costs.
 6. In opposing the application, the Respondent averred that the said Application is dishonest and deceptive aimed at misleading the Court with false facts. According to the Respondent, the Application dated 21st July, 2021 referenced in the Applicant's application first came up for hearing on 11th August, 2021 when the Applicant was not present to prosecute the suit and consequentially the application was dismissed. The Applicant filed an application dated 28th August, 2021 to have the order of dismissal set-aside and the Application dated 21st July, 2021 reinstated. On 20th September, 2021 the Applicant and the Respondent compromised the said Application dated 28th August, 2021 and by consent the Application dated 21st July 2021 was reinstated. The Court thereafter directed that the Application dated 21st July, 2021 would be canvassed by way of written submissions and directed that each party file and serve submissions within 14 days with the Applicant proceeding first.
 7. According to the Respondent, as per the Court's direction the Applicant was to file their submissions on or before 4th October, 2021 and the Respondent was to file submissions within 14 days of receiving the Applicant's submissions. In disregard of the directions of the Court, the Applicant did not file their submissions in time whereof the Respondent filed submissions on 8th November, 2021 as directed by the Court and the matter was subsequently mentioned on 10th November, 2021 to confirm compliance on which date only the Respondent was had complied. The Court in its discretion granted the Applicant 14 more days to comply and reserved for Ruling for 24th February 2022.
 8. The Respondent noted that whereas the Applicant now purports that their submissions were filed on 11th February, 2022, that was over 77 days after the stipulated timeline as directed by the Court. To the Respondent, the said actions are indicative of an indolent litigant who has no interest in prosecuting their Application. It was further averred that the Applicant's application dated 24th February, 2022 is defective as it seeks reinstatement of the application dated 28th August, 2021 which application was by consent compromised by the parties. According to the Respondent, the Court's Ruling dated 24th February, 2022 pertains to the Application dated 21st July, 2021 and not 28th August 2021. Accordingly, the prayers sought in the Application dated 24th February, 2022 are defective and cannot be granted by this Honourable Court.



Determination

9. I have considered the application, the affidavits, both in support of and in opposition thereto and the submissions filed.
10. Although the application is prosecuted by the Applicant as if it is an application for review, the matter does not fall under the purview of review. It is more of an application seeking to set aside an order than review. That however is not fatal to the application. The Court of Appeal in *Murtaza Hussein Bandali T/A Shimoni Enterprises v P. A. Wills* [1991] KLR 469; [1988-92] held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See *Gharib Mohamed Gharib v Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999.

11. In this case, in an earlier ruling, I expressed myself as follows:

“This matter has a chequered history. On 26th July, 2021, I granted temporary orders of stay to the Applicant, directed that the Motion dated 21st July, 2021 be served and scheduled the matter to 11th August, 2021 for further orders. Come that day and only the Respondent was represented and the Motion was thereby dismissed. The Applicant then sought vide an application dated 28th August, 2021, to have the order of dismissal set aside and the dismissed motion be reinstated to hearing. That application was allowed by consent of the parties on 20th September, 2021 on which date directions were issued regarding the hearing of the Motion dated 21st July, 2021, inter alia, that the applicant files and serves the submissions within 14 days with the Respondent filing and serving theirs within 14 days of service thereof. Come 10th November, 2021 when the matter was listed to confirm compliance, only the Respondent had filed and served the submissions. Nevertheless, the Court indulge the Applicant by giving them 14 more days within which to file the submissions. No such submissions were ever filed. It is therefore clear that the mode of prosecution of the application dated 21st July, 2021 was by way of written submissions, a mode which the Applicant has not adhered to despite indulgence extended to it by the Court. The history of this matter clearly reveals a party who is lethargic in pursuing his cause. The conduct of the Applicant in this matter is that of a person whose only desire is to delay the Respondent from enjoying her fruits of judgement by adopting delaying tactics and thereby obstructing the court of justice. Such conduct can only amount to an abuse of Court process. Court process ought to be invoked by genuinely aggrieved parties and not by parties whose only intention is to frustrate and vex the other parties to the proceeding. That is the conduct portrayed by the Applicant herein.”

12. I then proceeded to dismiss the application. The Applicant now contends that his submissions dated 28th January, 2022 were subsequently dispatched on 07th February, 2022 via the court email address-highcourt.machakos@gmail.com. and the hardcopies were filed on 11th February, 2022. As appears from the above ruling, on 10th November, 2021, notwithstanding the earlier non-compliance, the Court indulge the Applicant by giving him 14 more days within which to file the submissions. The said 14 days lapsed on 24th November, 2021. It follows that even if it is true that the Applicant filed



the submissions on 7th or 11th February, 2022, he was already out of time and in light of the earlier conduct of the applicant, that delay is inexcusable. Without any reason being put forward for non-compliance, this Court cannot simply ignore its directions regarding the timelines considering the fact that the Applicant has in the past evinced a tendency of not complying with the directions of the court as regards the timelines. This Court cannot afford to ignore its directions so ignobly.

13. Apart from that I agree with the Respondent that the application is incompetent as it seeks to reinstate an application which had been reinstated by consent of the parties.
14. In the premises, the application dated 24th February, 2022 fails and is dismissed with costs.
15. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JUNE, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Gathenya for the Applicant

Mr Nagwere for Mr Maingi Musyimi for the Respondent

CA Susan

