



**Rana Auto Selection Limited & another v Kegode (Civil Appeal
74 of 2021) [2022] KEHC 3197 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 74 OF 2021
EKO OGOLA, J
JUNE 27, 2022**

BETWEEN

RANA AUTO SELECTION LIMITED APPLICANT

AND

NYAIMWA A. NYAKEGA T/A EKEMWANYA AUCTIONEERS APPELLANT

AND

EVANS GALLO KEGODE RESPONDENT

(Being An appeal from Eld CM CC No.E0220 of 2021)

RULING

1. The application as amended on the 19th of November 2021 before court seeks to reinstate the appellant's application dated the 29th of October 2021 and to set aside the orders of this court issued on the 8th of November 2021 dismissing the appellant's/applicant's application dated the 29th of October 2021.
2. The application is premised on grounds that the applicant/appellant's application dated the 29th of October 2021 was dismissed by court on the 8th of November 2021 for want of prosecution after the failure of counsel to appear before court. In this regard, the appellant/applicant's counsel averred that they were unable to get the correct virtual links for the court to enable them attend to the proceedings. In addition, counsel for the appellant/applicant deponed that they obtained virtual links from the Kenya Law website but which links were apparently outdated. Counsel therefore averred that her inability to log into the session was not deliberate and argued that it is in the interest of justice that the orders sought are granted.
3. The application was supported by the affidavit of Ms. Grace Otieno, counsel for the applicant/appellant sworn on the 19th of November 2021 reiterating the grounds highlighted above.



4. The application was opposed by the respondent through his reply sworn on the 26th of January 2022. In particular, the respondent was of the view that the grounds relied upon by the applicant's counsel cannot be substantiated since the court's links have never been changed. He questioned how his advocate was able to access court using the same link yet the applicant/appellant was not able to access court via the same link. The respondent further averred that the Court did not indicate that its virtual court links had technical issues. He opined that the applicant herein is bent on buying time with the sole intention of punishing him since the subject suit motor vehicle is in their possession while he continues to pay for the same.
5. Of particular note, the respondent observed that no loss will be suffered by the appellants/applicants that cannot be compensated in monetary terms if the court were to dismiss the application. According to the respondent, this is so because the suit motor vehicle was sold to him on hire purchase at Kshs 1,650,000 and he has already paid 1,325,000 representing more than 80% of the agreed purchase price yet he is not using the subject motor vehicle. He also noted that he is still paying for the balance which stands at Kshs 325,000.
6. The respondent viewed the instant application as one not made in good faith but one full of mischief and should thus be dismissed with costs.
7. There are no submissions filed to the instant application.

Determination

8. In my view the following issues fell for determination in the application.
 - a. Is there a reasonable excuse why the appellant/applicant counsel did not attend court?
 - b. If the orders are not issued would the applicant suffer any prejudice?
 - c. In any event what are the appropriate orders to be granted by this Court?
9. On the first issue, it is the Applicant's case that their counsel was unable to access court virtually since the virtual court links were not functional. They observed that this was a mistake that was not deliberate and as such, the same should not be visited upon the innocent Applicant.
10. The general principles governing applications like the one at hand are anchored in the realm of judicial discretion. However, I find it relevant to invoke the provisions of Section 1A (1) of the *Civil Procedure Act* which provides for the overriding objective of the court so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the Act, to assist the court to further the overriding objective by participating in the processes of the court and to comply with the directions and orders of the court as directed.
11. The foregoing discussion is in tandem with the spirit under Article 159 of *the Constitution*, which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.
12. The Kenyan Constitution has deposited judicial power with judicial officers for the purpose of being used to adjudicate disputes and administer justice substantively and fairly within due regard to technicalities. This is the prism of Article 159 of *the Constitution*.
13. I now turn to the question whether the appellant's/applicant's counsel action is excusable. On this, courts have come up with applicable principles and standards to consider in exercising judicial discretion.



14. As noted in *James Mwangi Gathara & Another v Officer Commanding Station Loitoktok & 2 Others* [2018] eKLR the following cases are relevant;
15. The decision whether to reinstate a suit and the legal test to be met has been discussed in the case of: *Wanjiku Kamau v Tabitha Kamau & 3 Others* 2014 eKLR where the court observed that;

“The court has the discretion to set aside judgement or order and there are no limitations and restrictions on the discretion of the judge except of the judgement or order is raised. It must be done on terms that are just”
16. Further, in the case of *Lochab Bros Ltd v Peter Karuma T/A as Lumumba, Lumumba Advocates* 203 eKLR the court observed that:

“the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to filter the wide discretion given to it by rules”.
17. In *Esther Wamaitha Njihia & 2 Others v Safaricom Limited* [2014] eKLR, the court fortified the legal threshold to determine the rights of the parties on issues like the ones at hand. The court held as follows:

“The discretion is free and the main concern of the courts is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See shah Versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration v Gasyali). It also goes without saying that the reason for failure to attend should be considered”.
18. Further, in the case of *Philip & another v Augustine Kibede* 1982-88 KLR 103, the court expressed itself thus;

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline”.
19. The stand that this court takes is not far from what the courts in the above cited cases have taken. I agree that parties to a litigation are bound to make mistakes and sometimes the mistake is on the part of the counsel retained by those parties who is guilty of laches without the knowledge of the client. However, such a scenario does not leave them without a remedy for the court to exercise discretion in the interest of justice. I reiterate the view that a litigant who is not guilty of dilatory conduct should not be debarred from pursuing his/her rights in court because of the negligence of his/her Counsel.
20. In the instant case, my mind is clear that the virtual links provided by court were functioning at all times and did not experience any challenge on the material day. This has been confirmed by the respondent who noted that his advocates were able to access court using the same virtual link that the appellant/



applicant's counsel submitted were not functional. The same was also confirmed by the Court's ICT Officers who indicated the virtual links have never had a challenge.

21. I therefore detest the applicant/appellant's counsel lies in the greatest terms possible. An advocate is foremost an officer of the court under a duty to assist court in the dispensation of justice. This duty is paramount.
22. Consequently, I find the excuse given by the counsel to be inadequate and insufficient and the same is not excusable.
23. On the second issue that is whether the applicant/appellant would suffer irreparable loss if the orders sought are not granted, I am of the view that there is no loss that would be suffered by the appellants that cannot be compensated by way of monetary compensation. This is because from the evidence on record, the respondent has paid Kshs 1,325,000 against Kshs 1,650,000 that was the purchase price on higher purchase terms. The same has not been disputed by the appellant. The amount already paid in my view constitutes nearly 80% of the total purchase price. In this regard I am of the view that the respondent would be more prejudiced than the appellant/applicant if the court were to grant the applicant the orders sought. As such, no prejudice would be suffered on the part of the appellant that wouldn't be sufficiently addressed through monetary compensation.
24. In the circumstances, the court finds the applicants/appellants application amended on the 19th November 2021 without merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 27TH OF JUNE 2022.

E. K. OGOLA

JUDGE

