



REPUBLIC OF KENYA



KM (Suing as the father of MM - Minor) v Abdikarim & another (Civil Miscellaneous Application 7 of 2020) [2022] KEHC 12399 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL MISCELLANEOUS APPLICATION 7 OF 2020**

**RK LIMO, J
JUNE 21, 2022**

BETWEEN

**KM APPLICANT
SUING AS THE FATHER OF MM - MINOR**

AND

**SHEIKHOW ABDIKARIM 1ST RESPONDENT
LUCY NJERI KANGETHE 2ND RESPONDENT**

RULING

1. Before me, is a Notice of Motion dated November 16, 2020 where the applicant is seeking the following Orders/reliefs: -
 - i. That this Hon. Court be pleased to set aside the dismissal Order issued on October 7, 2020 in respect to an application dated February 14, 2020.
 - ii. That costs be in cause.
2. The applicants have listed the following grounds namely: -
 - a. That his application dated February 14, 2020 was also dismissed for non-attendance on October 7, 2020 when it was scheduled for hearing.
 - b. That the applicant's clerk failed to diarize the date.
 - c. That the application was coming up for the 1st time.
 - d. That the applicants counsel was absent and his absence was not deliberate.
 - e. That it will be fair and just to grant the relief sought.



3. In his supporting affidavit sworn on November 16, 2020 Counsel for the applicant pleads that he was not aware of the interparty date of October 7, 2020 when their application dated January 26, 2020 was coming up for hearing before this court. He avers that he sent his clerk to the court's registry to fix the application for hearing and that the clerk was given a date for the interparte hearing but failed to diarize the same on his diary. He has attributed his clerk's inadvertence to the fact that he was not in his right state of mind following stress as he was nursing his ailing father.
4. He has exhibited an apology letter from the clerk vilified for forgetting to diarize the matter.
5. The Counsel avers that he only became aware of the dismissal after perusal of court file after he had written to the Deputy Registrar vide letter dated October 28, 2020 asking for a hearing date for his application.
6. This application is opposed by the respondent who has filed a replying affidavit sworn on January 28, 2021 through learned counsel Philip M. Mulwa.
7. The application is opposed on grounds that the Applicants' counsel did not give a proper reason for failing to attend court and, that it is difficult for this court to authenticate the excerpt of the applicant's counsel diary and the reason advanced of his clerk tending to his ailing father.
8. Finally, the respondent contend that the applicant is not keen in prosecuting his matter due to the time that for him to set down the application for hearing.
9. In her submissions dated April 28, 2021 the 2nd Respondent through her counsel takes issue with the reason advanced by the applicant's counsel that his clerk failed to diarize the hearing date. The 2nd Respondent submits that it would be difficult for this court to authenticate whether the entries on the diary doctored or not.
10. It has also been submitted that advocates have a duty to assist courts in dispensing justice by ensuring their attendance in court, and that the 2nd Respondent is already prejudiced by the failure of the applicant to prosecute his application.
11. The 2nd Respondent has contends that, in the interest of justice and useful time of judicial time and resources the application ought to be dismissed. She has relied on the case on *Elosy Murugi Nyaga versus Tharaka Nithi County Government & Anor* (2020) eKLR where the trial court dismissed a similar application for reinstatement. In its decision, the court found that the applicant had failed to demonstrate the steps she took after her matter was rescheduled to determine the status of her case.
12. This court has considered this application and the response made. For the record this court directed the parties in this matter to proceed through written submission and though the parties through their Counsels informed this court on May 4, 2022 that submissions had been filed, when this court retired to write this ruling it noticed that only the respondents had filed their submissions. I have found it just to consider the grounds listed and the affidavit filed by the applicant's learned counsel Mr. Musili Mbiti with a view to determining this matter on the merit rather than a technicality.
13. The application is premised on Order 12 Rule 7 of the *Civil Procedure Rules* which gives this court discretion to reinstate a suit that has been dismissed. The rule provides;

“Where under this Order Judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just”
14. It is apparent that the application may have invoked the wrong provisions because what this court dismissed for want of prosecution was an application dated February 14, 2020. The applicant is seeking



- reinstatement of an application rather than a suit. In such circumstances, the correct procedure or rule to invoke is Order 51 Rule 15 of the [Civil Procedure Rule](#) where this court is given a discretion to set aside an order made *ex parte* in respect to applications.
15. I am however inclined or minded to determine this matter on merit because after all under Order 51 Rule 10 a wrong citation of a rule or non-citation is not a basis to strike out an application.
 16. The power to set aside an *ex parte* order is a discretionary one which depends on given circumstances. The court's discretion to set aside an *ex parte* order or dismissal is meant to avoid injustice resulting from some mistake or inadvertence which is found to be excusable in the circumstances. The discretion is not meant to aid the indolent or assist a litigant who deliberately aims delay or obstruct the course of justice.
 17. On determining whether there was an excusable mistake, the court is called upon to examine the reason brought forth for the Applicants' non-attendance and decide whether the same is an excusable reason.
 18. Counsel for the applicant claims that their application dated February 14, 2020 was scheduled to come up for hearing on October 7, 2020 but on the said date, it was dismissed for non-attendance. The reason given by counsel is that he sent his clerk to the Court's registry to pick a date and that the clerk was given the date of October 7, 2020 for hearing but he failed to diarize the date and as a result, counsel was not aware of the date which led to the non-attendance. Counsel attached a page of his diary for October 7, 2020 which shows that the matter had not been diarized.
 19. Counsel further claims that he later sent his clerk to the registry with a reminder for issuance of a date and wrote a letter to that effect. The letter is dated October 28, 2020 and marked as annexure MM2. This court however notes that the letter does not have a court stamp indicating that it was indeed received by the registry.
 20. Section 1A, 1B, 3A of the [Civil Procedure Act](#) provide for the objectives and duties of this court.

“This court in exercise of its powers is required to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.”
 21. Section 1A, (3) of the [Civil Procedure Act](#) requires;

“A party to the proceedings or an advocate of such party to assist the court to further the overriding objective of the Act, to participate in proceedings of the court and to comply with directions and orders of the court.”
 22. Section 1B (1) of the [Civil Procedure Act](#) provides;

“For the purposes of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims;

 - a) The just determination of the proceedings
 - b) The efficient disposal of the business of the court
 - c) The efficient use of the available judicial and administrative resources.
 - d) The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties.....”
 23. Flowing from the above, it is apparent that court proceedings should be taken seriously and parties who bring their matters to court are required to be diligent to avoid unnecessary delays.



24. In this matter, going by the proceedings herein, the conduct of the applicant has been wanting from the beginning. When you consider the nature of the application sought to be reinstated, it is to do with lateness or failure by the applicant to carry out a necessary step within the stipulated time.
25. The applicant has vilified a clerk attached to their advocates firm for their predicament but if one considers the time it took for application to be fixed for hearing one will note that while the application was filed on November 23, 2020, it was only fixed for hearing on January 23, 2021. There is no explanation given for the delay. This court is alive to the demands placed upon courts to balance the scales of justice carefully in order to ensure that parties are not locked out of the seat of judgement unless it is absolutely necessary. In *Esther Wamaittha versus Safaricom* [2014] eKLR the court made the following observations when handling a similar matter invoking the discretion of court
- “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 Versus Gasyali). It also goes without saying that the reason for failure to attend should be considered”.
26. The exercise of courts discretion is to do justice to the parties before it. The basis of setting aside an exparte order should be factored in because there is no point to exercise discretion in favour of a party whose cause is doomed to an extent that setting aside would only serve to waste of judicial time. As I have observed above the applicant is seeking to set aside the dismissal order so that he can reinstate an application to extend time to appeal against a decision in a judgement delivered on December 18, 2019. That judgement was delivered in the presence of the applicant’s counsel. The application for extension of time was filed almost two months after judgement was delivered. There’s therefore a pattern of indolence or lack of diligence on the part of the applicant and his counsel.
27. The applicant, in my considered view has not demonstrated sufficient basis to warrant this court to exercise its discretion in his favour. He has exhibited lack of seriousness from the word go and stating that he did not turn up in court because the clerk failed to diarize the matter it too lame, an excuse in my view particularly when the vilified clerk has not sworn an affidavit to affirm that he should carry the cross for the counsels’ failure to turn up in court on October 7, 2020. I am not persuaded in the circumstances to exercise my discretion in his favour.
28. In the premises the application dated 16th November, 2020 lacks in merit and the same is dismissed with costs.

DATED,SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF JUNE,2022.

HON. JUSTICE R. K. LIMO

JUDGE

