



**Sewe Group Limited v Fort Investrust Limited (Miscellaneous Application E1292 of 2020)
[2022] KEHC 12421 (KLR) (Commercial and Tax) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1292 OF 2020**

A MSHILA, J

JULY 29, 2022

BETWEEN

SEWE GROUP LIMITED APPLICANT

AND

FORT INVESTRUST LIMITED RESPONDENT

RULING

BACKGROUND

1. The Notice of Motion dated 14th March 2022 was brought under section 1A, 1B & 3A of the [Civil Procedure Act](#); Order 12 Rule 7; Order 17 and Order 51 Rule 1. The Applicant sought the following orders;
 - a. The court to stay of any further proceedings in the matter herein pending the hearing and determination of this application.
 - b. The court to set aside its orders issued on the February 23, 2022 dismissing the Applicant's Application dated December 11, 2020 and reinstate the same to be heard on merits.
 - c. The costs of the Application be provided for.
2. The Application was supported by the sworn affidavit of Duncan A. Akhulia.

Applicant's Case

3. The applicant herein stated that the advocate handling the matter was present on the online court proceedings for the day but unfortunately and for reasons beyond his control a power surge/outage occurred at his offices on Marsabit Plaza and he was inadvertently logged-off from the session thereby unresponsive when the matter was called out.



4. It was the applicant's averment that the court recording will show that the advocate was logged in the entire time until around 9:40- 9:45a.m or thereabouts, with the court at number 17 when there was a power surge/outage at the offices that damaged the applicant's Wi-Fi router and laptop.
5. Further, the applicant was unable to log in with a secondary device and was re-admitted at 9:57am on a third device. The recording of the court proceedings show that the applicant was logged in with two devices Duncan Akhulia and Duncan Akhulia (guest) which was unresponsive. (Annexed copy of screenshots marked "DAA -1 ")
6. The circumstances of the advocate's non-attendance in court on that day was beyond his control and that of the applicants who should not be made to suffer. The 'mistake of an advocate ', in this sense, should not be visited upon the client despite the same being a technical and unfortunate issue which was way beyond the control of the Advocate.
7. The applicant is unable to file any documents with respect to the Application on seeking to enforce the arbitral award as there has been no order of consolidation and the original case number being Civil Division- (Misc Application 558 of 2020) is marked as closed
8. There have been no formal orders of consolidation with respect to that Misc Application as the respondents did not take a new case file number administratively once the file was transferred by Hon Justice Serگون from the Civil Division to the Commercial Division.
9. The two weeks delay has been occasioned by the applicant's advocate trying to engage the building's management agents to get a report of the power surge for the subject day but has been informed that he will have to engage the Kenya Power & Lighting Company a situation that will be time consuming and counterproductive noting the urgency of the matter.

Respondent's Case

10. In response to the Application, the respondent filed a replying affidavit dated March 31, 2022 and stated that the power surge/outage alleged by the Applicant is not supported by any proof and if the same was actually true, counsel would have at least attached the letter from the management company of the building verifying his assertions.
11. The copy of screenshots marked "DAA -1 " does not disclose the day counsel was logged in and the same was taken at 13:14 which is at least four (4) hours after the Court session has already started and ended.
12. Further, Counsel did not move the Court without delay since he waited for over Two (2) weeks to file this Application, clearly indicating it was an afterthought.
13. The Respondent added that the Application dated December 11, 2020 was dismissed for good cause considering Counsel's perennial non-attendance and had failed to comply with the Judges' directions to pay the court Adjournment Fees of Kenya Shillings Eight Thousand (Kshs. 8,000.00).
14. Since the filing of the dismissed Application, Counsel failed to enter appearance with no sufficient explanation despite being served with Notices clearly depicting lack of interest in prosecuting the matter. (Annexed and Marked "WNK IA, 1B, IC & ID" are Notices served and received by the Applicant's firm)
15. It was the respondent's averment that the applicant has been indolent to prosecute its case for a period of over one (1) year without taking any steps to proceed with their Application that this Honourable Court dismissed.



16. In addition, the supporting affidavit dated March 14, 2022 specifically paragraph 8 is misleading to the Court considering the same was settled by Hon. Serگون on March 24, 2021 and Hon. Ngenye on May 11, 2021 where Counsel was present in both instances.
17. The averment that Counsel is unable to file any document is not only misleading but also improbable considering this case number is as a result of their Application and the Consent of May 24, 2021 before Hon. Serگون where Misc. Application E558 of 2022 was consolidated. There is no need for a new case number considering the case was merged and consolidated.
18. In the Supporting Affidavit dated March 14, 2022 specifically paragraph 9 the Counsel is trying to shift blame to the e-filing system yet since 1st November 2021 when the Judge directed the payment of Court Adjournalment Fees of Kenya Shillings Eight Thousand (Kshs. 8,000.00) to February 23, 2022 being at least four (4) months counsel had enough time to comply.
19. The Creditors Petition dated October 14, 2021 has neither a bearing on the prosecution of this Application nor the recognition of the Arbitral Award as it neither undermines nor affects any other Creditor nor does it undermine the objects of the insolvency law.
20. The delay in prosecution of the applicant's case is inordinate, unreasonable and inexcusable thereby continuing to prejudice the Respondent and deny him his earned Award. It is only fair that the applicant acknowledges that litigation must come to an end and the Respondent deserves to have the Award adopted as an order of the court.
21. In any case, after adoption and enforcement of the Arbitration Award, the respondent will seek to also be listed as a creditor.
22. The respondent prayed that the Application be dismissed with Costs.

ISSUES FOR DETERMINATION

23. The Application and the response therewith have been carefully considered by the court and the only issue for determination is;
 - a. Whether the Application dated December 11, 2020 should be reinstated;

ANALYSIS

24. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

25. In an application for reinstatement of a dismissed suit or application, the court's discretion is sought by the applicant as is the case herein. However, in the exercise of this discretion, the court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position was held in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend



court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice."

26. The Court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

27. This is further buttressed by section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.

28. The applicant seeks to reinstate the Application dated December 11, 2020 on the grounds that the Advocate was present on the online court proceedings for the day but unfortunately and for reasons beyond his control a power surge/outage occurred at his offices on Marsabit Plaza and he was inadvertently logged-off from the session thereby unresponsive when the matter was called out.

29. The respondent opposed the Application and argued that Counsel did not move the court without delay since he waited for over Two (2) weeks for him to file this Application, clearly indicating it was an afterthought.

30. The applicant explained that the delay was due to the fact that the Advocate tried to engage the building's management agents to get a report of the power surge for the subject day but was informed that he will have to engage the Kenya Power & Lighting Company.

31. The applicant annexed a copy of the screenshot and it is notable as pointed out by the respondent that the same does not disclose the day counsel was logged in.

32. However, the Court in the exercise of its jurisdiction considers reasons advanced by the applicant for failure to attend Court that led to the dismissal of the Application. The power outage was beyond the applicant's control and it caused the applicant to go offline.

33. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court stated that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

34. The Respondent will not suffer any prejudice as the Respondent will have a chance to challenge the Application. This court is satisfied that the Applicant has shown sufficient cause to warrant this court to set aside the order and reinstate the Application dated December 11, 2020.

Findings and Determination

35. In light of the above, this court makes the following findings and determinations;

- i. The application is found to have merit and it is hereby allowed;



ii. The court Order issued on the February 23, 2022 dismissing the applicant's Application dated December 11, 2020 is hereby set aside; and the application is hereby reinstated and the same to be heard on merits;

iii. Thrown away costs agreed at Kshs. 20,000/= payable within seven (7) days of the date hereto;

iv. Mention on 8th November for directions.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF JULY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Kiiru for the Respondent

Akuli for the Applicant

Lucy-----Court Assistant

