



**Marenga v Mbwana (Miscellaneous Succession Cause E006 of 2022)
[2022] KEHC 14928 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS SUCCESSION CAUSE E006 OF 2022
JN ONYIEGO, J
OCTOBER 28, 2022**

BETWEEN

ROBERT STEPHEN MARENGA APPLICANT

AND

MARRIAM MOHAMMED MBWANA RESPONDENT

RULING

1. This ruling is in respect of a Chamber Summons dated 29th March 2022 brought under Rule 49 and 73 of the P&A rules, Article 47 of [the constitution](#) and [Fair Administrative Action Act](#) seeking that;
 - a. Spent;
 - b. This Honourable court be pleased to set aside the orders made on 29th March 2022 dismissing the applicant's Summons dated 28th February 2022 for non-attendance by the advocate
 - c. The Honourable court be pleased to reinstate and admit the summons dated 28th February 2022 for hearing forthwith.
 - d. The order of stay of execution issued on 16th March 2022 be reinstated pending the hearing and determination of the summons dated 28th February 2022
 - e. That costs of this application be in the cause.
2. The application is based on grounds set out on the face of it and an affidavit sworn on 29th March, 2022 by Patrick Mutinda counsel for the applicant. Mr. Mutinda averred that on 29th March 2022 when the applicant's application dated 28th February 2022 came for hearing, he joined the court for virtual proceedings at around 9.08 A.M and remained on the platform until the matter was called out. That for unknown reasons, Ms Awour counsel for the respondent introduced herself thus informing the court that there was no attendance from the applicant's side while in actual sense he was present with his camera on.



3. He stated that despite his spirited effort to interject and introduce himself, the court could not hear him properly due to a technical hitch. That upon conclusion of the cause list, he communicated to the court thus explaining his predicament hence the instant application seeking to reinstate the dismissed application and the stay orders in place.
4. Counsel urged the court to find that his non-appearance was not deliberate and that the cause of confusion was due to a technological hitch which was not intentional hence none of the parties will be prejudiced by granting the orders sought.
5. In response, the respondent filed a replying affidavit stating that the application was frivolous and an abuse of the court process as there was no proof that Mr Mutinda ever joined the platform as alleged hence no good explanation given to support the allegations.
6. I have considered the application herein, response thereof and oral submissions by both counsel; the gist of the application is the non-attendance of the applicant nor his advocate on 29th March 2022 when the applicant's application dated 28th February 2022 was scheduled for hearing. According to Mr Mutinda , he did join the virtual court platform at 9.08 am. That he heard his file being called out but the court , could not hear him communicate.
7. According to him, the application was dismissed in his presence but the court could not see nor hear him due to a technical hitch
8. Whereas the applicant's counsel is claiming that he did join the platform as early as 9.08 am, counsel for the respondent is denying ever seeing Mr. Mutinda on the platform. I must admit that virtual court proceedings have their own peculiar challenges. Sometimes it is not easy to tell who is telling the truth.
9. Considering the fact that the applicant's counsel moved with speed the same day and filed the instant application, I am persuaded to believe that Mr. Mutinda may have suffered a technical hitch. I will therefore give him a benefit of doubt without losing sight of the fact that a litigant should not be punished for excusable mistakes of his or her counsel.
10. In the case of *Tana and Athi River Development Authority vs Jeremiah Kimigho Mwakio & 3 others* (2015) KLR the court held that ;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and a holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a duty to the court in which he practices and even to the other side.
11. Similar position as above was held in *Patriotic Guards vs James Kipchirchir Sambu* (2016)eKLR. After taking into account the general circumstances under which the application was dismissed and the explanation given for nonattendance, it leaves the court with one conclusion to make. That is, counsel's non-attendance may not have been deliberate. To that extent and in the interest of justice, I will exercise my discretion in favour of the applicant while bearing in mind that none of the parties will suffer prejudice by the court granting the order sought. Accordingly, I am inclined to allow the application as prayed.
12. Consequently, the orders of 29th March, 2022 are hereby set aside and the application dated 28th February 2022 be reinstated for hearing and the obtaining stay of execution orders then in place to



remain in force until the said application is heard and determined. I will however award costs of the application to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF OCTOBER 2022

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J.N. ONYIEGO

JUDGE

