



REPUBLIC OF KENYA



**Mbaruk v Ali (Miscellaneous Application 1 of 2020)
[2021] KEHC 9766 (KLR) (26 March 2021) (Ruling)**

Neutral citation: [2021] KEHC 9766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 1 OF 2020**

**JN ONYIEGO, J
MARCH 26, 2021**

BETWEEN

MARIAM HOMANED MBARUK APPLICANT

AND

HAMISI MZEE ALI RESPONDENT

RULING

1. On 2nd February, 2021 the application dated 1st October, 2019 was scheduled for hearing. However, none of the parties turned up for hearing. Consequently, the application was dismissed for want of prosecution. Subsequently, the applicant filed a notice of motion dated 5th February 2021 seeking reinstatement of the same.
2. The application is premised upon grounds stated on the face of it and an affidavit sworn on 5th February, 2021 by Mr. Khatib Mohamed counsel for the applicant. According to Mr. Khatib, when the file was called out, he was appearing before Njoki J in HCA 149 of 2016. He attached a cause list to prove that that case was cause listed on that day. He further claimed that when he finished from Judge Njoki's court, he experienced difficulties in joining my court through virtual platform. That when he managed, he found that his matter had been called out and dismissed for want of prosecution.
3. He contended that his non-attendance was not deliberate and that there will be no prejudice suffered by the respondent who in any event did not appear on that day nor had he opposed the application.
4. In response, the respondent filed a replying affidavit sworn 19th February, 2020 by Charlotte Naliaka advocate who averred that the application was defective, bad in law and misconceived. She contended that counsel for the applicant ought to have logged into the virtual platform earlier enough ready to prosecute his application. Further, she stated that counsel should have instructed somebody to hold his brief or first attend a hearing in respect of this case instead of a mention before Judge Njoki. That



the appeal being sought to be prosecuted had been litigated upon up to the court of appeal and any attempt to revive it amounts to abuse of the court process.

5. During the hearing, both counsel reiterated averments contained in their respective affidavits. The main ground adduced for non-attendance by Mr Khatib was that he was appearing before Judge Njoki mentioning a file No 149 of 2016. It is not in dispute that the matter before Judge Njoki was scheduled for that day. The question is, why didn't he get counsel to hold his brief?
6. Mr. Khatib did not explain why he did not instruct any colleague to hold his brief either in this court or Judge Njoki's court. I do not find the first explanation by Khatib reasonable. However, on the second aspect, I take judicial notice of the fact that joining virtual proceedings has been a challenge to most litigants and even lawyers and Judges mostly due to internet connectivity. On a benefit of doubt, I am inclined to hold that the non-attendance may not have been deliberate.
7. I have also considered the fact that even the respondent did not attend court on that day. In the interest of justice and considering that the application herein has been filed timeously, I am inclined to allow the same. Consequently, application dated 1st October,2020 is reinstated for hearing and determination on merit.

DATE, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MARCH, 2021

J. N. ONYIEGO

JUDGE

