



North Rift Diaries Limited v Seahwak General Logistics Limited & another (Environment & Land Case E045 of 2023) [2023] KEELC 22509 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E045 OF 2023
EK WABWOTO, J
DECEMBER 20, 2023**

BETWEEN

NORTH RIFT DIARIES LIMITED PLAINTIFF

AND

SEAHWAK GENERAL LOGISTICS LIMITED 1ST DEFENDANT

DALAI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiff being aggrieved by the orders issued by this court on 20th November 2023 dismissing the suit has now moved this court seeking for reinstatement of the same vide its application dated 24th November 2023. The said application is supported by the affidavit sworn by Emily Cherotich Ego a director of the plaintiff company.
2. The plaintiff avers that on 20th November 2023, their advocate inadvertently failed to attend court when the matter was scheduled for mention owing to the failure to diarize the matter. It was also averred that in the absence of the plaintiff, the court proceeded to dismiss the suit and discharged the interim orders purportedly after perusing the documents filed by the defendants showing that there existed a similar suit in relation to the plaintiff's suit.
3. During the hearing of the application counsel for the plaintiff argued that the court proceeded to dismiss the suit when indeed the matter had been scheduled for mention. It was also argued that the defendants had not filed any defence to the suit and the court was urged to allow the application.
4. The application was opposed by the defendants who filed a preliminary objection dated 29th November 2023. The Defendants contended that the court having pronounced itself is now functus officio and cannot reopen the matter. The court was urged to dismiss the application with costs to the defendants.



5. The court has considered the application and oral submission made by counsel for the parties and the main issue for determination is whether this court should proceed to vary and or set aside its orders made on 20th November 2023.

6. The court has wide powers to set aside its orders save that where the discretion is exercised the Court will do so on terms that are just. In *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 it was held as follows:

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate”.

7. In the instant case, a perusal of the court record shows that the suit was dismissed on 20th November 2023 in the absence of the plaintiff when the matter had been set down for mention. It is clear that the matter was coming up for mention for directions rather than for hearing of the application. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing. In *Central Bank of Kenya v Uburu Highway Development Ltd. & 3 Others* Civil Appeal No. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In *Mrs. Rahab Wanjiru Evans v Esso (K) Ltd.* Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in *AG v Simon Ogila* Civil Appeal No. 242 of 2000 held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly, in *Peter Nzioki & Another v Aron Kuvuwa Kitusa* Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in *Kenya Commercial Bank v NJB Hawala* Civil Application No. 240 of 1997

8. Being guided by the aforementioned decision, this court is satisfied that the plaintiff's application is merited and will proceed to allow the same in the following terms;

- i. The preliminary objection dated 29th November 2023 is hereby dismissed.
- ii. The orders given on 20th November 2023 are hereby set aside and the suit is hereby reinstated together with the application dated 8th August 2023 and its interim orders.
- iii. Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2023.



E. K. WABWOTO
JUDGE

