



Kenindia Assurance Co Ltd v Kipnyekwei t/a Nyekwei & Co Advocates (Environment and Land Appeal E033 of 2022) [2023] KEELC 22237 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E033 OF 2022
EO OBAGA, J
DECEMBER 7, 2023**

BETWEEN

KENINDIA ASSURANCE CO LTD APPLICANT

AND

**JEVAN KIPNGETICH KIPNYEKWEI T/A NYEKWEI & CO
ADVOCATES RESPONDENT**

RULING

1. This is a ruling in respect of a notice of motion dated October 5, 2023 in which the Appellant/Applicant seeks the following orders:-
 1. Spent
 2. This honourable court be pleased to issue an order of stay of execution of the judgement delivered on September 7, 2022 in Eldoret CM E&L no. 116 of 2019 and the decree therein and all consequential orders arising therefrom pending the hearing and determination of this application interpartes.
 3. That the Honourable court be pleased to vary or set aside its orders dismissing the Appellant's application dated 21.7.2023 for non-attendance.
 4. That the Honourable court be pleased to reinstate the interim orders issued on July 27, 2023.
 5. That the application dated July 21, 2023 be reinstated for hearing and determination on merit.
 6. Costs of this application be provided for.
2. The Applicant's application is supported by an affidavit sworn on 5/10/2023 by its advocate Duke O. Omwenga. The advocate depones that his failure to attend court on 28/9/2023 was not deliberate. He stated that failure to attend court on the said date was due to non-diarization of the application in the



master diary. He provided a copy of an extract from the master diary for 28/9/2023 whose Appeal No. E033 of 2022 does not appear.

3. The application was opposed by the Respondent based on a replying affidavit sworn on 24/10/23. The Respondent contends that there is no good reason given why the Applicant's counsel was not in court on 28/9/2023. The Respondent further contends that reinstating the dismissed application will be an exercise in futility as what was granted was a declaratory order which is incapable of stay and that the sum of Kshs. 340,000/= was not part of what was appealed against.
4. The respondent also took issue with variance in handwriting in the copy of extract from the master diary and the fact that the dismissed application was signed by Mr. Oribo Advocate whereas the supporting affidavit to Application seeking reinstatement was signed by Omwenga advocate.
5. In a supplementary affidavit sworn on 10/11/2023, the applicant's advocate explained that there are five advocates in the firm of Omwenga and Company Advocates and that any of the five advocates can sign pleadings. On the variance in the handwriting, the Advocate explained that the firm has one master diary where each of the five Advocates write their cases.
6. On the issue of the sum of Kshs. 340,000/=, the Advocate explained that the appeal was against the entire judgement of the lower court. On the issue of Mr. Oribo signing pleadings, the advocate explained that Mr. Oribo is an Associate in the firm who can sign pleadings.
7. I have considered the applicant's Application and the opposition to the same by the respondent. I have also considered oral submissions by the Advocates for the parties during the hearing. The only issue for determination is whether the Applicant has given a sufficient reason for non attendance as to call for exercise of the court's discretion in its favor.
8. The reason given for failure to attend court is that the Advocate failed to diarize the case in the master diary. An extract of the master diary was annexed to the supporting affidavit. Appeal No. E033 of 2022 does not appear among the files diarized. This indeed is the reason why there was no attendance in court.
9. Paragraph 6 of the supplementary affidavit was explained as an error. It is indeed not one of the reasons given in the application as well as the supporting affidavit. I find that this is a clear case where this court should exercise its discretion in favor of the Applicant. Consequently, I allow the notice of motion dated 5/10/2023 in terms of prayers (2), (3), (4) and (5).

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 7TH DAY OF DECEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Khaemba for Appellant/Applicant.

Mr. Mogambi for Respondent.

Court Assistant - Laban

E. O. OBAGA

JUDGE

7TH DECEMBER, 2023

