



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC MISC. APPLICATION NO. 103 OF 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT**

**AND**

**1. BRONSON HARE CHOGO**

**2. ONESMUS MANGARO**

**3. PAULINE KANYORA**

**4. MAURICE SIMON OCHIENG.....EX-PARTE APPLICANTS**

**AND**

**AFRICAN UNIVERSITY TRUST OF KENYA.....INTERESTED PARTY**

**RULING**

The application is dated 16<sup>th</sup> December 2019 and is brought under Articles 22(3), 159 of the Constitution of Kenya 2010, Sections 1A, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 12 Rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That this Honourable Court be pleased to review, vary and/or set aside the order for dismissal issued on the 10<sup>th</sup> December, 2019 and reinstate the Ex-Parte Applicant's Notice of Motion Application dated 11<sup>th</sup> November, 2019.
2. That costs of this application be in the cause.

The application is supported by the affidavit sworn by Godfrey Mutubia Advocate and is based on the ground that the exparte applicant's advocate failure to attend court was purely inadvertent and excusable and as such the notice of motion dated 11<sup>th</sup> November 2019 should be reinstated.

The Respondent stated that the failure to attend Court was deliberate since the Counsel in conduct opted to attend Employment and Labour Relations Court. That this is an old matter which commenced on 2012.

Reinstating this case would defeat the overriding objective of the Court to hear and determine cases expeditiously. That the Application is fatally defective because it proposes to reinstate an application dated 16<sup>th</sup> December 2019. The application dated 16<sup>th</sup> December 2019 was asking the Court to reinstate the suit because the suit was dismissed on 10<sup>th</sup> December 2019. There is no suit upon which the present application dated 16<sup>th</sup> December 2019 or that dated 25<sup>th</sup> September 2020 are anchored upon because the main suit was dismissed on 10<sup>th</sup> December 2019.

This court has considered the application and submissions therein. The exercise of judicial discretion in setting aside *ex parte* orders is to be exercised judiciously. The Applicant submitted that failure to attend court on 10<sup>th</sup> December 2019 when the matter was coming for hearing was due the fact that the Advocate inadvertently failed to attend court and attended a continuous Legal Education Seminar and was under the impression that it was set down for hearing on the 13<sup>th</sup> December 2019.

In the case of **Edney Adaka Ismail vs Equity Bank (2014) eKLR** which cited with approval the case of **CMC Holdings Limited vs Nzioki (2004) 1 KLR 173** that;

*“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 weight, 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 if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate.”*

In the case of **Bilha Ngonyo Isaac vs Kemu Farm & Another (2018) eKLR** it was held that;

*“16. As a whole, I am not satisfied that the trial court misdirected itself in the exercise of its discretion. To the contrary, I find that the decision to disallow the application for reinstatement of the suit was well thought out and reasons for the decision stated therein, those that were placed before the court on the material date. There would be no misjustice to a party who for three consecutive times would fail to attend court for hearing of her case, and no satisfactory reasons are given when the court fails to hear him out, then states that she is prejudiced by an order of dismissal. In the circumstances, it is the respondents who were prejudiced by the appellant's failures to prosecute the case without unreasonable delay.*

*17. Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in finalizing cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.*

*18. I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures - Kenya Power & Lightning Co. Ltd -vs- Alliance Media Kenya Ltd (2014) e KLR”.*

The Respondent submitted that the Court should not exercise its discretion in favour of an applicant who failed to attend court for the hearing of his case and gives no satisfactory reasons for the non-attendance then states that he is prejudiced by the dismissal order. In the case **Shah vs Mbogo & Another (1967) EA 1116**, the court stated on the matter of its discretion, that;

*“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”*

A Court's discretion to set aside its ruling/Judgment is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court. I find the Interested Party's submissions quite persuasive that for the 3<sup>rd</sup> time the appellant failed to attend court thus causing unreasonable and inordinate delay in the finalization of the case thus causing prejudice to the Respondents. In the case of **Utalii Transport Co. Ltd and 3 Others vs N.I.C. Bank and Another (2014) e KLR**, the court held that:

*“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”*

I find that this matter was filed way back in 2012, this case dragged on and whenever it was fixed for hearing. I find the reasons given for non-attendance unsatisfactory and I reject them. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>rd</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**