



Optica Kenya Limited v Aya Limited (Environment and Land Appeal E008 of 2025) [2025] KEELC 3368 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E008 OF 2025**

CK YANO, J

APRIL 24, 2025

BETWEEN

OPTICA KENYA LIMITED APPELLANT

AND

AYA LIMITED RESPONDENT

RULING

1. By Notice of Motion dated 11th March, 2025, the Appellant/Applicant sought the following orders: -
 - a. Spent.
 - b. This Honourable Court be pleased to reinstate the application dated 27th February, 2025 for further prosecution.
 - c. This Honourable Court be pleased to issue another hearing date for the Applicant to be able to shed more light to his claim
 - d. Spent.
2. The application is premised on 8 grounds on its face and supported by the affidavit sworn by Dennis Muoki Kithuka, an advocate of the High Court of Kenya, having conduct of the matter on behalf of the Appellant/Applicant herein, on even date.
3. He avers that on 11.3.2025, when the application dated 27/2/2025 was coming up for interpartes hearing, he tried to log into the Teams Platform but he could not attend court since he was not let into the platform. He annexed a screenshot showing the party waiting in the lobby of the Teams Platform.
4. He further avers that he tried to login in with a different device but was faced with the same problems accessing the virtual platform and he only received a prompt that he would be let in soon but was again unable to be admitted into the platform and was thus unable to attend the proceedings.



5. He deponed that he later logged into the Court Tracking System later that day to confirm the status of the matter and found out that the application dated 27/2/2025 had been dismissed.
6. It was his contention that upon due diligence, they discovered that the virtual link in respect of this court had been changed to <https://tinyurl.com/rmt3jpuv> but that the same was not updated on the Judiciary Cause List portal and the E-filing portal, which remained as <https://bit.ly/3EdyBF9>. He annexed a screenshot of the Judiciary E-filing portal indicating the virtual court link.
7. He thus attributed their non-attendance to the said change in the virtual link and maintained that no notice was issued of the said changes on the judiciary Cause List portal. It was his contention that the application had been brought in a timely manner as the date of the dismissal was 11/3/2025.
8. It was his claim that unless the application is allowed, the applicant stands to suffer a great prejudice and injustice as they will be denied their fundamental right to be heard and the opportunity to shed more light to their claim. He thus urged the court to allow the application as sought.
9. The application was opposed. The Respondent filed a Replying Affidavit dated 20.03.2025 and sworn by Isaac Njoroge, the Director in - charge of operations of the Respondent. He dismissed the application as being frivolous and an abuse of the court process.
10. It was his claim that the appellant/applicant has not annexed any reasonable proof to warrant the application being reinstated. That the applicant had an opportunity to log in but failed to do so in total disregard of court date and time.
11. He averred that the applicant was fully aware of the date of the hearing and had a duty to attend court and prosecute their application.
12. It was his contention that the applicant chose to deliberately delay the matter and dismissed the log in details provided by the applicant as proof and that the same do not indicate the court they were to log into and as such it amounts to mere pretense.
13. It was further his claim that the applicant was not being truthful since the court dealt with the matter later in the day having placed the matter aside and no attempt to log in was done by the applicant as alleged.
14. He averred that litigation must come to an end and the respondent continues to suffer having done the tribunal matter for more than one year. That the court has a duty to protect both parties in arriving at the case/application. He thus urged the court to dismiss the application with costs.
15. The Application was canvassed by way of written submissions. The applicant filed their submission together with authorities dated 4th April, 2025 which I have read and considered and taken into account in arriving at my decision. The respondent on the other hand did not file their submissions. Be that as it may, I will proceed to render my decision as hereunder.

Analysis and Determination:

16. Having carefully considered the Application and the grounds thereof, the Supporting Affidavit and the annexures, the Replying Affidavit thereto and the applicant's submissions in totality, it is this court's view that the sole issue arising for determination is;
 - i. Whether the application dated 27th February, 2025 can be reinstated for hearing



17. The relevant law governing setting aside of a judgment or an order for dismissal is found under Order 12 Rule 7 of the Civil Procedure Rules which provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”

18. In their application dated 27.2.2025 (dismissed application), the Applicant sought stay of execution of the judgment issued on 24.2.2025. The application came up for hearing on 11.3.2025 but was dismissed for non-attendance. The applicant stated that counsel on record tried to log into the Microsoft Teams platform but could not be let into the platform. That efforts to log in with a different device were futile.

19. The applicant attributed the said challenge to the virtual link in respect to this court which they learnt that it had been changed. That the virtual link that was displayed on the Cause List and E-filing portal was different from the actual virtual link of the court in use. The Applicants counsel provided a screenshot of the same in support of their allegations. It is their contention that they were never notified of the said changes and hence their non-attendance was not deliberate.

20. The respondent on their part dismissed the said allegations by the applicant and maintained that the applicant deliberately failed to log into the virtual session despite being aware that the matter was coming up for hearing.

21. The principles/elements to be considered in an application for reinstatement were set out in John Nahashon Mwangi –vs- Kenya Finance Bank Limited (in Liquidation) [2015] eKLR. The court held the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.

22. The question that therefore follows is whether the reasons advanced above by counsel for the applicant for their non-attendance are reasonable and/or sufficient and the degree of prejudice likely to be occasioned by both parties in allowing the reinstatement.

23. The orders sought herein are discretionary in nature and for the Court to exercise its discretion in favour of the applicant, the applicant has to satisfy the court that there is sufficient cause or reason to warrant the setting aside the order of dismissal and subsequently reinstate the application.

24. Sufficient Cause was defined by the Supreme Court of India in Parimal vs Veena where the Supreme Court stated as follows:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”



25. Guided by the definition of what amounts to sufficient cause hereinabove, it is my considered view that the reasons advanced by counsel for the applicant for his non-attendance on the date when the dismissed application was coming up for hearing is sufficient in the circumstances. This is further demonstrated by the diligence on the part of the counsel in discovering the mix-up of the virtual link to be used as evidenced in the screenshot annexed in their supporting affidavit.
26. Even though the respondent maintained that the counsel for the applicant failed to log into the virtual court session, he did not challenge or controvert the evidence adduced by the applicant in their annexures.
27. Further, it is also important to consider whether the failure by the applicant and their counsel to attend court for hearing was deliberate and was aimed at delaying the hearing of the suit.
28. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, the Court of Appeal stated:-

“We agree with those noble principles which go further to establish that the court’s discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

See also *Shah vs Mbogo* (1979) EA 116

29. Thus, taking the totality of the circumstances of this case, this court finds that the reasons advanced by the applicant are sufficient to persuade the Court that the non-attendance by the Applicant and/ or its counsel at the hearing of the dismissed application was not a deliberate attempt to obstruct or delay justice.
30. Article 48, 50 and 159 of *the Constitution* embodies the fundamental principles of justice on the right to be heard, fair hearing and the need for substantive justice to all parties. The same must however be weighed against the likelihood of any prejudice being occasioned upon the respondent.
31. This court notes that the dismissed application sought orders of stay of execution against the judgment delivered on 24.2.2025. The applicant has demonstrated the prejudice it is likely to suffer in the event that its application for stay is not reinstated. The respondent on the other hand has not demonstrated any prejudice it is likely to suffer if the dismissed application is reinstated. Moreover, if the application is reinstated, then the same will be heard and determined on merit.

Conclusion;

32. In the upshot, I accordingly find that the Application dated 11th March, 2025 is merited and is hereby allowed on the following terms: -
 - a. The orders of dismissal made on 11th March, 2025 are set aside and the Application dated 27th February, 2025 is hereby reinstated for hearing.



- b. That the hearing of the said application shall proceed by way of written submissions. The Applicant is hereby directed to file and serve their written submissions within 7 days from the date of this ruling.
- c. The Respondent is directed to file and serve their corresponding written submissions within 7 days from the date of service.
- d. Mention on 14.5.2025 for purposes of taking a ruling date on the application dated 27.2.2025
- e. Costs of the Application to be in the cause.

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF APRIL, 2025.

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Mr. Mwoki for the Appellant/Applicant.

No appearance for the Respondent.

Court Assistant – Laban

