



**Matolo v Attorney General & another; Maithya (Interested Party) (Environment and Land Miscellaneous Application 193 of 2012) [2022] KEELC 2967 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2967 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 193 OF 2012**  
**CA OCHIENG, J**  
**MAY 25, 2022**

**BETWEEN**

**ROBERT MULI MATOLO ..... PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT MUTHIANI VULI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PETER NZESYA MAITHYA ..... INTERESTED PARTY**

**RULING**

1. What is before this court for determination is a Notice of Motion Application dated 15<sup>th</sup> December, 2020 which is brought pursuant to Order 8 Rule 3 and Order 51 Rules 1 & 4 of the [Civil Procedure Rules](#) including Sections 1A, 1B (i) as well as 3A of the [Civil Procedure Act](#). The Interested Party/Applicant seeks the following prayers:
  - a. That the ex-parte proceedings of 17<sup>th</sup> October 2019 be set aside and the Bill of costs dated 20<sup>th</sup> May 2019 be set down for taxation afresh.
  - b. That costs of the Application be in the cause.
2. The Application is premised on the grounds on the face of it and supported by the affidavit sworn by one Francis Manthi Masika. The Application is opposed by the Plaintiff who filed a Replying Affidavit dated 9<sup>th</sup> April, 2021.
3. The background against which the Application is brought is that the Interested Party/Applicant was awarded costs when the Plaintiff's Chamber Summons Application dated 27<sup>th</sup> August, 2012 was struck out at the preliminary stages. Further, the Plaintiff herein later applied for a review of the decision to



strike out the Chamber Summons Application vide an Application dated 24<sup>th</sup> March, 2014, which was also dismissed on 20<sup>th</sup> July, 2018 and Interested Party once more awarded costs which culminated in the preparation as well as filing of a Bill of Costs dated 20<sup>th</sup> May, 2014 for taxation.

4. According to the Court Records, the Applicant's Bill of Costs was scheduled for taxation on 21<sup>st</sup> August, 2019 but the court was on leave. The same was then set for taxation on 9<sup>th</sup> October, 2019 on which date the Deputy Registrar dismissed the same for want of prosecution since both parties were absent. It is this dismissal that the Applicant seeks to set aside.

### **The Applicant's case**

5. Among the grounds of his Application, the Applicant stated that the matter was scheduled for taxation on 17<sup>th</sup> October, 2019. From the record, there are no proceedings that took place on 17<sup>th</sup> October, 2019. However, the Bill of Costs was dismissed for want of prosecution on 9<sup>th</sup> October, 2019. In his supporting affidavit which was sworn by his Advocate Francis Manthi Masika, he explained that the matter had been fixed for taxation by his clerk for 17<sup>th</sup> October, 2019, but avers that the matter was then wrongly diarized on a Sunday and misfiled, leading to their lack of attendance in court on the date the Bill of Costs was dismissed for want of prosecution. He reiterated that the Applicant should not be punished for mistakes of the advocate.
6. In his submissions dated 2<sup>nd</sup> February, 2022, he reiterated the contents of the Supporting Affidavit. He further submitted that the delay in taking action was occasioned by the Client's sickness and COVID-19 in 2020 and 2021.

### **The Respondent's case**

7. In his Replying Affidavit sworn on 9<sup>th</sup> April, 2021, the Respondent, who was the Plaintiff in the main suit, averred that the instant Application is made in utmost bad faith and should fail. He deposed that the Applicant had not given sufficient reasons as to why he did not attend court on the scheduled date. He stated that since the Applicant's counsel had issued them with the Taxation Notice, there is no excuse as to why they did not attend court on the set date. He further argued that the Applicant had enough time to instruct his counsel until 21<sup>st</sup> March, 2020 when the courts were deemed inaccessible due to COVID-19 pandemic. He reiterated that the Application fell short of the minimum threshold as set out in Order 21 Rule 12 of the *Civil Procedure Rules* for failing to show sufficient cause. It was their contention that should the court allow the Application, then they should be awarded costs in compensation for inconvenience occasioned. The Respondent did not file any submissions in support of their case.

### **Analysis and determination**

8. Upon consideration of the instant Notice of Motion application including the respective affidavits and Applicant's submissions, the only issue for determination is whether the proceedings of 17<sup>th</sup> October, 2019 be set aside and the Bill of costs dated 20<sup>th</sup> May, 2019 be set down for taxation afresh.
9. On a keen perusal of the Court Record, I note there were no proceedings on 17<sup>th</sup> October, 2019 as claimed but the Bill of Costs was dismissed for want of prosecution on 9<sup>th</sup> October, 2019 by the Deputy Registrar, Honourable Bartoo SRM, in the absence of both parties. Be that as it may, I will assume that the error does not go to the root of the Application and in applying the provisions of Sections 99 and 100 of the *Civil Procedure Act* on the general power of this court to order an amendment as well as Article 159 (2) (d) of *the Constitution*, I will proceed to rectify the error and consider the real issue in dispute that is the reinstatement of the Bill of Costs dated the 20<sup>th</sup> May, 2019 for taxation.



10. The law on setting aside of ex parte orders is found under Order 12, Rule 7 of the [Civil Procedure Rules](#), 2010 which stipulates inter alia:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
11. In the current scenario, the Applicant seeks to have the Bill of Costs dated the 20<sup>th</sup> May, 2019 which was dismissed for want of prosecution reinstated for taxation. He avers that non-attendance of his Advocate was a mistake which cannot be visited upon him. Further, he blames the COVID-19 pandemic as well as his ill health for the delay in filing this application.
12. The Respondent opposed the application and provided various reasons which I have highlighted above.
13. I note the Applicant was awarded costs which are yet to be taxed. Further, he had put enough effort in preparing and prosecuting the Bill of Costs, but on the day it was scheduled for taxation, the Court was not sitting. I further note that he only failed to attend court once culminating in the said Bill of Costs being dismissed for want of prosecution.
14. In the case of [PMM v JNW](#) [2020] eKLR the Court while dealing with an Application to set aside an order held that:

“In the circumstances of this case, the Applicant is not wholly to blame for the delay in filing his replying affidavit dated 30th June, 2020 or his failure to attend the virtual hearing of 4th June, 2020 having given sufficient explanation thereof. The court must not oust the Applicant from being heard for no absolute fault of its own. This is especially so, in a case such as this where the subject matter concerns a child. The court is under a duty to make orders that will advance the best interest of the child which is paramount. To do so, it is important that the court appraises the arguments advanced by the respective parties on both sides in order to weed out mischief and malice, if there so be, on either party’s part, and determine the application on merit. 33. This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice. (See – Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR).”
15. Based on the facts as presented while relying on the legal provisions I have cited and associating myself with the quoted decision, I am of the view that non-attendance of the court on the 9<sup>th</sup> October, 2019 when the Bill of Costs was scheduled for taxation constituted an excusable mistake and was not meant to deliberately delay justice. I opine that this Court exists to serve substantive justice to the parties and mistakes or errors do occur which the Court has a discretion to set aside. Further, I note the Respondent will not suffer any prejudice as he will have a chance to participate in the taxation proceeding before the Deputy Registrar.
16. In the circumstance, I find the Notice of Motion application dated the 15<sup>th</sup> December, 2020 merited and will allow it. I will proceed to set aside the Order dismissing the Bill of Costs dated 20<sup>th</sup> May, 2019 for want of prosecution and direct that the same be set down for taxation before the Deputy Registrar of this Court within 60 days from the date hereof, failure of which it stands dismissed for want of prosecution. The Respondents are awarded the costs of this Application.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY,  
2022

CHRISTINE OCHIENG

JUDGE

