



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. 513 OF 2011**

**NOREEN SHEIKH ..... APPLICANT**  
**(also known as NOREEN ASHIQ HASSAH SHEIKH)**  
**VERSUS**  
**INVESTMENTS & MORTGAGES BANK LIMITED..... RESPONDENT**

**RULING**

The applicant's application dated 22<sup>nd</sup> July, 2011 seeks the following orders:

- “(1) That this honourable be pleased to set aside the order issued on 1<sup>st</sup> of July, 2011 dismissing the applicant's application dated 6<sup>th</sup> June, 2011 for non-attendance.**
- (2) That the application dated 6<sup>th</sup> June, 2011 be reinstated for hearing and determination.**
- (3) That costs of this application be provided for.”**

The application was supported by an affidavit sworn by **Hillary Micheo Apima Orina**, an advocate of this court practicing in the firm of **A.H. Malik & Company**, which firm has the conduct of this matter on behalf of the plaintiff/applicant. The advocate explained that the application dated 6<sup>th</sup> June, 2011 was scheduled to be heard on 1<sup>st</sup> July, 2011. On the evening of 30<sup>th</sup> June, 2011 he accessed the electronic version of the next day's cause list and the said application was not among the listed ones for hearing before the Hon. Justice Njagi or any other judge. Relying on that information Mr. Orina chose not to attend in court.

On 6<sup>th</sup> July, 2011 he sent an invitation to the respondent's counsel inviting him to meet at the registry on 14<sup>th</sup> July, 2011 with a view to fixing a date for the application. The respondent's counsel responded to the said letter and stated that the application in question came up for hearing on 1<sup>st</sup> July, 2011 and was dismissed with costs for want of prosecution.

When Mr. Orina received that response he made up a follow up at the court registry and confirmed that indeed the application had been dismissed for non-attendance. But when he checked the non-electronic version of the cause list, he realized that the application had actually been listed before the Hon. Justice Njagi.

Counsel regretted his mistake in relying on the electronic version of the cause list which he said had misled him and urged the court not to punish the plaintiff for his mistake.

**Martin G. Mwaniki**, an advocate of this court practising in the firm of **Muri Mwaniki & Wamiti advocates** which firm is on record for the respondent/defendant filed a replying affidavit. He stated that the application dated 6<sup>th</sup> June, 2011 was served upon his firm on 8<sup>th</sup> June, 2011 with a clear indication that the same would be heard on 1<sup>st</sup> July, 2011. The respondent filed and served a replying affidavit upon the applicant's advocate.

On 30<sup>th</sup> June, 2011 Mr. Mwaniki checked the electronic cause list and confirmed that the matter was listed before the Hon. Justice Njagi. He attended court on 1<sup>st</sup> July, 2011 for the hearing of the application. When the matter was called out neither the applicant nor her counsel were present to prosecute it and accordingly, the same was dismissed with costs to the respondent.

Mr. Mwaniki further deposed that the electronic version of the cause list annexed to Mr. Orina's affidavit relates to the Milimani Law Courts Civil Division and does not include the portion in respect of Commercial and Tax Division where this matter was filed. He added that Mr. Orina ought to have confirmed the actual position in respect of the application from the non-electronic version of the cause list and from the registry to ascertain the reasons for its omission, if at all. In his view, Mr. Orina's affidavit does not disclose sufficient and plausible reasons for non-attendance. Counsel urged the court to dismiss the applicant's application.

I have carefully considered the two affidavits sworn by the advocates for the parties herein. The application dated 6<sup>th</sup> June, 2011 that was dismissed for want of prosecution was seeking transfer of the plaintiff's suit, **CMCC No. 2167 of 2010**, from the Chief Magistrate's Court to this court for hearing and determination. Mr. Orina explained the reasons that caused his failure to attend court when his client's application was coming up for hearing. He annexed to his affidavit a copy of the electronic cause list which is headed "**HIGH COURT – MILIMANI LAW COURTS**". However, a close examination of that cause list reveals that it does not contain applications and hearings for matters before Commercial and Tax Division of the High Court as correctly stated by Mr. Mwaniki. Even if Mr. Orina had not seen his client's application in the electronic cause list he ought to have been diligent and seek to obtain a copy of the non-electronic cause list to confirm whether it contained his client's application. He should also have sent his clerk to the court registry to ascertain the actual position.

That notwithstanding, it appears to me that the applicant's advocate made a genuine and innocent mistake though he exhibited some negligence as aforesaid. In the exercise of this court's unfettered discretion in considering an application of this nature, the court is entitled to consider the conduct of the applicant and/or her advocate, whether there has been delay in making the application for reinstatement, the degree of prejudice to be suffered by the respondent and whether the interest of justice would be better served by allowing or refusing the application.

I have no reason to doubt that the applicant's counsel was keen on prosecuting his client's application save for the negligent mistake that he committed. The plaintiff's advocate received the respondent's advocate letter informing him of the dismissal of the applicant's application on 14<sup>th</sup> July, 2011. On 22<sup>nd</sup> July, 2011 he prepared the application seeking reinstatement of the dismissed application. There was no inordinate delay in so doing.

It has not been demonstrated by the respondent that any prejudice would be suffered by allowing the applicant's application. The respondent can be compensated by way of costs.

Having taken into consideration all the relevant factors, I am of the view that the interests of justice would be better served by allowing the applicant's application as failure to do so would be tantamount to unduly punishing the applicant for her advocate's mistake. Consequently, I hereby set aside the order issued on 1<sup>st</sup> July, 2011 dismissing the applicant's application dated 6<sup>th</sup> June, 2011 and further direct that that application be reinstated for hearing and determination. The applicant's advocate will pay costs of the application which are assessed at **Kshs.5,000/=**. The costs should be paid within the next ten (10) days failing which the orders for reinstatement aforesaid shall stand vacated.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.**

**D. MUSINGA  
JUDGE**

**In the presence of:**

**Muriithi – Court Clerk**

**Mr. Orina for the Plaintiff**

**Mr. Okweri holding brief for Mr. Mwaniki for the Respondent**