



**Hardware & General Stores Limited v Jihan Freighters Limited & another;  
Kinyua t/a Valley Auctioneers & 2 others (Intended Defendant) (Environment &  
Land Case 83 of 2014) [2022] KEELC 15165 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 83 OF 2014  
NA MATHEKA, J  
DECEMBER 6, 2022**

**BETWEEN**

**HARDWARE & GENERAL STORES LIMITED ..... PLAINTIFF**

**AND**

**JIHAN FREIGHTERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PETER KINYUA T/A VALLEY AUCTIONEERS ..... INTENDED DEFENDANT**

**STANDARD CHARTERED BANK LIMITED ..... INTENDED DEFENDANT**

**ATTORNEY GENERAL (SUED ON BEHALF OF THE LAND REGISTRAR  
MOMBASA) ..... INTENDED DEFENDANT**

**RULING**

1. The application is dated August 17, 2022 and seeks the following orders;
  1. That this application be certified as urgent and service of the application be dispensed with in the first instance.
  2. That the order made by the honourable court on the December 18, 2019 dismissing the application dated February 20, 2019 for non-attendance by the Plaintiff and their advocates be reviewed, varied and/or set aside.
  3. That the application dated February 20, 2019 be reinstated and orders granted as prayed.
  4. That costs of the application be provided for.



2. It is based on the grounds that the plaintiff's former Advocates George Egunza & Associates fixed application dated February 20, 2019 for hearing for the October 29, 2019. On the October 29, 2019 a hearing date for the plaintiff's application dated February 20, 2019 and the 2<sup>nd</sup> defendant's application dated August 17, 2016 was given for the December 18, 2019 with Mr Odour holding brief for Mr. Egunza who was said to be indisposed. On the 18<sup>th</sup> December 2019 Mr Egunza Advocate did not attend the hearing of the Application dated February 20, 2019 and The application was dismissed. On the March 2, 2020 Mr Egunza Advocate sought leave to file an application for reinstatement of the application dated February 20, 2019. On the March 2, 2020 Mr Egunza Advocate was granted fourteen (14) days to file an application for reinstatement ie March 16, 2020. Mr Egunza Advocate did not file the said application but filed application dated June 9, 2021 to withdraw from acting. = The plaintiff was not aware and not informed what had transpired until the August 3, 2022 when he sought copies of the proceedings from the court file. The plaintiff seeks to enjoin the intended defendants as the plaintiff purchased the property at an auction carried out by the 1<sup>st</sup> Intended defendant and the proceeds received by Standard Chartered Bank Ltd the 2<sup>nd</sup> Intended defendant. The 3<sup>rd</sup> intended defendant being the custodian of the land titles in the Republic of Kenya had guaranteed the plaintiff by way of the search certificate that the title had no encumbrance hence was a clean title. The plaintiff seeks to be indemnified or refunded by the Intended defendants if the 1<sup>st</sup> and 2<sup>nd</sup> defendant are successful to the tune of Kshs 30,000,000/= (Kenya Shillings Thirty Million only). The plaintiff stands to lose the sum of Kshs 30,000,000/= (Kenya Shillings Thirty Million only) if the orders are not granted as prayed. It is in the interest of justice that this orders be granted as prayed.
3. The interested party submitted that the applicant has lost interest in prosecuting this matter. That the application dated February 20, 2019 was dismissed on the December 18, 2019 for the reason that the applicant failed to attend court. The applicant was given a second chance on March 2, 2020 when the court granted it leave to apply to reinstate the application. However, the applicant failed to apply to reinstate. That the present application is defective and should be dismissed with costs. The 2<sup>nd</sup> intended defendant opposed the application and stated that this application has been brought after 2 years and 11 months that it is an abuse of the court process. The interested party submitted that the applicant has lost interest in prosecuting this matter.
4. This court has considered the application and the submissions therein. The applicant stated that the plaintiff's former Advocates George Egunza & Associates fixed application dated February 20, 2019 for hearing for the October 29, 2019. On the October 29, 2019 a hearing date for the plaintiff's application dated February 20, 2019 and the 2<sup>nd</sup> defendant's application dated August 17, 2016 was given for the December 18, 2019 with Mr Odour holding brief for Mr Egunza who was said to be indisposed. On the December 18, 2019 Mr Egunza Advocate did not attend the hearing of the application dated February 20, 2019 and the application was dismissed. On the March 2, 2020 Mr Egunza Advocate sought leave to file an application for reinstatement of the application dated February 20, 2019. On the March 2, 2020 Mr Egunza Advocate was granted fourteen (14) days to file an application for reinstatement ie March 16, 2020.
5. In *Ruga Distributors Limited v Nairobi Bottlers Limited* [2015]eKLR, Abirili J. cited the decision of Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCCC No 397/2002*, where he stated;
6. Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.



7. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.
8. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal."
9. On the issue of the delay to reinstate the suit, the interested party submitted that the suit was dismissed on December 18, 2019, the plaintiff filed the present application on August 17, 2022. That is a period of 2 years and 11 months since. No credible, satisfactory and sufficient explanation has been provided by the plaintiff why it took a total of over two years to file an application to reinstate the suit. It is the interested party's case that the plaintiff is not keen on prosecuting the matter. I agree if the plaintiff had been a diligent litigant, he would have been aware of the dismissal of his application for non attendance sooner than 2 years later.
10. In the case of *Gideon Sitelu Konchella vs Daima Bank Limited* [2013]eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that;
11. It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the act."
12. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR considered the duty that advocates owe to the court:
 

"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."
13. Should this error or abandonment by the advocate be visited upon the client? The courts have adopted an equitable approach in addressing this issue. In the case of *Philip Chemwolo & another v Augustine Kubede* [1982-1988] KAR 103, Apaloo posited as follows:
 

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."
14. In *Belinda Murai & 9 others v Amos Wainaina* [1979]eKLR, the court pronounced itself on the consequences of a mistake of an advocate as follows:
 

"The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring



in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

15. The test for consideration for reinstatement of a suit and or application that has been dismissed for non-attendance is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the plaintiff or the defendant will be prejudiced by reinstatement of the suit. In this case, the delay in this case is that the application was dismissed on December 18, 2019 and this notice of motion for reinstatement is dated August 17, 2022 this period is long and inexcusable. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6<sup>TH</sup> DAY OF DECEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

