



Karweru t/a Karweru & Co Advocates v Mburu & another (Miscellaneous Application 17 of 2021) [2024] KEELC 5094 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION 17 OF 2021**

LN GACHERU, J

JULY 4, 2024

BETWEEN

CHARLES KARWERU T/A KARWERU & CO ADVOCATES APPLICANT

AND

MARY NYOKABI MBURU 1ST RESPONDENT

SAMUEL MACHARIA MBURU 2ND RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 18th July, 2023, premised on Order 12, Rule 7, Order 51, Rule 1 of the *Civil Procedure Rules*, and Sections 1A, 1B and 3B of the *Civil Procedure Act*, the Applicant has sought for the following Orders:
 - a. This Honourable Court be pleased to set aside the dismissal order made on 5th July, 2023, and any other consequential Orders thereto.
 - b. This Honourable Court be pleased to reinstate the application dated 10th June, 2023, for hearing.
 - c. The costs of this application be in the cause.
2. The Application is supported by the grounds enumerated on its face and on the Supporting Affidavit of Loise N. Miriti Advocate, sworn on 18th July, 2023. The deponent stated that she is an Advocate working in the Applicant's Law Firm.
3. She further deposed that the Applicant represented both Respondents in Murang'a ELC Case No 203 of 2013, as consolidated with Nyeri ELC No 168 of 2015, until 20th June, 2017, when the Respondents changed their Advocates to the Law Firm of Wanyoike Macharia & Co Advocates.



4. It was her further averments that as a result of the aforesaid change of Advocates, the Applicant raised a Fee Note dated 1st August, 2017, to the Respondents through their Advocates demanding the sum of Kshs 252,400/-. Thereafter, the Applicant filed a Bill of Costs against the Respondents on 17th December, 2021, which Bill of Costs is dated 24th June, 2021.
5. It was the Applicant's contention that the Bill of Costs dated 24th June, 2021, was presented for taxation wherein the Taxing Officer declined to tax the same on grounds that the Court must decide on the existence of an agreement related to legal fees between the Applicant and the Respondents.
6. The Applicant further contended that it was dissatisfied with the aforesaid Ruling by the Taxing Master and wrote a letter dated 29th March, 2023, requesting for the reasons of taxation.
7. The Applicant stated that it filed a Reference before this Court on 13th April, 2023, and served the same plus attendant Notice of hearing scheduled for 30th May, 2023, upon the Respondents' Advocates on 18th April, 2023, via email. The deponent annexed a copy of the email dated 18th April, 2023, and Affidavit of Service dated 19th April, 2023, marked as "D1" and "D2", respectively.
8. It was the Applicant's further contention that they attended Court on 30th May, 2023, for the hearing wherein, the Respondents' counsel was absent and the Court upon being satisfied that the Respondents' were duly notified of the hearing of 30th May, 2023, issued directions that the Reference be canvassed by way of written submissions, and the Applicant to serve a mention notice upon the Respondents, notifying them that the matter was due for mention on 5th July, 2023.
9. The Applicant annexed an Affidavit of Service dated 13th June, 2023, marked "E2" and a copy of the email sent to the Respondents' Advocates dated 31st May, 2023, notifying the Respondents that the matter would be mentioned on 5th July, 2023, which is marked as annexure "E1".
10. The Applicant stated that its written submissions dated 26th June, 2023, were filed before the Court on 27th June, 2023, and the aforesaid submissions were served upon the Respondents, as verified by annexure "F" being a copy of the email sent to Respondents' Advocates dated 27th June, 2023.
11. Further, that the Applicant was not able to attend Court on 5th July, 2023, as it had not diarized the same which was an oversight on its part. A copy of the Applicant's diary was annexed to the Affidavit and was marked as "G". Further, that its failure to attend Court on 5th July, 2023, was not intentional, but due to the result of an excusable mistake, that the current Application was brought without delay and the Respondents do not stand to suffer any prejudice if the Applicant's Application dated 10th April, 2023, is reinstated.
12. The Application is resisted by the Respondents herein through their joint Grounds of Opposition dated 6th February, 2024, and filed before the Court on 5th March, 2024.
13. The Respondents asserted that the dismissal of the Applicant's Application dated 10th April, 2023, was regular as the Applicant was well aware of that the matter was listed for hearing on 5th July, 2023.
14. It was the Respondents' contention that the Applicant has not provided the Court with any valid reasons for non-attendance of court, leading to the dismissal of the Application dated 10th April, 2023.
15. The Respondents alleged that the Applicant did not file a Notice of Objection opposing the Ruling by the Taxing Officer dated 29th March 2023, which renders the Applicant's Application dated 10th April, 2023, seeking a review of the Taxing Master's Ruling moot.



16. The Respondents referred to the Applicant's annexure "A" which they claimed demonstrated that the parties herein had executed an agreement concerning legal fees in respect of which the Applicant on 1st August, 2017, issued a demand to the Respondents of Kshs 252,400/- being the outstanding balance.
17. The instant Application was canvassed by way of written submissions, which this court has duly considered.

Applicant's Submissions

18. The Applicant filed written submissions on 29th November, 2023, reiterating the averments contained in the Supporting Affidavit of Loise N. Miriti Advocate, dated 18th July, 2023. It was the Applicant's submissions that this Court dismissed the Application dated 10th April, 2023, due to a mistake and inadvertence of the counsel.
19. The Applicant further submitted that a mistake of a counsel ought not to drive a litigant from the seat of justice, and as there is no ulterior motive for the Applicant's non-attendance of Court on 5th July, 2023, and the Court ought to reinstate the Application dated 10th April, 2023.
20. Further, the Applicant submitted that the failure to update its diary was a mistake on the part of its counsel, and that the record reflect that the Applicant demonstrated interest in prosecuting the matter because the Applicant's counsel had complied with the Orders of this Court issued on 30th May, 2023, unlike the Respondents who did not file their response to the Application, despite being served with both the Application dated 10th April, 2023, and also with directions of the Court dated 30th May, 2023.
21. The Applicant cited the holding of the Court in the case of *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR, where the Court referenced the decision of the Court of Appeal in *Tana River Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR, in support of the proposition that where the Court is satisfied that by excusing the mistake of counsel, it will result in a justiciable, expeditious and holistic disposal of the matter, the Court will exercise their discretion and excuse the mistake of counsel so as not to visit the same upon a client.

Respondents' Submissions

22. The Respondents filed their written submissions jointly on 5th March, 2024, through the Law Firm of Njoroge Ng'ang'a & Co. Advocates, and identified two (2) issues for determination as follows:
 - i. Whether the court has jurisdiction to entertain the Application dated 18th July, 2023, as presented by the Applicant before this Court?
 - ii. Whether the Application dated 18th July, 2023, is merited?
23. They relied on the holding of the Court in the cases of *Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company*; and, *Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* [1989] KLR 1 on the question of jurisdiction.
24. They submitted that the main prayer in the Applicant's Application dated 10th April, 2023, was for the Court to tax the Advocate-Client Bill of costs dated 24th June, 2021, as drawn which was disallowed by the Taxing Officer via a Ruling dated 5th July, 2023, wherein, the Taxing Master held that she lacked jurisdiction to tax the same due to the presence of an agreement on fees and balance executed by the Applicant and the Respondents.



25. Reliance was also placed on the decision of the court in the case of *Tom Ojienda & Associates v Mumias Sugar Company Ltd & another* [2019] eKLR, to anchor the submission that a Taxing Officer lacks jurisdiction to tax a Bill of costs in the face of a written agreement on legal fees between the parties.
26. The Respondents further submitted that dismissal of a suit for want of prosecuting amount to a Judgment, and cited the holding of the Court in the case of *James Cheruiyot Laboso v Reuben Chepkowny* [2021] eKLR, in support of the foregoing submission. They urged the Court not to reinstate the Applicant's Application dated 18th July, 2023.
27. The above being the pleadings herein, the rival written submissions and the cited authorities, this court finds the issues for determination are as follows;
 - i. Is the Applicant entitled to the orders sought?
 - ii. Are the Respondents likely to suffer prejudice if the Application dated 10th April, 2023 is reinstated?

i) Is the Applicant entitled to the orders sought?

28. This Court dismissed the Applicant's Application dated 10th April, 2023, for reason of want of prosecution on 5th July, 2023, when the matter came up for mention on the Court's virtual Platform, and was called for three times without any response. The Applicant admitted that it did not attend Court on the material date, that is 5th July, 2023, and it explained the absence from the Court on the mentioned date due to failure by counsel to diarize the matter.
29. It is trite that reinstatement of a suit is at the discretion of the Court, which discretion ought to be exercised in a just manner. In the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, the Court held as follows:

“A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”
30. In the case of *Ivita v Kyumbu* [1984] KLR 441, the Court laid down the principles for issuance of an order of dismissal of suit for want of prosecution as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.
31. The preceding position was affirmed by the Court in the case of *Mwangi Nedangi S. Kimenyi v Attorney-General & another* Civil Appeal No E003 of 2021. The Court finds and holds that it has



discretion to grant the orders sought herein, but the said discretion has to be exercised judiciously. See the case of *Kenya Pipeline Co. Ltd v Maguta Production Ltd* [2014] eKLR, where the Court held;

“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

32. It trite that the Courts do retain inherent or residual powers to render justice in every case before them under Section 3A of the *Civil Procedure Act*. In the case of *Murtaza Hassan & another v Ahmed Slad Kulmiye* [2020] eKLR, the Court cited *Halsbury's Law of England* 4th Edition Volume 37 Paragraph 14 addressing the inherent/residual powers of the Court:

“Is a virile and viable doctrine and has been defined as being the reserve or found powers, a residual source of powers which the court may draw upon as necessarily whenever, it is just or equitable to do so, in particular to ensure observance of due process of Law, to do justice between the parties and secure a fair trial between them.”

“As to the construction of Order 10 Rule 11 of the *Civil Procedure Rules*, where Judgment has been entered under this order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

33. In the subject suit, the Applicant explained the failure to turn up in Court on 5th July, 2023, as having been occasioned by an oversight on the part of counsel who did not diarize the matter.

34. The Court has perused and analyzed the pleadings, evidence and submissions tendered by the parties. The Court has also considered the Applicant's general conduct in the matter prior to the dismissal of its Application dated 10th April, 2023. It is the finding and holding of the Court that the Applicant has demonstrated conscientiousness in prosecuting its Application dated 10th April, 2023, with the exception of 5th July, 2023, when the Applicant failed to attend Court.

35. Further, the Applicant has demonstrated that it served the Respondents with the aforesaid Application, and with various notices as directed by this Court. On the basis of the foregoing, it is the considered view of this Court that the Applicant, by commencing the present Application for reinstatement of the dismissed Application is not seeking to prolong or delay the final determination of the matter.

36. Again, the current Application for reinstatement was filed by the Applicant on 18th July, 2023, following dismissal of its Application dated 10th April, 2023, by this Court on 5th July, 2023.

37. Therefore, it is the holding of this Court that the present Application was filed without delay, and thus no prejudice is likely to be visited upon the Respondents if the Applicant's Application dated 10th April, 2023, is reinstated.

38. Accordingly, the Court finds and holds the instant Application is merited and consequently the Order dated 5th July, 2023, which dismissed the Applicant's Application dated 10th April, 2023, be and is hereby set aside, and the said Application dated 10th April 2023, is reinstated, for hearing and be determined on merit.

39. Given the circumstances of the case, the court directs each party to bear own costs.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 4TH DAY OF JULY 2024.

L. GACHERU

JUDGE.

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

M/s Wanjira H/B Mr Karweru for the Applicant 1st Respondent

M/s Nzilani H/B for Mr Nganga for the 2nd Respondent

