



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISCELLANEOUS APPLICATION NO. E036 OF 2021

REYNOLDS CONSTRUCTION CO. (NIG.) LTD....APPLICANT

VERSUS

FESTUS M'ARITHI M'MBOROKIRESPONDENT

RULING

1. The application dated 18.10.2021 seeks the setting aside of the orders dated 18.10.2021 and reinstatement for hearing of the application dated 22.9.2021. The application is supported by an affidavit sworn on 18.10.2021 by Kelvin Kimathi.
2. The grounds of the application are that the counsel handling the matter was unable to join proceedings virtually out of internet down time from their service provider Jamii Telcom in the morning hours. He could not therefore on time or at all hence the reason for non-attendance. The applicant has attached a call log correspondence marked as “KK-2”.
3. The application is opposed by the respondent through a replying affidavit sworn by Thurair Atheru Advocate on 18.10.2021.
4. The respondent states the applicant has been employing delaying tactics so as to ensure the lower court suit is not heard and determined. He avers that this being a third application filed over the same subject matter, the previous conduct militates against granting the orders sought.
5. The respondent further state the reasons for non-attendance are not plausible for lack of electronic evidence to show an attempt to log into the court online portal and or call counsel for the respondent to explain the difficulties or at the very least reach out the court registry personnel for help.
6. The respondent avers if the application is allowed, it will open a Pandora's Box where any party desirous of rolling back the wheels of justice would just allege that there was no internet in their gadget and undo what a vigilant party could rightly have achieved.
7. Lastly, it is averred the application was an academic exercise since even if the lower court matter proceeds, the applicant retains an opportunity to file a substantive appeal hence no prejudice shall be occasioned if the application is not reinstated for hearing.
8. When the application came for hearing on 1.12.2021 the court directed the respondent to file and serve a replying affidavit within 14 days. Parties were also ordered to file written submissions to dispose of the same. A deadline of 30.12.2021 was given. There was no leave granted to the applicant to file any supplementary affidavit and hence the one filed on 20.12.2021 is filed without leave. The same is hereby expunged from the court record.
9. The applicant submits the reasons for non-attendance was due to internet down time which was beyond his control, he made efforts to reach out a counsel in Meru but in vain; it would not be fair to be condemned unheard yet the application dated 22.9.2021 has merits; courts should do justice to parties taking note of the peculiar circumstances of each case presented before the court.
10. On the court's discretion under **Order 12 Rule 7 Civil Procedure Rules** the applicant relies on ***Richard Ncharpi Leiyagu –vs- IEBC & 2 Others [2013]*** on the proposition that the discretion to set aside an ex parte order is intended to avoid injustice, inadvertence or inexcusable mistake or error.
11. The applicant submits this its circumstances are enough to persuade the court that non-attendance was not a deliberate attempt to obstruct or delay justice.
12. The applicant continues to submit courts of law are prohibited from making decisions without looking into the peculiar circumstances of

a case presented before it and that the court is requested to make further inquiries into the matter. Reliance placed on Wachira Karani –vs- Bidad Wachira [2016] eKLR on the proposition that the applicant has demonstrated sufficient cause which prevented it from attending court and that no prejudice will be occasioned to the respondent if the application is reinstated for interpartes hearing on merits.

13. Similarly, the applicant relies on K.G. Patel & Sons Ltd. –vs- John Kabukuru Gituro [2016] eKLR on the proposition that each party should be given an opportunity to be heard; Lochab Bros Ltd –vs- Peter Karuma T/A Lumumba, Lumumba Advocates [2003] eKLR on the proposition that the court should do justice to all parties; Peter Muriuki Ngure –vs- Equity Bank (K) Ltd [2018] eKLR on the proposition that the costs follow the event.

14. On 30/9/2021, the court certified the application dated 22.9.2021 urgent and directed that it be served for interpartes hearing on 18/10/2021.

15. On 18.10.2021, the matter was called out but only Mr. Atheru Advocate appeared virtually for the respondent and told the court they had been served with the application on 7.10.2021 via email. He confirmed that the respondents had filed a replying affidavit in response to the motion sworn on 18.10.2021. In absence of any appearance, the court dismissed the application for non-prosecution.

16. That the court has powers to dismiss a suit or an application for non-prosecution/non-attendance is not in dispute as provided under Order 12 Civil Procedure Rules.

17. The applicant was aware of the hearing date. The cause list had been published at least 7 days before the hearing date and the applicant knew that the matter was the first one in the cause list. The court has no obligation to make enquires why a party has not appeared in court on time or at all. See Solomon Ouko Onyango –vs- Amedo Centre (K) Ltd. [2019] ECLR.

18. Under **Order 12 Rule 7**, the court has discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or no-attendance.

19. 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.

20. The question herein is whether the applicant has demonstrated reasonable grounds for the reinstatement of the application and whether the respondents will suffer prejudice if the application is reinstated.

21. The court's main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the court of justice.

22. The applicant's counsel blames his law firm's internet service provider, Jamii Telcom. The applicant has not attached any verification that the lawfirm service provider is Jamii Telcom and whether it ever owned up or apologized for the mistake leading to the internet interruption on the morning of 18.10.2021.

23. Further, the court takes judicial notice there are other available service providers through mobile telephony handsets which the applicant's counsel could have used and or accessed as a show of vigilance to reach the court.

24. Be that as it may, in Belinda Murai & 9 others –vs- Amos Wainaina. [1961] EA 679, it was held mistakes of a legal adviser may amount to sufficient cause.

25. In Mutinda Musila Malua –vs- Ngunga Yatta Deputy County Commissioner Kitui West Sub-County & 2 Others [2021] eKLR, **Angote J.** reinstated a dismissed petition due to the failure of internet connectivity, since the advocate addressed the court albeit late after the petition had been dismissed as a sign of his efforts to reach court at the earliest opportunity possible.

26. In the instant case, the applicant's counsel does not name the lawyer(s) he tried to reach that day in Meru, or at the very least, the court personnel by which ever means to express his predicament. The court was sitting the whole day and there was not communication that morning that counsel was unable to log in.

27. In Sophia Chemasigen Kachuwai & Another –vs- Union Of Kenya Civil Servant & 2 Others [2021] eKLR, an advocate joined the virtual court at 8.45 a.m. However, when the matter was called out, the network collapsed and he was logged out. Upon logging back, his matter had already been dealt with. The court held sufficient reason ought to have been provided with back up evidence that there was unstable internet network that prevented him from logging into the court's virtual session.

28. The applicant submits if the application is not reinstated, it will be condemned unheard and that it would suffer grave injustice and prejudice.

29. On the other hand, the respondent alleges there has been inordinate delay of the lower court suit out of endless myriad applications by the applicant.

30. **Articles 48 and 50 of the Constitution** guarantees every Kenya right to access to justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to technicalities whereas **Sections 3, 4 and 13 of the Environment and Land Court Act** as read together with **Section 1A, 1B and 3A of the Civil Procedure Act** expects the court to strive towards substantive justice. See

Lochab Brothers Ltd (Supra).

31. Looking at the totality of the circumstances in this matter, my considered view is the route of lesser risk of injustice is to allow the application otherwise the applicant would be more prejudiced if denied a chance to prosecute the application dated 22.9.2022. **See Gladys Njeri Kirugumi –vs- Langata Development Co. Ltd & Another [2016] eKLR & Films Rover International Ltd. –vs- Cannon Film Sales Ltd., [1986] 3 All E.R. 772.**

32. Orders granted on 28.10.2021 are set aside with costs to the respondent.

33. Parties to put in written submissions to the application dated 22.9.2021 within 30 days and a mention for submissions on 17.3.2022 to fix a ruling date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

Materi holding brie for Atheru for respondent

Kimathi for Kamande for applicant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE