



Kassam Hauliers Ltd v Takaful Insurance of Africa Limited; Ngaruiya (Suing as the administrator of the Estate of Samuel Mbugua Mungai (Deceased) (Interested Party) (Civil Case E009 of 2020) [2025] KEHC 26 (KLR) (10 January 2025) (Ruling)

Neutral citation: [2025] KEHC 26 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E009 OF 2020
FR OLEL, J
JANUARY 10, 2025**

BETWEEN

KASSAM HAULIERS LTD PLAINTIFF

AND

TAKAFUL INSURANCE OF AFRICA LIMITED DEFENDANT

AND

JULIAH WAMBUI NGARUIYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL MBUGUA MUNGAI (DECEASED)). INTERESTED PARTY

RULING

A. Introduction

1. The application before court for determination, is the Notice of Motion application dated 4th July 2024 brought pursuant to provisions of Section 1A, and 3A of the *Civil Procedure Act*, Order 12 rule 7 of the *Civil Procedure Rules*, and all other enabling provision of law. The applicants seek for orders that;
 - a. Spent
 - b. That this Honorable court be pleased to reinstate the matter herein
 - c. That the Honorable court be pleased to issue an earlier date if need be.
 - d. Any other and further relief that this Honorable court may deem fit and just to grant.
2. The said application is supported by the ground stated on the face of the said application and the attached supporting affidavit dated 4th July 2024, sworn by Mr. Mohammed Kassim Hussein, who deponed that on 04.03.2024, the court had dismissed this suit for want of prosecution and this was due to the fact that their previous counsel was indisposed and unable to attend court on the said date.



- They had tremendous interest in having this matter heard and had thus instructed a new counsel to take over the conduct of this matter, and follow its prosecution to the logical end.
3. They had a strong actionable claim against the respondent and unless the suit was heard and determined on merit, great mischief would be occasioned, yet the dismissal order was made under circumstances, which were not due to their fault. They had moved court with clean hands in equity and urged the court to grant the orders sought as it would not prejudice the respondent.
 4. This Application was opposed by the respondent, who filed their replying affidavit dated October 17, 2024, sworn by their legal officer one Dolphine Moindi. She deponed that the narrative of a “previous counsel”, who was indisposed is inaccurate as the proper position as could be gleaned from the record was that the applicant was duly represented by one “Mr Elkana Mogaka Advocate”, who attended court on 25.09.2023, when the hearing date of 04.03.2024 was taken by consent and subsequently failed to attend court on the said material date.
 5. That it was therefore not true by any stretch of imagination that there was another counsel who was took the hearing date and who subsequently was unwell and thus unable to attend court on the said hearing date. Further, even assuming the said other counsel was unwell, there was no evidence whatsoever placed before the court to prove the fact of illness attributed to any specific counsel and thus the averments made by the Applicant, had to be taken with a pinch of salt.
 6. Finally, the respondent averred that applicant had moved court with unclean hands, in bad faith and made averments full of falsehood thus the court could not exercise its discretion in their favour. They also urged the court to find that the suit as filed had no chances of success as the plaintiff intended to have the insurer pay on behalf of the insured a sum exceeding the insurers limit as set out in law namely under Section 5(b),(iv) of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405, which limited their liability to Kenya shillings three million (Kshs.3,000,000/=).
 7. The respondent thus urged the court to find that this application was not merited and be pleased to dismiss the same.

B. Analysis & Determination

8. I have carefully considered the Application, its supporting affidavit, the response and both set of submissions filed. The only issue which arises for determination is whether this court should exercise its discretion to set aside its order dated 4th March 2024 dismissing the plaintiff’s suit for want of prosecution.
9. It has been held severally that the court has inherent power to restore a case for hearing after it has been dismissed. However, the decision on whether or not to reinstate a dismissed Appeal/case is no doubt an exercise of discretion, which must be based on evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. The said orders must only be issued in deserving circumstances and not arbitrarily, whimsically or capriciously. See *Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999 & *Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills* [1991] KLR 469; [1988-92].
10. The circumstances under which a court sets aside its default orders were also set out in the celebrated case of *Shah vs. Mbogo* (1967) EA 166 where the Court stated that;

“ this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not



designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

11. The applicant blames their previous advocate for not attending court on 4th March 2024, when the suit was dismissed, but as rightly pointed out by the respondent, on 25th September 2023, when the hearing date was taken by consent, the Applicants current counsel Mr. Elkana Mogaka was present in court and subsequently failed to attend court on the trial date. Blame can therefore not be placed at the feet of their former Advocate, whose particulars are not given.
12. Secondly the therein no affidavit on record signed by the past or present advocate explaining why they failed to attend court on the material day nor did the applicant provide any evidence to prove that, indeed there advocate was indisposed where no plausible explanation given, no discretion can be exercised in favour of the Applicant.
13. Finally, the applicant submits that mistake of counsel should not be visited on an innocent litigant. That may well hold true, but the circumstance’s herein dictate otherwise as the facts pleaded are based on falsehood, which are glaring and cannot be swept under the carpet. In the case of *Departed Aseans Property Custodian Board v Issa Bakuya* the Supreme Court of Uganda in Civil Appeal No. 18 of 1991 held that:

An application to set aside an ex-parte Judgment cannot succeed if no good or substantial reasons are given to justify the setting it aside.”

C. Disposition

14. I do find the Application dated 4th July 2024 lacks merit and the same is dismissed with costs to the Respondent.
15. The said costs are assessed at Kshs.30,000/= all inclusive
16. It is so Ordered

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 10th day of January, 2025.

In the presence of: -

No appearance for Appellant

No appearance for 1st Respondent

No appearance for 2nd & 3rd Respondent

Susan/ Sam Court Assistant

