



**Tunoi & Company Advocates v Kimemia (Miscellaneous Application Probate & Administration E024 of 2022) [2025] KEHC 1740 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION E024 OF 2022  
E OMINDE, J  
FEBRUARY 19, 2025**

**BETWEEN**

**TUNOI & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**JORAM KIMEMIA ..... RESPONDENT**

**RULING**

1. The Applicant approached this court vide a Notice of Motion Application dated 29/07/2024 seeking the following orders;
  - i. That this Miscellaneous application be reinstated and be fixed for hearing on merit.
  - ii. That the order made on 24/6/2024 dismissing the Advocate - client bill of costs be reviewed and set aside.
  - iii. That upon grant of prayer 2 above, the court be pleased to give directions and/ or orders in respect to the hearing of the Advocate - client bill of costs.
  - iv. That costs of this application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit.

**Applicants' Supporting affidavit**

3. The applicant deposed that the Miscellaneous application was dismissed for non-attendance on 24/06/2024 which was occasioned by an inadvertent mistake in diarizing. Further that the application involves issues dealing with the payment of costs of legal services offered to the Respondent to a tune of Kshs 7,534,400 and therefore, it would be prejudicial to the applicant who will suffer irreparable loss and suffering if the matter is not reinstated for hearing. He urged that the applicant is keen on



prosecuting this matter and it is in the interest of the court to allow the reinstatement of the advocate-client bill of costs.

### **Applicants' submissions**

4. Learned counsel for the applicant filed submissions dated 25/10/2024. Counsel urged that the applicants' non-attendance on 24/6/2024 was occasioned by an inadvertent mistake in diarizing as the date was mistakenly diarized as coming up on 24/7/2024 instead of 24/6/2024. As a result, the Applicant's advocate failed to attend court on 24/6/2024 and rather appeared on 24/7/2024 only for the Miscellaneous application not to be mentioned. Upon perusal of the court file he discovered that an Order for dismissal had been made on 24/6/2024 for non-attendance. Counsel submitted that the mistake on the part of the advocate was neither deliberate nor intentional so as to obstruct substantive justice.
5. Counsel submitted that this Application involves issues dealing with payment of costs of legal services offered to the Respondent at a tune of Kshs 7, 534, 400/= and therefore would be prejudicial to the Applicant who will suffer irreparable loss and suffering if the matter is not reinstated for hearing. Further, that the Application has been brought promptly and in good faith. The Applicant is keen on prosecuting this Miscellaneous Application and therefore aggrieved by the decision of the Honourable court. He reiterated that the Applicant is desirous to prosecute this Miscellaneous application and urged the court to invoke discretion to allow the reinstatement of the Advocate -client bill of costs. He stated that there was sufficient cause why the Advocate - client bill of costs ought not to have been dismissed.
6. Counsel cited Order 12 Rule 7 of the [Civil Procedure Rules](#) and the case of [Agip \(K\) Ltd v High Land Tyres](#) (2001) KLR 630 where the Court held:

“Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity' to have his case determined on merit, the court must also consider whether the defendant has been prejudiced by the delay.”
7. Additionally, he cited the case of [Martha Wangari Kama v IEBC](#), Nyeri Civil Appeal No 1 of 2017 the Court of Appeal held:

“The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
8. Counsel reiterated that it is in the best interest of justice, that the said order ought to be reviewed and/or set aside and this Miscellaneous application be reinstated for hearing and determination.

### **Respondent's Case**

9. Learned counsel for the respondent filed submissions dated 12/11/2024. He submitted that the miscellaneous Application was filed in the year 2022, no explanation has been offered by the applicant why he has failed to prosecute the said application for almost two years and has not demonstrated any step he took to ensure the same is prosecuted and why they had to wait for the court to fix the same for dismissal then take action.



10. Counsel cited Order 17 Rule 2 of the *Civil Procedure Rules, 2010* and further, the case of *Utulii Transport Company limited & 3 others v NIC Bank Limited & another* (2014) eKLR where the court held as follows: -

“I will decree the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are;  
Whether there had been inordinate delay on the part of the Applicant in prosecuting the case;

- i. Whether the delay is intentional, contumelious;
- ii. Whether the delay is an abuse of the court process;
- iii. Whether the delay gives rise for substantial risks for further trial or cause serious prejudice to the Respondent.
- iv. What prejudice will the dismissal occasion the Claimant;
- v. Whether the Claimant has offered a reasonable explanation for the delay;
- vi. Even if there had been delay, what does the does the interest of justice dictates lenient exercise of discretion by the court.

11. Additionally, counsel cited the decision of the court in *Kiiru M'Mugambi & 39 others v Moses Kirima Meenje & Kirima Advocates & 3 others* (2020) eKLR and urged that on that matter, the court further stated that the court should be reluctant in giving audience to non-committed litigant and that litigation must come to an end. He urged that the Applicant has totally failed to demonstrate any action he took since the Application was filed in the year 2022 until it was dismissed in the year 2024 hence he does not deserve the orders herein sought. Counsel prayed the court dismiss the application with costs to the Respondent.

### **Analysis & Determination**

12. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

13. In *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, the court held that;

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”



14. In *Shah v Mbogo & another* (1967) EA 116 (Harris J), the court expressed itself on the matter of discretion as follows:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

15. Having considered the Application in its totality as well as the submissions filed by both Counsel for the Applicant and Counsel for the Respondent and having applied my mind to the reasoning in the authorities that I have cited above, what is clear is the fact that to reinstate or not to reinstate the Applicant’s Bill of costs is a discretion of the Court. As was held in the case of *Shah v Mbogo (supra)* all that is required of the Court is that it exercises this discretion judicially.

16. This being an Advocate Client Bill of costs where the claim is for Ks. 7,534,400/- as per the principles of setting aside set out in the case of *Utulii Transport Company limited & 3 others v NIC Bank Limited & another* (2014) eKLR (*supra*) I am satisfied that the Applicant stands to suffer prejudice if this Application is not granted for reasons that this is a demand for payment for services rendered and not paid for. Further I do not see any prejudice that will be occasioned to the Respondent. In this regard, I associate myself fully with the further principle therein enunciated that even if there had been delay, the interest of justice dictates lenient exercise of discretion by the court by the very nature of this case in my view.

17. Much as I agree with the Counsel for the Respondent that this is a 2022 matter that was dismissed on 24<sup>th</sup> June 2024 and so therefore the delay to prosecute it can be termed inordinate, I also find that Counsel for the Applicant has been very candid with the Court as to why he overlooked the matter. He did not come up with some grandiose dramatic explanation to make his nonattendance appear extraordinary. He stated very simply that he had diarized the date wrongly.

18. In this regard I am persuaded by the sentiments of Justice Madan in the case of *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782 (CALL) where his Lordship stated as follows:

A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

19. For the above reasons, I am satisfied that the Application has merit and the same is allowed in its entirety but with costs to the Respondent.

**READ DATED AND SIGNED AT ELDORET ON 19<sup>TH</sup> FEBRUARY 2025**

**E. OMINDE**

**JUDGE**

