

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 42 OF 2013

MARGARET NDUNGE KIOKO.....PLAINTIFF

VERSUS

MANASA ANANDA CALLED.....DEFENDANT

RULING

(Application seeking to reinstate an application that was dismissed for non-attendance; counsel not present during the online session; apparent that application was dismissed owing to mistake of counsel; application allowed but subject to payment of throw away costs)

1. The application before me is that dated 21 January 2021 filed by the plaintiff. It basically seeks orders to reinstate an application dated 28 October 2020 which was dismissed on 19 January 2020 for non-attendance. The application is opposed by the defendant.
2. To put matters into context, judgment in this matter was delivered on 21 September 2020, with the applicant's case (as plaintiff) being dismissed with costs to the defendant/respondent. Aggrieved by the judgment, the applicant filed a Notice of Appeal on 23 September 2020, and on 30 October 2020, the applicant filed the application dated 28 October 2020, seeking orders of stay of execution of the judgment pending appeal. The respondent filed a replying affidavit to oppose the motion. The said application was listed for *inter partes* hearing on 19 January 2021. On that day, there was no appearance on the part of counsel for the applicant, with only Mr. Mutubia, learned counsel for the respondent, being present. I proceeded to dismiss the application dated 28 October 2020 for failure to prosecute. This application was subsequently filed on 21 January 2021, and as I have mentioned, it seeks orders to reinstate the dismissed application.
3. The supporting affidavit is sworn by Simon P.M. Mutugi, counsel on record for the applicant. He has deposed that he logged into the online portal at 9.00am on 19 January 2021, but the court was not sitting. He deposes that he later checked at 10.00am when a message was relayed that the judge would sit at 11.00am. He continues to depose that at 11.00am, he logged into the platform but unfortunately there was nothing going on, and he remained online waiting for the court to start. He states that the court did not commence until later in the day, past midday, when he was informed that the court had now commenced. He continues to depose that unfortunately, when he logged in again, he found that the court had called out the application and dismissed it for non-attendance. He avers that he did not contribute to this unfortunate turn of events.
4. The respondent has opposed the application through the replying affidavit of Godfrey Mutubia, his counsel on record. He points out that counsel admits logging in to the virtual platform but opted to log out before the court session commenced, and in his view, this was reckless and the consequences clear. He has deposed that it is prudent for counsel to remain logged in unless communicated otherwise. He is of opinion that no sufficient reason has been advanced for counsel's non-attendance. He has further deposed that on that day, the Court Assistant, posted on the chat section of the virtual platform, at around 9.15am, that the court was to begin the session at 11.00am. He has further argued that it will be a waste of time to reinstate the application as it is not merited.
5. When the matter came up for *inter partes* hearing on 25 February 2021, counsel fully relied on the affidavits filed. I have considered the matter.
6. I have gone through the cause-list of 19 January 2021, and at the outset, it is important to set some facts right. Mr. Mutugi's depositions seem to suggest that the court did not sit until way past 11.00am but that is not the correct position of what transpired on that day. The correct position is that the cause-list for that day was split into two, the first, being a physical session in court for the hearings, and the second, being an online session to attend to mentions and applications, which was to commence after the court had finished with the physical session in court. The physical session was set to commence at 8.30am whereas the online session was to scheduled to start at 11.00am. That cause-list was shared to all counsel. If indeed Mr. Mutugi logged in at 9.00am as he deposes, that was completely pointless, for the judge was not in the online platform, but was physically in open court proceeding with the cases fixed for main suit hearings. Mr. Mutugi was aware, or ought to have been aware, by a simple look at the cause list, that the online platform was to commence at 11.00am or thereafter, and there is nothing to gain in saying that he logged into the online platform at 9.00am and found no judge and that he again checked at 10.00am and found no judge. There could not have been a judge attending the virtual platform at those hours as I have explained above. Counsel ought to have logged in from 11.00am onwards.
7. What transpired on that day is that the physical hearings extended beyond 11.00am and counsel were informed, through the Court Assistant, of the delay and the estimated time when the virtual session was to commence. Counsel ought to have followed those directions as indeed, it appears Mr. Mutubia did. I do recall Mr. Mutugi coming into the virtual platform way after his application was dismissed. I wonder where he was, because before reaching applications, the court first dealt with the mentions which must have consumed half an hour at the very least, for the cause list shows seven mentions. The subject application was first on the list of applications and counsel ought to have been alert and alive to that.
8. I cannot overemphasise that counsel have a duty to court and to their clients and part of that duty is to exercise diligence in attending court

sessions, whether physical or virtual. Logging in and logging out indiscriminately on the virtual platform, to attend to other issues other than the court session, is risky behaviour that may lead to adverse consequences. It was the lackadaisical approach of counsel, that led to the dismissal of the application, and not any “unfortunate turn of events” as claimed by Mr. Mutugi. I can only trust that counsel has learnt his lesson on diligence in attending court sessions.

9. I would not wish, in the circumstances of this case, to shut out the applicant from being heard on her application dated 28 October 2020, based on the mistake of her counsel. I will therefore reinstate her dismissed application, but this will be subject to payment of throw away costs of Kshs. 10,000/= payable to counsel for the respondent within the next 7 days. If these costs are not paid as I have ordered, then the application dated 28 October 2020 will remain dismissed. I will give further directions on the date of the hearing of that application upon delivery of this ruling.

10. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA