



Mawe Mbili Limited v Standard Chartered Bank (K) Limited & another (Civil Case 458 of 2017) [2025] KEHC 5068 (KLR) (Commercial & Admiralty) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY**

CIVIL CASE 458 OF 2017

PM MULWA, J

APRIL 24, 2025

BETWEEN

MAWE MBILI LIMITED PLAINTIFF

AND

STANDARD CHARTERED BANK (K) LIMITED 1ST DEFENDANT

JEAN FRANCOIS RAYMOND LOUIS DAMON 2ND DEFENDANT

RULING

1. In the Notice of Motion dated 3rd May 2024, Jean Francois, the 2nd Defendant herein, seeks to set aside the order of the Court dated 10th July 2023, which marked the matter as closed, and prays for reinstatement of his counterclaim for hearing.
2. The application is premised on grounds set out in the face of the motion and supported by the affidavit of the Applicant sworn on 9th May 2024. The Applicant avers that the counterclaim was not determined on merit and that the present application is made in the best interest of the company. He attributes the closure of the matter to his counsel's inadvertent failure to attend court on the scheduled hearing date of 10th July 2023 at 8:30 a.m., during which time the Plaintiff proceeded to withdraw her suit, resulting in the matter being marked as withdrawn.
3. The Applicant maintains that the counterclaim, which has been pending since 2017, raises substantive issues that warrant adjudication and that he ought not to be penalized for his advocate's omission.
4. The application is opposed. The 1st Respondent's director, Jacqueline Mack Damon, filed a replying affidavit sworn on 19th July 2024 in which she avers that the counterclaim was dismissed on account of the 2nd Defendant's non-attendance. She challenges the explanation offered by the Applicant as inadequate and contends that the supporting affidavit, having been sworn by the Applicant rather than



his advocate, is comprised of hearsay insofar as it relates to procedural matters. She further argues that the counterclaim is now moot in light of the pending proceedings in HCCOMM E655 of 2020, where leave has already been granted to the Applicant to commence a derivative suit.

5. The application was heard by way of written submissions. The Applicant filed submissions dated 13th September 2024, while the 1st Respondent filed submissions dated 22nd July 2024.

Analysis and determination

6. I have considered the Motion, the affidavits in support and in opposition, as well as the submissions filed by the parties. The following issues commend to me for determination:
 - i. Whether the Applicant has shown sufficient cause to warrant the setting aside of the order made on 10th July 2023.
 - ii. Whether the counterclaim should be reinstated for hearing.
7. The court has been called upon to exercise its discretion, which ought to be done judiciously (See Court of Appeal case in *Patriotic Guards Limited v James Kipchirchir Sambu* (2018) KECA 799 (KLR)).
8. The Applicant must show there is sufficient cause to warrant the court set aside the court orders of 10th July 2023 and reinstate the counterclaim for hearing on merit.
9. It is not disputed that the Applicant’s advocate failed to attend the proceedings on 10th July 2023 at the scheduled time. The Applicant attributes this to inadvertence on the part of counsel. It is well settled that the mistake of counsel, particularly where it is neither deliberate nor contumelious, should not be visited upon the client. In *Philip Chemwolo & Another v Augustine Kubende* [1982-88] KAR 103, the Court of Appeal observed:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit.”
7. Courts have consistently held that justice must not be sacrificed at the altar of procedural technicalities, particularly where the mistake lies with counsel. The delay between the closure of the matter in July 2023 and the filing of this application in May 2024 is not insignificant. The Applicant’s explanation, albeit sparse, mitigates against the delay. In *Ivita v Kyumbu* [1984] KLR 441, it was held that:

“The test is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite the delay.”
10. I find no evidence of bad faith or willful neglect on the part of the Applicant. Furthermore, the counterclaim has not been adjudicated on its merits, and it would be contrary to the principles of natural justice to deny the Applicant an opportunity to be heard.
11. 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. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule (See *Belinda Murai & Others – Versus - Amos Wainaina* (1979) eKLR).



12. The Respondent contends that the counterclaim was dismissed for non-attendance. However, there is no extract from the court record or formal order to this effect. The order made on 10th July 2023 simply marked the matter as closed following the withdrawal of the main suit. It is trite law that a counterclaim is a distinct and independent pleading, which may survive even after withdrawal of the main suit. In *Graham v Commercial Bank of Africa Ltd* [1982] KLR 611, the Court affirmed that:

“ A counterclaim is in the nature of a cross-suit and is not automatically extinguished by the withdrawal of the main suit.”
13. The Court is enjoined to do substantive justice between parties and not shut out litigants where an arguable issue remains. Denying reinstatement would effectively deny the Applicant an opportunity to be heard which is a cardinal principle of natural justice.
14. As to the existence of a related matter, HCCOMM E655 of 2020, where the Applicant has been granted leave to commence a derivative action, I am not persuaded that this renders the counterclaim herein otiose. No duplication of issues or prejudice has been demonstrated by the Respondent. The Respondent will still have an opportunity to respond to the counterclaim on merit, and no irreversible prejudice will arise from its reinstatement.
15. On the issue of the supporting affidavit, while the Respondent raises concerns that it should have been sworn by counsel, the affidavit is not fatally defective. Matters within the personal knowledge of a party may be deposed by that party. In any case, the court retains a discretionary power to admit affidavits that are not in strict compliance with procedural expectations where no prejudice is occasioned. The defect, if any, is curable and does not go to the root of the application.
16. In sum, the Court is enjoined under Article 159(2)(d) of *the Constitution* to administer justice without undue regard to procedural technicalities. Further, the overriding objective under Sections 1A and 1B of the *Civil Procedure Act* calls upon courts to facilitate the just, expeditious and proportionate resolution of disputes.
17. Accordingly, I am satisfied that the application dated 3rd May 2024 has merit and is allowed. The orders made on 10th July 2023, marking the matter as closed, are set aside. The 2nd Defendant’s counterclaim dated 15th September 2021 is reinstated for hearing on merit. The costs of the application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms Kanyoni for Plaintiff

Ms. Nyabuto for 2nd Defendant/Applicant

Court Assistant: Carlos

