Matendechere & another v Atac (Civil Appeal E1120 of 2024)
[2025] KEHC 12189 (KLR) (Appeals) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 12189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL E1120 OF 2024

TW CHERERE, J

MAY 15, 2025

BETWEEN

CAROLYN RACHEL MATENDECHERE ..... 1ST APPELLANT

EDWIN OBIERO ..... 2ND APPELLANT

AND

BENARD SHIVEGA ATAC ..... RESPONDENT

RULING

"Procedural lapses, where satisfactorily explained and free from mala fides, should not override a party's right to be heard. The ends of justice are better served by adjudication than by exclusion."

1. This ruling is in respect of the Appellants' notice of motion dated 12th February 2025, in which they seek the following orders:
    1. Spent
    2. Spent
    3. An order setting aside the dismissal issued on 12th February 2025 of their notice of motion dated 20th January 2025;
    4. An order reinstating the said application dated 20th January 2025
    5. An order nullifying the proclamation notice dated 14th January 2024 issued by Interfield Auctioneers together with the warrants of attachment and sale.
    6. Costs be in the cause

2. The application is supported by the affidavit of George Ombati, learned counsel for the Appellants, sworn on the same date. He avers that his non-attendance on 12th February 2025 was occasioned by a dropped call during the virtual call-over, and that the matter was called out and dismissed in his absence before he could reconnect.

3. In support of their application, the Appellants relied on the decisions in *Maneno & others v Ibrahim & 3 others* (Environment & Land Case 30 of 2016) [2023] KEELC 19324 (KLR) (28 August 2023) (Ruling and *Salim Mohamed v Robert Fondo Kirimo* [2021] KEHC 7837 (KLR),(14 April 2021) (Ruling) where the courts found that plausible explanations for non-attendance and prompt remedial steps by counsel justified the setting aside of dismissal orders.

4. The Respondent opposes the application through a replying affidavit sworn on 21st February 2025. He argues that:

    1. The application is an abuse of the court process

    2. The application is intended to delay the execution of the judgment delivered in his favour on 15th January 2024

    3. The Appellants previously failed to comply with the directions of stay issued on 23rd September 2024

    4. No sufficient cause has been shown to justify the orders sought.

5. The Respondent on his part relied on *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR urging that courts should be cautious not to impede a successful litigant from enjoying the fruits of a judgment by granting stays or indulging delays without sufficient justification.

Issues for Determination

6. From the pleadings and submissions of the parties, the following issues arise for determination:

    1. Whether sufficient grounds have been established to warrant setting aside the dismissal order of the same date and reinstating the application dated 20th January 2025

    2. Whether this Court should issue immediate orders nullifying the proclamation and execution proceedings pending hearing of the reinstated application.

    3. Who bears the costs

7. On the first issue, Counsel avers that he was disconnected by a dropped call during the virtual call–over on 12th February 2025, and only became aware that the matter had been called and dismissed when he reconnected.

8. While virtual proceedings have enhanced access to justice, they are not immune to technical hitches such as connectivity failures. The non-attendance in this instance does not appear to have been intentional or indicative of neglect. Notably, the Appellants acted promptly in seeking to rectify the situation, which demonstrates diligence rather than indifference to the court process.

9. It is now settled law that mistakes of counsel, where not part of a pattern of indolence or abuse, should not be visited upon the client. As the Court of Appeal observed in *Belinda Murai & Others v Amos Wainaina* [1978] eKLR,

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it, but it ought to do whatever is necessary to rectify it if the interests of justice so dictate."

10. Similarly, in *Philip Chemwolo & Another v Augustine Kubende* [1982-88] 1 KAR 103, the Court of Appeal reaffirmed that:

> " 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."

11. Guided by these principles, I am persuaded that the Appellants should not be shut out due to a technical hitch resulting in counsel's absence. The justice of the case demands that their application be reinstated for hearing on the merits.

12. Concerning the second issue seeking to nullify the proclamation notice dated 14th January 2024 and related execution proceedings, I find that the issues raised therein are integrally connected to the merits of the Appellants' pending application dated 20th January 2025. That application, which seeks orders for stay of execution, remains undetermined and stands reinstated by this ruling. It would therefore be premature and procedurally inappropriate to make any definitive pronouncement on the lawfulness or effect of the execution steps at this stage. The proper course is to have those issues ventilated and adjudicated within the context of the pending application, where both parties shall have an opportunity to address the Court on all relevant facts and applicable law.

13. On the issue of costs, the general principle under Section 27 of the *Civil Procedure Act* is that costs follow the event, unless the Court directs otherwise. Although the Appellants have succeeded in obtaining the reliefs sought, the dismissal of their application was precipitated by their own non-attendance. The explanation has been accepted, but that does not absolve them of responsibility for the lapse. I therefore find it just that they should bear the costs of this application.

Disposition

14. Accordingly, I make the following orders:

    1. The order made on 12th February 2025 dismissing the Appellants' notice of motion dated 20th January 2025 is hereby set aside
    2. The Appellants' notice of motion dated 20th January 2025 is reinstated for hearing on merit
    3. Ruling on application dated 20th January 2025 on 22nd May 2025
    4. Stay of execution of the impugned judgment is issued until 22nd May 2025
    5. The Appellants shall bear the costs of this application

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025.

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Mr. Ombati for B.M. Mutie & Co. Advocates

For Respondent - Mr. Khafumi for Musili Mbiti Advocates LLP