



REPUBLIC OF KENYA



**Safari Eight Two Thousand and Two Company Limited v Nyasani t/a Nyasani EN Company  
Advocates (Civil Appeal 16 of 2019) [2025] KEHC 7912 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 16 OF 2019**

**A MSHILA, J  
MAY 16, 2025**

**BETWEEN**

**SAFARI EIGHT TWO THOUSAND AND TWO COMPANY  
LIMITED ..... APPELLANT**

**AND**

**EVANSON NYASANI T/A NYASANI EN COMPANY  
ADVOCATES ..... RESPONDENT**

**RULING**

1. Before court is an application by way of Notice of Motion dated 17<sup>th</sup> July, 2024.
2. The application is brought under the provisions of Article 159(2)(d) of the Constitution, Order 12 Rule 7 and Order 9 Rule 9(a) of the Civil Procedure Rules, 2010. The Respondent/Applicant sought for orders that:-
  - a. Spent
  - b. That this Honourable Court be pleased to set aside the order dismissing the Respondent/Applicants Bill of Costs on 16/07/2-24 for want of prosecution and reinstate the same.
  - c. That costs be in the cause
3. The application is supported by the affidavit of Evanson Nyasani advocate and the applicant herein. He deposed that he gave instructions to the firm of Wangari Wahome herein to take over the matter from Mwhia & Mutai Co. Advocates. That leave be granted for his counsel to take over the matter, judgment having been entered. That his bill of cost was dismissed for want of prosecution on 16/7/2024 when the matter came up for notice to show cause. That he is keen on prosecuting the bill as such he has moved the court seeking to set aside the dismissal as his previous advocate failed to



update him on the status of the case hence he should be penalized for failure of his previous counsel to prosecute the said bill of costs.

4. Robert Mugwe filed his replying affidavit dated 11<sup>th</sup> November, 2024. He deposed that the matter herein was determined on 29/5/2020 and the respondent drew his bill on 22/3/2023 almost 3 years after the judgment and the same came up in court severally and the respondent failed to attend as such the bill was dismissed. The applicant was said to be aware of the notice to show cause and has failed to give reasonable excuse for his failure to attend to the matter. The court was urged to dismiss the applicant's application with costs.
5. The application was disposed of by way of written submissions.

### **Applicant's Submissions**

6. The Applicant submits that he had previously filed an application dated 9/7/2024 seeking to replace his previous counsel but the said application was not heard on 16/7/2024 as the Notice to Show Cause was coming up for hearing as such had no locus standi as they were not on record. That the Applicant's previous advocate did not attend court as such the bill was dismissed for want of prosecution. The Applicant seeks to reinstate the same without delay and that he is now well represented as such urges the court to set aside the order dismissing the bill and reinstate it. The court was urged to apply the oxygen rule and pump life into the bill as no prejudice will be suffered by the Respondent if it is reinstated

### **Respondent's Submissions**

7. The Respondent's submit that the affidavit of service dated 12/7/2024 is evidence enough that both advocates for the Applicant were aware of the notice to show cause coming up on 15/7/2024 and they all failed to attend and have not given reasons for lack of attendance as such the court was urged to strike out the new facts being introduced for lack of attendance in the Applicant's submissions. Reliance was placed in the case of *Nelson Nyauma Ndubi v Gekara Ogeto* (2021) eKLR. The Applicant was said to have approached the court with unclean hands as such the court should not exercise its discretion in their favour. Reliance was placed in the case of *Peter Nyaramba Nyabate & another v Nancy Wakonyo Gatberu & 2 others* (2018) eKLR.

### **Issues For Determination**

8. The Application and the response therewith have been carefully considered by the Court and the only issue for determination is;
  - i. Whether the Application dated 11<sup>th</sup> December 2020 should be reinstated

### **Analysis**

9. The relevant law governing setting aside of judgments or dismissals is Order 12 Rule 7 of the *Civil Procedure Rules*. It provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
10. The court is vested with wide discretion which must be exercised judiciously when it comes to deciding on an application to set aside dismissal orders. Refer to the case of *Racheal Njango Mwangi (Suing as*



eKLR where the court held thus:-

“For the Court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.”

11. However, in the exercise of this discretion, the Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position was held in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

12. The Court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

13. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the *Act* which is to facilitate the just, expeditious resolution of disputes.

14. The Applicant seeks to reinstate the Bill of Costs on the grounds that he was in the process of replacing his erstwhile advocate and the new counsel had filed a Notice of Motion which had not been heard by the time the Notice to Show Cause for Dismissal had been listed for hearing. The new Advocates could not attend court to oppose the Notice as the firm had not yet been granted leave to come on record and thus lacked locus standi. As such the Bill of Costs was dismissed for want of prosecution.

15. The Respondent opposed the Application and argued that Counsel did not move the Court without delay since he waited for over Three (3) years for him to file the Bill of Costs. The Respondent urged the court to take note that and confirm from the record that Mr.Mboha Advocate appeared in court to represent the Applicant under both firms of lawyers that is Mwihia & Mutai Co. Advocates and also that of Wangari Wahome & Co. Advocates; on the face of the Affidavit of Service dated 12/07/2024 that it was apparent that both firms were aware of the Notice to Show Cause coming up for hearing on 15/07/2024.

16. The Applicant explained that the delay was due to the fact of representation as he was in the process of engaging another firm of advocates and indeed it is notable that the first prayer sought was for leave under Order 9 Rule 9 of the *Civil Procedure Rules*. The Applicant annexed a copy of the screenshot and it is notable as pointed out by the Respondent that the same does not disclose the day counsel was logged in.



17. However, the Court in the exercise of its jurisdiction considers reasons advanced by the Applicant for failure to attend Court that led to the dismissal of the Bill of Costs. The issue of leave to come on record and legal representation was beyond the Applicant's control and this led to the non-attendance and dismissal.
18. In *Patel v E.A. Cargo Handling Services Ltd* [1974] E.A. 75 the court stated that:
- “There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”
19. The Respondent will not suffer any prejudice as the Respondent will have a chance to challenge the Bill of Costs. This Court is satisfied that the Applicant has shown sufficient cause to warrant this court to set aside the order and reinstate the Bill of Costs that was dismissed on 16/07/2024.

### **Findings And Determinations**

20. For the forgoing reasons this court makes the following findings and determinations;
- i. This Court finds the Applicant's application dated 17/07/2024 for reinstatement of the Bill of Costs to have merit and it is hereby allowed;
  - ii. The orders of 16/07/2024 are hereby set aside.
  - iii. The Applicant shall pay thrown away costs of Kshs.25,000/- payable to the Respondent/ Appellant within Thirty (30) days. In default the dismissal order of 16/07/2024 be reinstated.
  - iv. The file be remitted for Taxation before the Taxing Master.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 16<sup>TH</sup> DAY OF MAY, 2025**

**A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Maina Chege – for the Respondent

Mboha – for the Applicant

