Tawazon Chemical Company (EA) Limited v Wandera & another (Civil Appeal E225 of 2024) [2025] KEHC 11117 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E225 OF 2024

FN MUCHEMI, J

JULY 24, 2025

BETWEEN

TAWAZON CHEMICAL COMPANY (EA) LIMITED ..... APPLICANT

AND

FLORENCE AKINYI WANDERA ..... 1ST RESPONDENT

BONIFACE WAMBUI ..... 2ND RESPONDENT

RULING

Brief Facts

1. The application dated 16th January 2024 is seeking for orders of setting aside the orders made on of 9th December 2024 dismissing the applicant's suit. The motion also seeks for reinstatement of the said suit.

2. The 1st respondent opposed the application and filed a Replying Affidavit dated 24th February 2025.

Applicant's Case.

3. The applicant states that on 9th December 2024, the Honourable Court dismissed the instant suit for want of prosecution. The applicant further states that the said orders were issued ex parte without its participation. Prior to the issuance of the said orders, the applicant was not notified to appear in court to show cause under Order 12 Rule 1 why the suit should not be dismissed for want of prosecution.

4. The applicant states that their counsel's failure to attend court was not deliberate as counsel had diligently attended all previous court sessions save for the mention of 9th December 2024 when he misdiarised it.

5. The applicant states that it is aggrieved by the said orders and prays that the suit be reinstated. Further, if the said orders are left to stand, the same exposes the applicant to unnecessary hardship and legal

liability on matters that it did not have a chance to legally pursue. The applicant further states that it shall suffer irreparable damage to the tune of Kshs. 1,500,000/- should this application not be allowed.

The 1st Respondent's Case.

6. The 1st respondent states that the application is unmerited, misconceived, bad in law, a nonstarter and an afterthought having been overtaken by events as execution was duly finalized and the decretal sum settled pursuant to execution levied against the applicant. The 1st respondent states that the appeal was dismissed by the court after the appellant failed to appear severally to prosecute it.

7. The 1st respondent avers that this application was filed after motor vehicle registration number KCN 681Q was attached which shows the appellant's indolence. Furthermore, the applicant has not demonstrated why it took them over a month to file the current application despite the appeal being dismissed on 9th December 2024.

8. The 1st respondent argues that it is unfair and unjust for the applicant to pray for orders of stay of execution and seek to delay her enjoyment of the fruits of the trial court's judgment through an appeal that has no chances of success. Further, the 1st respondent states that the applicant had filed two applications before the trial court seeking for stay of execution which applications were dismissed.

9. The 1st respondent avers that the current application does not conform to the requirements of stay of execution of decrees pursuant to the *Civil Procedure Act* and Rules. Furthermore, the applicant has not demonstrated that he will suffer substantial loss should execution proceed. The 1st respondent avers that she will continue to suffer prejudice if the appeal is reinstated despite the applicant not showing any intentions of prosecuting the appeal. The 1st respondent further argues that the right of appeal must be balanced against her equally weighty right to enjoy the fruits of the judgment in her favour.

10. Directions were issued that parties put in written submissions and the record shows that the applicants complied with the directions.

The Applicant's Submissions.

11. The applicant submits that its advocates attended court on 7th November 2024 and the matter was fixed for mention on 9th December 2024. The applicant further submits that its advocates misdiarised the said date and erroneously failed to attend court on 9th December 2024 when the matter came up for mention. The court proceeded to make orders ex parte dismissing its suit for want of prosecution. The applicant argues that it moved the court within a month to file the current application which indicates its interest in prosecuting the suit. The applicant argues that it is vigilant and should not be punished for non-existing indolence. To support its contentions, the applicant refers to the cases of Ivita vs Kyumbu [1984] KLR 441; Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR and *Fran Investments Limited vs G4S Securities Limited HCCC No. 467 of 2009*.

12. The applicant relies on the cases of John Kiprono Chumo vs Philip Kipngeno Langat [2017] eKLR; CMC vs Nzioki (2004) 1 EA 23 and Patel vs EA Cargo Handling Services Limited (1974) EA 75 and submits that setting aside a court order is a matter of discretion which should be exercised judiciously. The applicant argues that its application is not a waste of time as it is keen on prosecuting the matter. Furthermore, if the said orders are left to stand, the same exposes the applicant to unnecessary hardship and legal liability on matters that it did not have a chance to legally pursue.

The Law.

Whether the applicant is entitled to an order setting aside dismissal of the appeal for want of prosecution.

13. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rules 35(1) & (2) of the Civil Procedure Rules which provides as follows:-

> Unless within three months after the giving of directions under Rule 13 the appeal shall be set down for hearing, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
>
> If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

14. It is trite law that the court's discretion to set aside an order dismissing the appeal for want of prosecution is unfettered. In Richard Ncharpi Leiyagu vs IEBC & 2 Others [2012]eKLR, it was held that the court's discretion to set aside an ex parte order or judgment 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.

15. In an earlier case of CMC Holdings Limited vs Nzioki (2004) eKLR 173 the court held that:-

> The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such 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 be wrong in principle.....the answer to that weighty matter was not 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 judgment seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant.

16. The applicant argues that its advocates failed to attend court on 9th December 2024 as they misdiarised the date.

17. From the record, the applicant lodged his appeal on 29th August 2024 vide its memorandum of appeal together with an application dated 28th August 2024 seeking for orders of stay of execution of the judgment in Thika SCCC No. E750 of 2024 delivered on 1st February 2024 and ruling dated 22nd August 2024. The appeal court declined to grant any interim orders on grounds that there were no sufficient grounds. The court below had earlier dismissed the application dated 15th July 2024 seeking for orders of stay of the decree. The application before the magistrate was scheduled for mention on 16th September 2024 whereby the applicant withdrew its application dated 29/8/2024 and informed the court that it had filed another application dated 13/9/2024. On 7th October 2024, the matter came up for mention. However the applicant did not attend court. There was no evidence of service on the respondent. The court scheduled the matter for mention on 16/10/2024 where the applicant sought more time to serve the respondents with the application.

18. The matter came up for mention on 9/12/2024 and both parties did not attend court resulting in the dismissal of the applications dated 13/9/2024 and 27/11/2024 for want of prosecution. The application dated 30/8/2024 was marked as withdrawn following a Notice of Withdrawal. Upon perusal of the memorandum of appeal, the applicant lodged an appeal against the ruling of the trial

court dated 22nd August 2024 which dismissed its application dated 15th July 2024 seeking to set aside default judgment and for orders of stay of execution of the judgment of the said judgment delivered on 1st February 2024. The trial court noted that the said application was res judicata as it had conclusively dealt with the said issues in its ruling dated 4th July 2024 in respect to the applicant's application dated 7th March 2024 which was seeking for the orders of stay of execution of the decree issued on 4th January 2024 ensuing from default judgment entered against it and setting aside of the default judgment against it.

19. It is evident that the applicant is not keen on prosecuting its appeal. Although the applicant alleges that his advocates misdiarized the dates, no affidavit has been annexed to confirm that allegation. A copy of their diary indicating the misdiarization of the case ought to have been annexed to this application.

20. The conduct of the applicant leads this court to the view that the reasons given by the applicant for failing to attend court are not candid and are inexcusable. Furthermore, from the proceedings, the applicant has not filed an appeal against the judgment of the trial court but against the ruling that dismissed its applications for stay. That notwithstanding, the respondent avers that they have already executed the decree and recovered the amount owed by the applicant. The appeal has been rendered nugatory by the process of execution. As such, this court has no basis of exercising its discretion. It is clear that the applicant is not serious in prosecuting matters that concern him as shown by the history of his case. It is said which is not denied, that the applicant only filed the present application after the 1st respondent moved to execute the case.

21. It is therefore my considered view that the applicant has not given plausible reasons to justify exercise of this court's discretion in its favour.

22. Accordingly, the application dated 16th January 2025 lacks merit and is hereby dismissed with costs to the 1st respondent.

23. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE