



REPUBLIC OF KENYA



KENYA LAW
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Tawazon Chemical Company (EA) Ltd v Kimungo & another (Civil Appeal E226 of 2025) [2025] KEHC 11157 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E226 OF 2025
FN MUCHEMI, J
JULY 24, 2025**

BETWEEN

TAWAZON CHEMICAL COMPANY (EA) LTD APPLICANT

AND

MARKTONE MAKARI KIMUNGO 1ST RESPONDENT

BONIFACE WAMBUI 2ND RESPONDENT

RULING

Brief facts

1. The application dated 16th January 2024 seeks orders of setting aside the orders of 9th December 2024 dismissing the applicant's suit and reinstate 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 desires for the suit to 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. Additionally, the applicant states that if the said orders are left to stand, it shall suffer irreparable damage to the tune of Kshs. 1,500,000/-.

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 their appeal.
7. The 1st respondent avers that the instant 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 seek 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 he 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 his equally weighty right to enjoy the fruits of the judgment in his favour.
10. Directions were issued that parties put in written submissions and the record shows that the applicants complied by filing submissions. The 1st respondent on the other hand failed to comply within the time given by the court.

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 ex parte 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. The record shows that the applicant lodged this appeal on 29th August 2024 vide its memorandum of appeal together with an application dated 29/08/2024 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 court declined to grant any interim orders in the first instance. It is noted from the record that the court below had dismissed a similar application dated 15th July 2024 for lack of merit. This appeal was fixed 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 before the Deputy Registrar and none of the parties attended court. The court fixed the matter for hearing of the application on the on 16/10/2024 and the parties were served by the registry to attend court during the next mention. By then, the applicant had filed another application dated 13/9/2024 which went before judge Chepkwony in Kiambu High Court. The judge fixed the Amended application for hearing inter parties on 17/10/2024. The record shows that when the file returned to Thika, the matter was not diarised for mention on the said date.



18. The matter came before this court on 7/11/2024 where the appellant's counsel Mr. Ondari sought for interim orders in his application dated 13/09/2024. He purported to have served the application on the respondent but there was no evidence of service in the file as well as in the case tracking system (CTS). It was apparent that the applicant's counsel had never served any of his two applications on the respondent. He was directed to serve the application dated 13/09/2024 and file a return of service.
19. The matter came up for mention on 9/12/2024 and both parties were absent from court. This was yet another indication that the respondent had not been served. The court dismissed the application dated 13/9/2024 for want of prosecution. Upon perusal of the memorandum of appeal it is not in dispute that the applicant lodged this appeal against the ruling of the magistrate dated 22nd August 2024 which dismissed its application dated 15th July 2024 seeking for orders of stay of execution of the judgment of the lower court delivered on 1st February 2024 and also sought to set aside the orders of the court dated 4th July 2024. In dismissing the application dated 15th July 2024, the magistrate noted that the said application dated 7th March 2024 was res judicata as it had been conclusively dealt with earlier and all the issues determined in the court's ruling of 4/7/2024. The applicant sought for orders of stay of execution of the decree issued on 4th January 2024 ensuing from default judgment entered against it and orders to set aside of the default judgment against it. This was in his Amended application dated 13th September 2024.
20. It is evident that the applicant has not been keen in prosecuting its applications filed herein starting with the first one dated 29th August 2024 as well as the Amended one dated 13/9/2025. He failed to serve the first application twice and still sought for interim orders which the court declined to grant. As for the 2nd application, the applicant said that his advocate failed to diarise the date. However, a copy of their diary to prove there was any such misdiarization was not annexed. In this regard, it is my considered view that the reasons given by the applicant for failing to attend court are not convincing and are inexcusable.
21. It is noted that the applicant has not filed an appeal against the judgment of the trial court but the ruling which dismissed its applications for stay. That notwithstanding, the respondent has already executed against the decree and the claim has been settled.
22. It follows that this is not a case for the court to exercise its discretion in favour of the applicant. It is clear that the applicant was not desirous of pursuing his applications. The respondent told the court that the decree has already been executed against. The application for stay dated the 13/09/2025 had been overtaken by events.
23. It is important to note that on 9th December 2024, this court dismissed the application dated 13th December 2024 and not the appeal. The applicant relied on Order 12 Rule 1 of the Civil Procedure Rules which provides:-

“If on the day of hearing, after the suit has been called out for hearing outside the court, neither party attends, the court may dismiss the suit.”
24. Order 12 Rule 1 is not relevant to reinstatement of suit for it concerns dismissal for non-attendance of parties. The applicant did not cite any statutory provision or rule that requires the court to give notice in dismissing an application for non-attendance or for want of prosecution. These are orders the court gave on the 9th December 2021.
25. I have given the background of this application whereas the applicant filed an application under certificate of urgency and after failing to get interim orders, he failed to serve the respondent severally



despite having been directed to do so by the court. The applicant seemed to have lost interest in the application and stopped attending court and complying with the directions of the court on service. The conduct of the applicant was sufficient reasons to dismiss the application for want of prosecution and non-attendance. The applicant seeks for reinstatement of the suit, though this is an appeal. It is noted that the appeal was not dismissed although the file was closed. For this reason, the applicant can still proceed with his appeal if he is still interested in prosecuting it. It is a matter of opening the file for the appellant to file his record of appeal.

26. In conclusion, I find that the prayer for reinstating the appeal is misplaced for it was not dismissed. The said prayer is struck out.
27. Due to the indolent history of the applicant and lack of interest in his application, this court, declines to reinstate the application dated 13th September 2024. The orders for stay are hereby declined in this application for the foregoing reason.
28. This application is hereby dismissed for lack of merit with costs to the respondent.
29. I hereby direct that the appellant do file and serve the record of appeal within 30 days.
30. It is hereby so ordered

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

**F. MUCHEMI
JUDGE**

