



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiriti Enterprises Limited v Wadia Construction Co Ltd (Civil Case  
E263 of 2021) [2024] KEHC 995 (KLR) (Civ) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 995 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE E263 OF 2021**

**AN ONGERI, J**

**FEBRUARY 9, 2024**

**BETWEEN**

**KIRITI ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**WADIA CONSTRUCTION CO LTD ..... DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 23/6/2023 brought under Section 1A, 1B, 3A, 63e of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 12 Rule 7, Order 45 Rule 1, Order 51 Rule 1 & 3 of the *Civil Procedure Rules* 2010 Article 159(2) (d) seeking the following orders;
  - i. This application be certified urgent and heard ex-parte in the first instance.
  - ii. This honourable court be pleased to review and set aside the orders of the honourable court issued on 12<sup>th</sup> day of June, 2023 dismissing the defendant/applicant's application dated 28<sup>th</sup> day of April, 2023 for non-attendance by the parties.
  - iii. The honourable court be pleased to reinstate the said application and consequently list the same for hearing.
  - iv. The costs of this application be provided for.
2. The application is based on the following grounds;
  - i. That the defendant/applicant's application dated the 28<sup>th</sup> day of April, 2023 came up for hearing on 12<sup>th</sup> day of June, 2023 and the same was dismissed for non-attendance.



- ii. That the defendant/applicant's advocate non-attendance was due to the fact that upon filing of the said application under certificate, the said was heard by Hon. Lady Justice Meoli who gave orders in the following terms "that the motion dated 28<sup>th</sup> day of April, 2023 considered. Let the motion be served for interpartes hearing on the 20.6.2023. Having interacted with the matter before, I direct that the application be listed before Hon. Onger J. on that date.
  - iii. That the defendant/applicant's advocates proceeded to effect service of the said application and the orders (court document) to the plaintiff's/respondent's counsel.
  - iv. That further to the forgoing the defendant/applicant was not aware of the said date the 12<sup>th</sup> June, 2023 nor served by the plaintiff/applicant and only learnt of the order dismissing the application on the 20<sup>th</sup> day of June, 2023 when the parties advocates appeared before the honourable Judge pursuant to the directions issued on 17<sup>th</sup> day of May, 2023.
  - v. That the defendant/applicant stands to be condemned unheard if the orders prayed herein are not granted.
  - vi. That there has been no delay in making this application and no prejudice will be suffered by the plaintiff/ respondent.
  - vii. That it is in the interest of justice that this application be heard.
3. The application is supported by the affidavit of Margaret Mwaniki dated 23/6/2023 which reiterates the grounds stated above.
  4. The respondents filed a replying affidavit sworn on 11/10/2023 by Praful Lathia opposing the application in which it is deposed that the application is legally defective and bad in law. He indicated that there was never a reason as to why the applicant did not attend court on 12/6/2023 as they were duly informed of the ongoing hearing.
  5. He averred that the respondent herein has suffered and continues to suffer as it has not been able to enjoy the fruits of the Decree dated 7/2/2022. Unless the court intervenes and asserts its authority the Respondent will forever be left baby-sitting its barren Decree
  6. The parties filed written submissions as follows; the applicant submitted that the non-attendance was neither occasioned by the litigant nor their advocates on record but rather that diverse dates were issued through the CTC system to which the parties were not notified of the later date issued.
  7. The Application dated 28/4/2023 was in the first instance placed before her Ladyship Justice Meoli who issued orders that the motion is considered and served for interparties hearing on 20/6/2023 before the court herein. It is on the basis of the above that Counsel for the Defendant/Applicant informed and notified her/his/it's client of the orders and the date set for the inter-partes hearing of the said Application and proceeded to diarize the said date.
  8. It was submitted further that Counsel for the Defendant/Applicant only learnt of the orders issued on the 12/6/2023 where the said application was dismissed for non-attendance on the 20/6/2023 when she appeared for inter-partes hearing as had been directed in the first instant when the application was filed in the CTC system.
  9. The applicant submitted that, interest of justice demands that the order sought be granted especially when no prejudice is demonstrated to be likely suffered by the Plaintiff/Respondent if the relief sought was granted. In support the applicant relied on the case of *Republic v the Honourable the Chief Justice*



“The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

10. The respondent alternatively submitted that the Applicant was duly served with summons to enter appearance but negligently failed to do so. With Judgment in default being entered, the Applicants were in essence seeking to make the Court sit on its own appeal as the said Judgment rendered it functus officio. Upon entering a default Judgment, the Applicant cannot now seek intervention of the court after negligently failing to comply with laid procedure.
11. The respondent argued that the Applicant has notoriously filed numerous applications since the Judgment in dire and desperate efforts to revive the suit. The Applicant is however not disclosing to this Court the fact that the reason the Judgment was entered in default was because it failed to enter appearance. The Applicant in the instant application has seemingly and deliberately preferred an appeal but disguised it as a review.
12. The respondent further submitted that the application by the Applicant seeking to set aside the judgment in default dated 14/3/2022 was determined on merits as the Hon. Justice C. Meoli vide a Ruling dated 11/10/2022 at paragraphs 30 and 31 was alive to the fact that the advocate who commissioned the affidavit in support of that motion was from HKM Associates Advocates, who are representing the Applicant. The advocate further lacked an active practicing certificate at the time of commissioning. This gross mistake by the Applicant was flagged and the Honourable Judge was of the view that the motion was significantly affected in its merits and as such struck out the application.
13. The respondent argued that by dint of the initial application being dismissed for want of requisite commissioning and careful determination on merit, the Applicant was of the view that its right to be heard had been violated and filed applications seeking new forum. The applications have since been res judicata as the issues have been the same seeking similar prayers.
14. The sole issue for determination is whether the application dated 28/4/2023 which was dismissed for non-attendance by the applicant should be reinstated.
15. The defendant filed the application dated 28/4/2023 and 17/5/2023 was given a hearing date but failed to appear in court on 12/6/2023 to prosecute the application and the same was dismissed for want of prosecution.
16. I find that the reason for non-appearance by the defendant’s advocate was that he was not aware that the matter had been re-allocated by the Presiding Judge.
17. I find that the court has a discretion to reinstate a matter which has been dismissed for want of prosecution upon certain conditions.



18. In the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, the court held as follows;

“The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a 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”

19. It was also held in the case of *Shah v Mbogo & Another* [1967] EA 116 as follows;

“Applying the principle that the Courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused”.

20. I find that the reason advanced by the defendant/applicant’s counsels is plausible.

21. The plaintiff will not suffer prejudice that cannot be compensated by an award of costs.

22. I reinstate the application dated 28/4/2023 on the following conditions;

- i. That the application dated 28/4/2023 be served upon the plaintiff respondent within 7 days of this date.
- ii. That the plaintiff/respondent be at liberty to file their response to the said application within 7 days upon being served with the application dated 28/4/2023.
- iii. That the said application to be canvassed by way of written submissions.
- iv. That each party is granted 7 days to file and serve written submissions starting with the defendant/ applicant.
- v. The matter will be mentioned on 7/3/2024 for a ruling date.
- vi. The defendant/applicant to pay the costs of this application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

