



**Mbwana v Nguru (Miscellaneous Application 18 of 2015)
[2024] KEHC 16889 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 18 OF 2015
F WANGARI, J
FEBRUARY 7, 2024**

BETWEEN

GABRIEL MAZERA MBWANA APPLICANT

AND

OMAR SALEH NGURU RESPONDENT

RULING

1. The Notice of Motion dated 10/1/2023 and filed on 18/1/2023 seeking to set aside orders made on 2/12/2022 dismissing the Bill of Costs dated 11/11/2011 by reason of non-attendance. The Applicant's also sought for costs of this application.
2. The Applicant in the Supporting Affidavit filed on 18/1/2023 stated that on the date of hearing of the dismissed Bill of Costs, the Applicant's Advocate Teams App call dropped and upon readmission to the teams call, he was informed that the matter had been called out by the DR Hon. Rita Orora, and after there was no response, the matter was dismissed for non-attendance. He was advised to file a formal application, hence the filing of this application.
3. The Respondent filed Grounds of Opposition dated 6/6/2023 opposing the Application. It was stated that the Bill of Costs in question was filed in November 2011 and was being prosecuted in December 2022, over 10 years later and its dismissal was not an injustice occasioned to the Applicant. The Application was ill-conceived and unsustainable in law and ought to be dismissed with costs to the Respondent.
4. The parties were directed to file written submissions. Only the Applicant complied by filing submissions dated 27/6/2023 and which was in support of the Application in issue.



Analysis

5. The issue in this case is whether the court should set aside the DR's Order dismissing the Applicant's Bill of Costs. It is not in dispute that the application was dismissed on the date of hearing for non-attendance on the part of the Applicant and his counsel.
6. Order 12 Rule 7 of the [Civil Procedure Rules](#) 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.”
7. Order 51 Rule 15 of the [Civil Procedure Rules](#) provides as follows;

“The court may set aside an order made ex-parte”
8. The Applicant thus has the burden to prove reasons to justify setting aside of the dismissal order. The Bill of Costs was dismissed because the Applicant and his counsel did not respond when the matter was called out.
9. The Counsel for the Applicant stated that on the material date, the cause list was long and the matters were being called out randomly. His teams call dropped out and upon re-admission, he was informed that the matter had been called out and was dismissed for non-attendance. He was advised to file a formal application to have the matter reinstated.
10. The setting aside of dismissal orders under Order 12 Rule 7 of the [Civil Procedure Rules](#) is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo* (1979) EA 116 quoted with approval in the case of [John Mukuba Mburu v Charles Mwenga Mburu](#) [2019] eKLR:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
11. The wording of Order 12 Rule 17 requires sufficient cause to shown or demonstrated as a consideration for setting aside a dismissal order for non-attendance.
12. Sufficient Cause was defined by the Supreme Court of India in [Parimal v Veena](#) which was cited with approval in the case of [Wachira Karani v Bildad Wachira](#) [2016] eKLR, the Supreme Court elucidated what sufficient cause entails. The apex court stated thus: -

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case



must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

13. The court in the above case added as follows: -

“...While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.” (Emphasis added)

14. The Plaintiff had the primary obligation to prosecute the Bill of Costs and the reason for the absence of counsel and the Applicant when the matter was called out for the purpose of the hearing was sufficiently explained. I have considered the observation by the Respondent on the Grounds of Opposition that the Bill of Costs was being prosecuted over 10 years after it was filed.

15. I have perused through the court proceedings, I note that there are several hearing notices on record but the matter never proceeded for taxation. I also note that the file may have gone missing as there is a letter dated 14/11/2023 addressed to the DR seeking for assistance to have the court file traced. I give the Applicant the benefit of doubt that the delay in prosecuting the Bill of Costs was not intentional.

16. For the reasons stated above, I am inclined to disallow the Application.

Determination

17. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Notice of Motion dated 10/1/2023 is allowed.
- b. The Bill of Costs be placed before the Deputy Registrar for taxation.
- c. File be placed before the Deputy Registrar for directions on 28/2/2024.
- d. Accordingly, in exercise of the powers granted to the Court under Section 27 of the [Civil Procedure Act](#), I direct that each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2024

F. WANGARI

JUDGE

In the presence of;

Aisha Taib Advocate for the Applicant

Nzamsa Advocate for the Respondent

Barile, Court Assistant

