



**Thomas Ondiba Aosa t/a Automaxx Motors v Otieno (Civil Appeal
81 of 2020) [2024] KEHC 1366 (KLR) (Civ) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1366 (KLR)

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

CIVIL

CIVIL APPEAL 81 OF 2020

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

THOMAS ONDIBA AOSA T/A AUTOMAXX MOTORS APPELLANT

AND

JOSEPH WILLIAM OTIENO RESPONDENT

RULING

1. The appellant filed a notice of preliminary objection (NOPO) dated 17/10/2023 to the application dated 24/7/2023 on the ground that the appellant is a perennial litigant who has been indolent in prosecuting the appeal herein contrary to order 42 rule 35 of the [Civil Procedure Rules](#).
2. The parties filed written submissions in the application dated 24/7/2023 as follows; the appellant submitted that it is deserving of this courts discretion to set aside the order of dismissal. In the supporting affidavit counsel deposed that on 6/6/2023, in conduct of the appeal was checking on the status of the appeal on the e filing portal when he noticed that the appeal had been listed for Notice to Show Cause on 12th and 19th May 2023 when it was dismissed for want of prosecution in the absence of both parties.
3. The appellant submitted that the respondent has not challenged the factual grounds sworn in the affidavit in support of the application and therefore are uncontested. The preliminary objection and grounds of opposition as drawn are broad and require factual foundation that is non-existent. The appellant urged this court to hear this appeal on its merit as it is its right and it stands to lose the said right without having been notified of the dismissal. In support the appellant cited [K.G. Patel & Sons](#)



Ltd v John Kabukuru Gituro [2016] eKLR where both appellant and respondent were similarly not served with the notice to show cause, Mativo J, (as he then was) held thus:

“I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of being heard especially so when the case was dismissed without proper notice being served. The court in the above cited case of *Richard Nchapai Leiyangu vs IEBC & 2 others* proceeded to state as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

Dismissing a suit without proper notice being served as in this case creates serious doubts as to whether the integrity of the court process was protected and such a dismissal opens the court process to abuse that is a recipe for injustice and a court of law cannot tolerate such a process.”

4. The sole issue for determination in the application dated 24/7/2023 is whether the suit which was dismissed for want of prosecution on 19/5/2023 should be reinstated.
5. The court has a discretion to reinstate a suit that has been dismissed upon certain conditions.
6. There is no dispute that this was dismissed in the absence of both parties.
7. The appellant’s contention that there was no proper notice served has not been disputed.
8. 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”

9. In the current case, the reason the suit was dismissed was attributed to the to the fact that no proper notice was served upon the parties.
10. The discretion to reinstate a matter is not meant to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice but it is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.
11. It is in the interest of justice that this appeal be reinstated for interpartes hearing and I so order.
12. The application dated 24/7/2023 is allowed and the NOPO is dismissed. Each party to bear its own costs of the same.
13. The appellant is granted 60 days to fully prosecute this appeal. Failure to which this appeal to stand automatically dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

.....
A. N. ONGERI



JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

