



Oye Ashioya t/a Ashioya and Co. Advocates v Omar (Suing as the Next Friend of Hadijah Mohammed) (Miscellaneous Civil Application 78 of 2019) [2024] KEHC 2568 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CIVIL APPLICATION 78 OF 2019
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

OYE ASHIOYA T/A ASHIOYA AND CO. ADVOCATES APPLICANT

AND

MOHAMED OMAR (SUIING AS THE NEXT FRIEND OF HADIJAH MOHAMMED) RESPONDENT

RULING

1. The Motion, dated July 17, 2023, is by the applicant. It seeks reinstatement of this cause. The applicant details that he had arrived at the court precincts on the material day of the dismissal, when he was informed by colleagues that the Judge was not sitting. He was later informed, by another colleague, that the Judge was in fact sitting, and that his matter had been placed aside. He rushed to the court, only to learn that the matter had been dismissed for want of prosecution. He avers that that was a maandamano day, and there was an air of uncertainty.
2. The response to the application is by way of notice of preliminary objection. The notice is dated 9th October 2023, and was filed in court on 13th October 2023. It is averred that the applicant had not complied with directions that had been given on 23rd May 2023; that there had been an unexplained delay of 4 years since the cause was registered in 2019, and the court had on its own motion issued notices to show cause on the applicant, why the same should not be dismissed; and that the belated application for reinstatement meant that the applicant was playing lottery with the court process.
3. The application was canvassed by way of written submissions, following directions given on 14th December 2023. Both sides filed written submissions, which I have read through, and noted the arguments made.



4. This cause was initiated on 16th May 2019, by way of an originating Notice of Motion, of even date. After 16th May 2019, the applicant took no steps to prosecute the matter. The application was not served on the respondent, as there is no affidavit of service. No dates were fixed for directions on its disposal, or for hearing. Due to that inaction, the Deputy Registrar, on own motion, caused a notice to issue to the parties, dated 28th March 2023, for a mention on 23rd May 2023, to show cause why the matter could not be dismissed for want of prosecution. The applicant appeared, but the respondent was absent. The applicant indicated that the parties were negotiating, and he asked for more time. The matter was set down for mention on 12th July 2023. On 12th July 2023, none of the parties were in attendance, and the matter was dismissed for want of prosecution.
5. The application before me dwells only on the events of 12th July 2023, to explain why there was no attendance. I do not recall whether there was maandamano on that day, and even if there were, court sessions had not been suspended, and the court did in fact sit, and handled the cause list. The applicant himself states that he was in the court precincts, but he had not attended the High Court where the matter was to be handled. He chose to rely on second hand information from his colleagues, instead of coming to the court which had given him the said date.
6. The matter had been initiated in May 2019, and nothing happened in it until May 2023, when the Deputy Registrar issued notices to show cause. The applicant only found himself in court on 23rd May 2023 in response to that notice. He requested for a date for mention, which the court graciously granted, and then he did not attend court on the appointed date. He talked of negotiations, the respondents have not acknowledged existence of any such negotiations. I am not satisfied that the applicant is keen on prosecuting this matter, given that history, and I am not persuaded that reinstatement of the matter would serve any purpose.
7. In view of the above, I have no option, but to dismiss the Motion, dated 17th July 2023, with costs. The court file shall hereafter be closed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 15TH DAY OF MARCH 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Ashioya, the applicant, in person.

Advocates

Mr. Oyas, instructed by Lawrence Obonyo Legal Advocates, Advocates for the respondent.

