



**Shabaa Supply Solution Building & Engineering Construction Limited
& 2 others v SMP Capital Ltd (Commercial Appeal E059 of 2022)
[2024] KEHC 2408 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E059 OF 2022**

A MABEYA, J

MARCH 8, 2024

BETWEEN

**SHABAA SUPPLY SOLUTION BUILDING & ENGINEERING
CONSTRUCTION LIMITED 1ST APPELLANT
JUSTUS AMONI EWOI 2ND APPELLANT
CECILIA ASIYEN NGITIT 3RD APPELLANT

AND

SMP CAPITAL LTD RESPONDENT**

(Being an appeal from the Judgment of the Honourable PM Ms E. Wanjala delivered on 14th April 2022 in Milimani CMCC E 3784 of 2020, SMP Capital Limited vs Shabaa Supply Solution Building & Engineering Construction Limited & 2 Others)

RULING

1. This is a ruling on a Motion dated 15/12/2023 by the appellants. The Motion was predicated on order 51, order 12 Rule 7 of the [Civil Procedures Rules](#) and Sections 1, 1A, 1B, 3 3A and 63(c) & (e) of the [Civil Procedure Act](#). It sought the setting aside of the order made on 14/12/2023 that dismissed the Appellants' Motion dated 29/11/2023.
2. The grounds thereof were set out in the body of the Motion and the supporting affidavit of Willis Otieno sworn on 15/12/2023. These were that the Motion of 29/11/2023 had been fixed for hearing on 14/2/2024 on 29/11/2023, that on 14/12/2023 it came up for hearing and the appellants' advocates did not attend. In the premises, it was dismissed for non-attendance.



3. It was urged that the non-attendance was not deliberate but due to confusion of the Court dates. That the mistake should not be visited upon an innocent litigant, the appellants. That in the premises, the application should be reinstated for hearing on merit.
4. The application was opposed vide a replying affidavit of Mehul Shah sworn on 22/1/2024. He swore that the respondent was on 8/12/2023 served with an order dated 6/12/2023. The said order erroneously indicated that the application dated 29/11/2023 was to be heard on 14/2/2023. That the applicant never sought to rectify the date but interpreted the same to be 14/2/2024. That the Court portal showed that the matter was to be heard on 14/12/2023 which the applicant willingly decided to ignore.
5. That nevertheless, the respondent did oppose the application dated 29/11/2023. That the stay had been granted on condition of depositing the decretal sum within 21 days. That the matter had unreasonably been delayed by multiple applications on the part of the applicant. That in the premises, the application should be dismissed.
6. I have considered the Motion, the opposing affidavits. This matter is very unfortunate. There seems to be multiple applications that are pending. The earlier they are determined the better otherwise they may delay justice.
7. Be that as it may, before me is an application for setting aside the orders made ex parte on 14/12/2023 that dismissed the applicants' application dated 29/11/2023.
8. The record shows that the Motion dated 29/11/2023 came up ex-parte on 5/12/2023. The court made order of stay and ordered that the Motion be heard on 14/2/2023. Obviously that date was already past. Nevertheless, the applicant served the order together with the Motion. However, the portal shows that because of existence of 2 physical files running parallel, Chepkwony J had made an order that the matter be mentioned before me on 14/12/2023 for directions. On that date the matter was listed before me and I dismissed the subject motion.
9. From the foregoing, it is clear that the application dated 29/11/2023 was erroneously listed for hearing on 14/12/2023. It should have been listed for hearing on 14/2/2024 as had earlier been intended by the order of 5/12/2023. To shut the applicants out without hearing them will be unjust.
10. In view thereof, I allow the application and reinstate the Motion dated 29/11/2023 for hearing on merit. Let the same be argued by way of submissions to be filed and exchanged within 14 days on a 7-day basis for Ruling on 14/6/2024.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb, EBS

JUDGE

