



**Panal Freighters Limited v First Assurance Company Limited & another
(Civil Suit E034 of 2021) [2024] KEHC 8851 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E034 OF 2021
JK NG'ARNG'AR, J
JULY 22, 2024**

BETWEEN

PANAL FREIGHTERS LIMITED PLAINTIFF

AND

FIRST ASSURANCE COMPANY LIMITED 1ST DEFENDANT

HABARI INSURANCE BROKERS LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 22nd June 2023 under certificate of urgency seeking for reinstatement of the suit that was dismissed for want of prosecution, that the suit be fixed for full hearing and that costs of the application be provided for.
2. The application was premised on grounds in the application and the Supporting Affidavit sworn by Ahmed Mwinyi Shimbwa, the director of the Plaintiff that the matter was last in court on 14.10.2022 when the court set aside the interlocutory judgment in favour of the Plaintiff. However, the Plaintiff was not aware of the mention date set on 22.3.2023 which set the hearing date of 2.5.2023. That the Plaintiff was not served or notified of the hearing date despite their diligence in following up and prosecuting the case, and that a year had not lapsed since the case was last in court.
3. In response through a Replying Affidavit sworn by Janerose Gitonga, the Legal Manager of the 1st Defendant averred that the matter came up in court severally before it was dismissed and that the Plaintiff has not demonstrated the diligence it claims to have in prosecuting the suit. They therefore prayed that the application be dismissed with costs.
4. The application was canvassed by way of written submissions. The Plaintiff/Applicant submitted by relying on the decisions in *Catherine Kigasia Kivai v Ernest Ogesi & 4 Others* (2021) eKLR, that set out the threshold for reinstatement of the suit to include whether the delay was prolonged and inexcusable,



if justice can be done to both parties despite the delay and whether the defendant must show that they will be prejudiced.

5. The Plaintiff/Applicant also relied on the case of *Trade Circles Ltd v Family Bank Ltd & Another* (2021) eKLR and *Reynolds Construction Co. (NIG) Ltd v Festus M'Aritibi M'Mboroki* (2022) eKLR on the role of the court to ensure a party has access to justice. The Plaintiff/Applicant therefore submitted that court allows their application as prayed.

6. The 1st Defendant/Respondent in their submissions opposing the application relied on the holding in *Bilba Ngonyo v Kembu Farm Limited & Another* (2018) eKLR that: -

“... A court’s discretion to set aside its ruling/judgment is not restricted but should be so exercised not to cause injustice to the opposing party. It is incumbent upon the party seeking the court’s favour to adduce sufficient evidence and plausible reasons that are demonstrable and persuasive to the court.

... a court’s discretion must be exercised judiciously based on facts and the law ...”

7. I have considered the application, the response thereto and submissions by the Plaintiff/Applicant and 1st Defendant/Respondent and established that the issue for determination is whether the application is merited.

8. This court notes that on 30.1.2023 when the matter came up, directions were issued and Mr. Mutungi holding brief for Mr. Ndege for the 2nd Defendant/Respondent was ordered by court to inform the parties absent of the orders issued on the said date. On 22.3.2023 when the matter came up for mention, there was no appearance for parties, hearing of the suit was then set for 2.5.2023 and the Deputy Registrar was to serve the said notices. However, there is no evidence on record that parties were served. The Defendants/Respondents have also not demonstrated that the Plaintiff/Applicant was aware of the said court date and deliberately chose not to attend court.

9. This court further observes that the suit was dismissed with costs on 2.5.2023 but on 24.6.2023, the Plaintiff/Applicant was back in court with the application herein dated 22.6.23 for reinstatement of the suit. This court is convinced that there was no inordinate delay as the application herein was filed as soon as the Plaintiff/Applicant was aware of dismissal of the suit. The Defendant/Respondents have also not demonstrated that they were prejudiced by the delay.

10. The court has wide discretionary powers over matters before it including whether or not it should reinstate a dismissed suit on the basis of unreasonable delay. Section 3A of the *Civil Procedure Act* provides: -

Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

11. In *Ivita v. Kyumbu* (1984) KLR 441 it was held that: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of



the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

12. In light of the above and for the interest of justice, this court sets aside the dismissal order of 2.5.2023 and allows the application dated 22nd June 2023. Costs be in the Cause. Parties to set down the suit for hearing.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Timamy & Company Advocates for the 1st Defendant/Respondent - Waithera

Bunde Mangaro & Company Advocates for the Plaintiff - present

Court Assistant – Samuel Shitemi

