



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v County Government of Embu & 3 others; Munyi (Exparte) (Judicial Review E005 of 2021) [2023] KEHC 587 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
JUDICIAL REVIEW E005 OF 2021  
LM NJUGUNA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF EMBU ..... 1<sup>ST</sup> RESPONDENT**

**SECRETARY, EMBU COUNTY GOVERNMENT PUBLIC SERVICE**

**BOARD ..... 2<sup>ND</sup> RESPONDENT**

**SECRETARY, EMBU COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY EXECUTIVE OFFICER (FINANCE) COUNTY GOVERNMENT OF**

**NAIROBI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**MARTIN MURIITHI MUNYI ..... EXPARTE**

**RULING**

1. Before this court is an application dated 17.10.2022 brought under certificate of urgency and wherein the appellant/ applicant seeks the following orders; -
  - i. The orders issued by this Honourable court on 27.09.2022 be set aside/ reviewed and this suit be reinstated for hearing and determination.
  - ii. Costs of this application.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by one Joachim N. Kalamu.



3. In a nutshell, the applicant's case is that the ex parte applicant herein with his advocate on record did not attend court on 27.09.2022 when this suit was slated for mention. That in the cause list for 27.09.2022 the matter was listed as HCJR/E005/2021 Johnson Mwaniki; a wrong entry of the applicant's name on the cause list which created an impression that the matter was not listed for mention on the said date. It was his case that his advocate on record made efforts to join the court link but due to malfunction on his part managed to gain admission to the virtual court when the court was concluding its cause list. It was contented that the mistake in the cause list by the court registry as well as network challenge on the said date, on the part of the advocate is a misnomer that should not be visited upon the applicant who is innocent. That the application has been brought timeously and without any delay and therefore, the applicant urged this court to reinstate the suit since he is interested in pursuing the same to its logical conclusion.
4. Counsel for the respondent, Mr. Kigen, informed the court that the respondent was not opposed to the application.
5. I have considered the application herein and although the respondent is not opposed to it, this court has a duty to determine whether the same is merited given that the court dismissed the same suo moto.
6. The application is indicated to have been brought under order 45 rules 1, 2 and 5. order 45 basically provides for review. From the provisions of the said Order, a court can only review its orders if the following grounds exist: -
  - a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made (See *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR); or
  - b) There was a mistake or error apparent on the face of the record (see *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243); or
  - c) There were other sufficient reasons; and
  - d) The application must have been made without undue delay.
7. In the instant application, despite the same having been brought under the above-analyzed Order, the applicant did not satisfy any of the conditions of review so as to warrant review of the orders of this court dismissing the application dated 15.11.2021 herein for non-attendance. As such the application ought to fail.
8. However, from the reading of the instant application, it is clear that the same seeks review and setting aside of the orders made by this court on 27.09.2022 dismissing the application dated 15.11.2021 and that the suit be reinstated and be heard on merits. The grounds in support of the said application are that the said orders were made when the suit came up for mention and in the absence of the advocates on record for the ex-parte applicant. The orders having been made ex-parte it is clear that the application herein ought to have been brought under Order 12 which deals with attendance during hearing of suits.
9. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that the discretion to set aside ex parte proceedings or decision is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error and the same is not designed to assist a person



who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. For a party to enjoy this discretion, he/ she must demonstrate a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that: -

“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...”

10. In the instant case, the reasons given by the applicant’s advocate on record is that on the cause list for 27.09.2022 the matter was listed as HCJR/E005/2021 Johnson Mwaniki; a wrong entry of the applicant’s name on the cause list which created an impression that the matter was not listed for mention on 27.09.2022. It was his case that the applicant’s advocate on record thus made efforts to join the court link but due to malfunction on their part managed to gain admission to the virtual court when the court was concluding its cause list. It was contended that the mistake in the cause list by the court registry as well as network challenge on the said date, on the part of the advocate is a misnomer that should not be visited upon the applicant who is innocent. On the other hand, these averments were never controverted by the respondent as they did not oppose the application. I have considered the explanation given by the applicant and the circumstances of this case. It is my view that failure to attend the hearing by the applicant’s advocate was not due to his negligence.

11. The respondents have not demonstrated the prejudice, if any, which they stand to suffer if the application is not allowed and in any case, Mr. Kigen, advocate for the respondent stated that he was not opposed to the prayers sought herein being allowed. In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo JA (as he then was) held that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to over reach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

12. In my view the applicant has demonstrated a sufficient cause upon which the court should exercise its discretion. Courts exist to serve substantive justice for all parties to a dispute before it. The only time when such justice can be served is to have parties present their issues and be heard on merit rather than being condemned unheard. [See article 50(1) of *the Constitution* of Kenya, 2010]. It therefore follows that every person ought not to be shut out from accessing court or having his day in court.

13. As such, I hereby allow the instant application.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....Applicant



.....Respondents

.....Ex Parte Applicant

