



REPUBLIC OF KENYA



KENYA LAW
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Ndiege v Arasa (Civil Appeal . E043 of 2022) [2023] KEHC 1845 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1845 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL . E043 OF 2022
WA OKWANY, J
MARCH 9, 2023

BETWEEN

JOHN ODHIAMBO NDIEGE APPLICANT

AND

SHARON MORAA ARASA RESPONDENT

*(Being an Appeal against the Ruling of Hon B O Okong'o (Mr) – RM
Nyamira dated and delivered at Nyamira on October 13, 2022 in the
original Nyamira Chief Magistrate's Court Civil Case No E181 of 2021)*

RULING

Background

1. The respondent herein obtained *ex parte* judgment against the applicant/appellant on June 30, 2022 in Nyamira CMCC no 181 of 2021.
2. Aggrieved by the said judgment, the applicant applied to set it aside. The lower court dismissed the applicant's said application thus precipitating the filing of the instant appeal and an application dated October 13, 2021 seeking, *inter alia*, orders to stay the execution of the *ex parte* judgment delivered on June 30, 2021 pending the hearing and determination of the appeal.
3. The respondent opposed the said application dated October 13, 2021 which was thereafter listed for directions on October 19, 2022.
4. The applicant's counsel did not attend court when the application came up for directions on October 19, 2022 whereupon Ms Sitati, advocate for the respondent applied for the dismissal of the application for want of prosecution.
5. This court noted that as at 1.00 pm there was no appearance for the applicant and dismissed the application for want of prosecution thereby precipitating the filing of the application dated October 19, 2022 which is the subject of this ruling.



Application

6. Through the application dated October 19, 2022, the applicant/appellant seeks orders for the reinstatement of the application dated October 13, 2022.
7. The application is supported by the affidavit of the applicant's advocate Mr Billy Mumo Ndolo, and is premised on the grounds that:-
 1. The matter is very urgent as the respondent may at any time proceed with execution against the applicant.
 2. Failure to attend on October 19, 2022 for mention of the application was due to an unfortunate as there was a black out in our offices at around 12 noon on the said date.
 3. Mr Ndolo the counsel assigned to handle the matter had handled other matters before that court such as Nyamira Civil Appeal 88 of 2021 but when there was a black out he was unable to handle this particular matter.
 4. That he tried to log in to court later on but I was unable to.
 5. That upon perusing the file later on unfortunately it was found that the application dated October 13, 2022 had been dismissed for non-attendance.
 6. That failure to address the court was inadvertent and highly regretted.
 7. The respondent might extract warrants and proceed and attach the respondent's movable property and sell the same.
 8. That mistake of counsel should not be visited upon an innocent client.
 9. That the respondent won't be prejudiced if the application is reinstated as an appeal has been duly filed."
8. The respondent opposed the application through her replying affidavit dated October 31, 2022 wherein she states that the application lacks merit and is merely intended to delay the realization of the fruits of her decree.
9. It is the respondent's case that the applicant has not advanced any plausible reasons for failing to attend court on October 19, 2022.
10. Parties canvassed the application by way of written submissions which I have considered.
11. The main issue for determination is whether the applicant has made out a case for the granting of the orders to reinstate the application dated October 13, 2021.
12. I note that the applicant attributes failure to attend court on technological challenges brought about by a power blackout that made it impossible for the applicant's counsel to attend court virtually.
13. I also note that the instant application was filed on the very same day that the applicant's earlier application was dismissed for want of prosecution thus lending credence to the applicant's position that his lawyers were unable to log into the virtual court session due to power blackout.
14. This court takes judicial notice that following the advent of virtual hearings, technological challenges, internet downtime and power blackouts may at times hinder the parties or even the court from accessing virtual courts on time or at all. In such circumstances, it is always advisable for the



affected parties to endeavor to inform the court of their predicament on time so that they can be accommodated.

15. In this case, I am satisfied that the applicant has tendered plausible grounds for seeking the reinstatement of the application dated October 13, 2021.
16. Consequently, I allow the application dated October 19, 2022 with orders that costs shall abide the outcome of the appeal.
17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 9TH DAY OF MARCH 2023.

W A OKWANY

JUDGE

