



Transfreight Logistics Limited v Aqua Marine Sealife Co. Limited (Miscellaneous Application E261 of 2021) [2023] KEHC 2784 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E261 OF 2021
DKN MAGARE, J
MARCH 24, 2023**

BETWEEN

TRANSFREIGHT LOGISTICS LIMITED DECREE HOLDER

AND

AQUA MARINE SEALIFE CO. LIMITED JUDGMENT DEBTOR

RULING

1. The application dated 17th February, 2023 was filed on 21st February, 2023. It was seeking to reinstate the application dated 19th December, 2021. The matter had been listed first before Deputy Registrar on 10th November, 2022 and did not proceed before by the 14th February, 2023. This matter was finally placed before me.
2. However, parties did not turn up. Instead of dismissing the matter, I filed the same for hearing on 16th February, 2023. The same was to be served. Whereas it appears it was served, the notice appears so short. I agree with the applicant that the matter was not on the main cause list but on as addendum cause list. This may have caused confusion.
3. I however, wish to point out that, the matter was placed before the Deputy Registrar when the court was not sitting and not as a matter of urgent.
4. It is the desire of this court that matters be heard on merit. Every time we drive or someone drivers himself from the seat of justice, it is not joy. It is gnashing of teeth, not knowing what could have happened has the matter been heard.
5. In a situation where there is exercise of discretion one way or another, in spite latent shortcomings, of the applicant, the courts shoulder endeavour to hear matters on merit. However, useless one's cause is,



it is important to hear then dismiss, as it should. The Court of Appeal, justices Kneller, Hancox JJA & Chesoni Ag JA) stated as doth in *Ngome v Plantex Company Ltd* [1984] eKLR: -

“...dismissing the appellant’s application as incompetent, in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider it’s merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion: See *The Elamria* [1981] 2 Lloyd’s Reports p 123, which this court followed in *Carl Ronning v Societe Navale Chargeurs Delmas & another* Civil Appeal No 16 of 1982 (unreported) and as said by Hancox JA in *Herman Mugachia*, supra, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That, as said by Ainley J (as he then was) in *Sodha v Hemraj* [1952] Uganda LR Vol 7, p 11, should be the last resort of any court.”

6. The Court must as such weigh the scales of justice in order for parties not to be driven of the seat of justice. In *Adaka Ismail v Equity Bank* [2014] eKLR which cited with approval the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 which stated as follows:-

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate.”

7. I accordingly find the application dated 17th February, 2023, as merited. I allow the same with no orders as to costs.
8. The application dated 9/12/2021 is reinstated for hearing. The applicant is however warned that the same should be prosecuted within the next 45 days, otherwise it will stand dismissed on the 46th day.

Determination

9. Consequently, the application dated is allowed in the following terms: -
- a. The Application dated 9th December, 2021 is hereby reinstated and to be heard on merit.
 - b. The said application dated 9/12/2021 to be prosecuted within 45 days and shall stand dismissed. If unprosecuted on the 46th day.
 - c. Each party to bear its costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:



Mugalo for the Applicant

No appearance for the Respondent

