



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Mwiki PSV Sacco Society Ltd & another (Civil Appeal
E467 of 2022) [2023] KEHC 1550 (KLR) (Civ) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E467 OF 2022

AA VISRAM, J

MARCH 2, 2023

BETWEEN

ROBERT KINAGA WAWERU APPELLANT

AND

MWIKI PSV SACCO SOCIETY LTD 1ST RESPONDENT

MARTIN MUNENE KABUTHIA 2ND RESPONDENT

*(Being an appeal from the Ruling of the Resident Magistrate's Court at
Milimani Small Claims Courts, Nairobi issued on the 30/5/2022 by the
Honorable Aswani Resident Magistrate in Nairobi SCCC No. E893 of 2021)*

RULING

1. This is an appeal from the ruling of the trial court delivered on May 31, 2022 in respect of the application dated May 4, 2022. In the application, the appellant (plaintiff in the lower court) applied for orders to review, vary and or set aside the orders made on January 27, 2022 regarding the withdrawal of the suit by the claimant, and further prayed that the suit be reinstated.
2. Unhappy with the ruling, the appellant now appeals to this court against it on the following grounds set out in its amended Memorandum of Appeal dated August 31, 2022:
 - a. The learned magistrate erred in law and in fact when she dismissed the claimant's application for reinstatement of the suit on the ground that the same had been withdrawn by the advocate.
 - b. The learned magistrate erred in law and in fact by failing to consider replying affidavit and submissions of the advocate being that the mistake of an advocate should not be visited upon the litigant.



- c. The learned magistrate erred in law in failing to exercise her wide discretion in favour of the appellant under the cited legal proceedings.
3. Reinstatement of a suit is a matter of discretion of the court. The general principles on when an appellate court may interfere with the discretionary power of a trial court are now well settled. In the case of *Mbogo & another v Shah* [1968] EA, these principles were set out as follows: -
- “An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
4. Further to the above, in *George Mwangi Kinuthia v Attorney General* [2019] eKLR the court held: -
- ‘It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the Civil Procedure Rules, 200. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit has been withdrawn there is nothing that can be sought to be reinstated.’
5. The Court of Appeal in *M & E Consulting Engineers Limited v Lake Basin Development Authority & another* [2015] eKLR held inter alia that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. The court also held that an advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.
6. Based on the record, it is evident that the suit was withdrawn at the express request of the advocate for the appellant. No evidence has been provided to show that the appellant was under instruction or direction from his client to the contrary. The record reads that on January 27, 2022, the appellant submitted as follows, “this claim was filed on December 2, 2021 and the time lapses on February 2, 2022. The prudent course of action we believe would be to withdraw the claim and refile it once we have everything ready unless the court otherwise directs”. The court responded by stating: “the claim is hereby withdrawn as prayed”.
7. Based on the authorities cited above, and for the reasons stated above, I am satisfied that the adjudicator exercised her discretion in a manner that was reasonable. It is clear that she considered the issue of mistake by the advocate and further considered the issue relating to beneficial ownership of the motor vehicle and reached a conclusion.
8. I do not find a good reason to interfere with the exercise of her discretion.
9. The appeal is dismissed.
10. I make no order as to costs as the respondents did not participate in this appeal.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 2ND DAY OF MARCH 2023

ALEEM VISRAM



JUDGE

In the presence of;

..... for the Appellant

..... for the Respondent

