



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rutere v Muigai (Civil Appeal E176 of 2022)**  
**[2023] KEHC 17345 (KLR) (Civ) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17345 (KLR)

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

**CIVIL**

**CIVIL APPEAL E176 OF 2022**

**DAS MAJANJA, J**

**MAY 12, 2023**

**BETWEEN**

**MOSES KITHINJI RUTERE ..... APPELLANT**

**AND**

**PETER MAINGI MUIGAI ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. S. G. Gitonga, RM/Adjudicator dated 31st January 2022 at the Small Claims Court Nairobi, Milimani in SCCC No. E217 of 2021)*

**JUDGMENT**

1. The Appellant appeals against the ruling of the Small Claims Court dismissing its application to set aside an order made on 28<sup>th</sup> September 2021 dismissing its suit.
2. The facts upon which this appeal is grounded are not disputed. The Appellant commenced its suit by the Statement of Claim dated 21<sup>st</sup> July 2021. The suit was defended through the Response to the Statement of Claim dated 8<sup>th</sup> September 2021. After preliminary issues, the suit was set down for hearing on 28<sup>th</sup> September 2021 by the court in the presence of counsel for both parties. When the suit came up for hearing on the scheduled date, neither the Appellant nor his advocate appeared before the court and the suit was dismissed for want of prosecution. The Appellant filed an application dated 21<sup>st</sup> October 2022 to set aside the dismissal order. When it came up for hearing on 4<sup>th</sup> November 2021, it was dismissed for non-attendance. On the same day, the court re-instated the application which was heard and dismissed thus giving rise to this ruling.
3. In his application dated 21<sup>st</sup> October 2021, the Appellant stated that he failed to attend court on the hearing day because he had wrongly diarised the matter as coming up for mention yet it was in fact



dismissed for want of prosecution. The Adjudicator considered the facts in light of the applicable law and concluded as follows:

This matter having been filed under the Small Claims Court is strictly governed by the Small Claims Court Act which sets the timelines of the court to 60 days from the date of filing suit to completion. This matter was filed on 1<sup>st</sup> August 2021. The hearing date set was 28<sup>th</sup> September 2021. This date was given in court on 10<sup>th</sup> September 2021 when both parties were present. I find it hard to believe that counsel for the claimant wrongly diarised it as a mention date because if that was the case they would have shown up in court and maybe sought an adjournment. The instant application was brought almost a month later after the suit was dismissed. Clearly the claimant's counsel is not keen on adhering to the strict timelines in the small claims court. I find that the claimant has not raised any plausible reasons that would warrant the court to exercise its discretion in favour of the claimant.

4. In his Memorandum of Appeal dated 11<sup>th</sup> February 2022, the argued that the Adjudicator erred in law and in fact in disregarding the provisions of Articles 50 and 159 of the *Constitution* on fair hearing and the concept of procedural technicalities in dismissing the application for reinstatement. That the Adjudicator erred in failing to hold that the mistakes of counsel should not be visited on the client and that the court failed to consider to submissions and authorities cited in support of the application to reinstate the suit. The appeal was opposed. Both parties filed written submissions.
5. In an appeal against the exercise of discretion by the trial court, the appellate court will not interfere with the decision of the trial court unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR). The fact that the Small Claims Court should not fetter its own discretion is underlined by section 43 of the SCCA which states that, "the court may on the application of any party to the proceedings set aside any of its orders and make such further orders as it may think just."
6. While the Adjudicator doubted the Appellant's advocates' reason for failure to attend court, the court ought to have considered whether in fact the mistake of counsel ought to be visited on the client which is a well-established principle (see *Phillip Chemwolo and Another v Augustine Kubende* [1982-88] KLR 103). Further, the court did not consider whether the Appellant has a good case to put forward or even the prejudice occasioned to the Respondent which could in any event be compensated by costs (see *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR). All these, among others are relevant factors ought to have been considered by the Adjudicator.
7. The court placed a lot of emphasis of the strict timelines imposed by the SCCA but failed to consider the flexibility provided by the court to do justice. The court has the right to impose any terms and conditions to ensure that the hearing could proceed within the time limited. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission and 2 others* [2013] eKLR, the Court of Appeal set aside a dismissal order despite the fact that the time for hearing the election petition was strictly limited by *the Constitution* and statute. The court observed that, "The learned Judge was clearly wrong in the exercise of his discretion which resulted in an injustice, the petition could have proceeded for hearing within the same time frame. The appellant was denied a hearing, we have no choice but to allow this appeal as disallowing the appeal would go against the spirit of the overriding objectives and also the provisions of Article 159 of *the Constitution*."



8. In this case, the Appellant's advocates had been the beneficiary of the court's discretion once before and the failure to ensure that the case was prosecuted with alacrity fell squarely on their shoulders. They should bear the consequences of the inconvenience to the Respondents. They shall pay the costs in the court below and in this court.
9. I therefore allow the appeal on the following terms:
  - a. The ruling and order dated 31<sup>st</sup> January 2022 be and is hereby set aside and substituted with an order setting aside the dismissal order made on 28<sup>th</sup> September 2021.
  - b. The reinstated suit shall be heard and determined within the next 21 days from the date hereof in default of which it shall stand dismissed.
  - c. The Appellant shall pay costs of the application before the Subordinate Court and of this court which are assessed at Kshs. 20,000.00 to be paid within 14 days in default of which the suit shall stand dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**D.S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr Ojonga instructed by Kiamah Kibathi and Company Advocates for the Appellant.

Ms Kedogo instructed by Meritad Law Africa LLP Advocates for the Respondent.

