



**Shiroko v Kenya Commercial Bank & another (Civil Suit  
21 of 2018) [2023] KEHC 19769 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19769 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT 21 OF 2018  
SC CHIRCHIR, J  
JULY 6, 2023**

**BETWEEN**

**JOSEPH OTUMA SHIROKO ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> DEFENDANT**

**KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court is the plaintiff's Application dated August 2, 2023. It seeks for the reinstatement of the suit. The suit was dismissed for non-attendance by the Applicant on July 20, 2023. The Application is supported by the affidavit of plaintiff and the grounds appearing on the face of the application
2. It is the plaintiff's case that prior to the hearing, he had just instructed one Neriko David Omwenga Advocate to take up representation from his previous advocate; that it later came to his knowledge that the said advocate did not attend court on the date of the hearing.
3. He further states that it was only later that he came to know that the said Mr Omwenga was described as being inactive by the Law Society of Kenya (LSK). He further points out that the defendant had just filed its defence a day before the hearing and he therefore reads malice on the act of dismissal considering that he was yet to be served with the defence. He further states that he as an arguable case, which he should be given an opportunity to prosecute.
4. The application is opposed through the affidavit of Lilian Sogo, who describes herself as the Lead counsel -litigation, in the 1<sup>st</sup> defendant company.
5. She states that the plaintiff was aware about the hearing date of July 20, 2022; that Omwenga Advocate was present in court on the day of dismissal but was denied audience due to his failure to file the Notice of change as per the earlier directions of the court given on May 19, 2023. She further points out that



the Applicant himself was also not in court on July 20, 2023 and that the advocate's practicing status had not been.....

6. Finally, it is the Defendant's case that the issue of the advocate's practicing certificate is not a ground upon which this court can exercise discretion and that the said Advocate's practice status was not raised when the matter came up on July 20, 2022.
7. The application was canvassed by way of oral submissions.

### **Applicant's Submissions.**

8. Ms Wanyonyi for the applicant submitted that on the day of the hearing there was an advocate who had been instructed to appear for the Applicant, but the said advocate did not have a practicing certificate at that particular time. It is further contended that the mistakes of an advocate should not be visited on a litigant.

### **Respondent's Submissions**

9. Mr Macharia for the respondent told the court that the applicant failed to comply with the court's directions given on May 19, 2023 directing them to file a Notice of change of Advocate.
10. He further submitted that the hearing date was fixed when both parties were present and further that the applicant has not provided sufficient explanation as to why he was absent in court on that day. It is finally submitted that the applicant need to demonstrate that he is not intend on derailing the course of justice.

### **Determination**

11. A brief background of this matter is necessary:

On July 31, 2018, the plaintiff filed this suit seeking a permanent injunction to bar the defendants from disposing off land parcel numbers Kisumu/Municipality/Block/3311, Lwanga/Lureko/2539 and Kisa/Khusiku/136 1(suit properties)

12. Together with the suit, he filed an Application seeking for a temporary injunction pending the hearing of the suit. The application for the injunction was eventually dismissed and the defendants were given the green light to sell the suit properties. From the submission of the parties it is apparent that, despite the discharge of the temporary injunction, the suit properties have never been sold.
13. In respect to the main suit, the record shows that the matter came up for pretrial conference on May 19, 2012. on that day Mr Khayumbi Advocate, who had been on record for the plaintiff, informed the court that he was withdrawing from representation and that Mr Omwenga Advocate was to take over the representation. Mr Omwenga, who was also present in court, did confirm that he was taking over the representation of the plaintiff. The court then directed Mr Omwenga to file a Notice of change of Advocates, to regularize the representation. At the same time the court scheduled the hearing for July 20, 2022.
14. On the day of the hearing, Mr Omwenga was present for the plaintiff. However, the defence raised objection to Mr Omwenga's right of audience before court on account of his failure to file a Notice as earlier directed.
15. Mr Omwenga told the court that it was an oversight attributed to his office and sought for the court's indulgence. The court was not satisfied with the explanation given, and denied him audience. Mr Ativa for the defendant then applied for the dismissal for the suit and his prayer was granted. The suit was



dismissed want of prosecution (sic) on the part of the plaintiff. This application is against the said dismissal.

16. The Application is premised on Order 12 of the Civil Procedure Rules. The order spells out the consequences of non-attendance by the parties during the hearing of suits. It also allows the party affected by the orders issued to approach court for the setting aside of such orders. Rule 7 of order 12 provides as follows: “where under the order, judgment has been delivered or the suit has been dismissed, the court, on application may set aside or vary the judgment upon such terms as may be just.

Order 51 rule 15 also provides that the court may set aside an order made *ex parte*.

17. The powers to set aside *ex parte* orders is at the discretion of the court of the court and the manner of the exercise of the said discretion has been restated in many past decisions.

In Macanley vs De Boer & Ano (2002) 2 KLR 260 it was held that in considering an Application of this nature the court need to consider factors such as “whether or not the Application to set aside has been filed without undue delay; whether or not the Applicant has acted with due diligence ; whether the inconvenience caused to the Respondent can be compensated by costs and finally whether, considering all the circumstances of the case, the ends of justice demands that the discretion is exercised in favour of the Applicant.”

18. In the case of Shah vs Mbogo (1979) EA 116 cited with approval in the case of John Mburu vs Charles Mwenga Mburu (2019) e KLR the court held :

“... this discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not meant to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”( Empasis added)

19. In Patel vs EA Cargo handling services Ltd (1974) EA 75 ,the court had this to say “there are no limits or restrictions to the judge’s discretion except that if he does vary the judgment he does so upon such terms as may be just..... the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to .... Wide discretion given to it by the rules.”

20. Against the above guidelines, I will proceed to consider the present application.

21. The applicant was not present in court on the day of the hearing and has not offered any explanation as to why he was absent. However, there was an Advocate whom he had sent to court, but whom he now alleges was not qualified to represent clients. He did not know this at the time, he says. However, this allegation has been made without any documentary proof. The question of whether or not an advocate was qualified could have been easily ascertained by getting an appropriate document from the Law Society of Kenya. The Applicant is not being candid in this regard. In any case, the record shows that the Advocate was denied audience not on the grounds of lacking a licence to practice, but for the reason that that he had failed to file the prerequisite document for purposes of representation.

22. The defendant has pointed out that the plaintiff too was absent in court on the material day and despite being confronted with this accusation the plaintiff has chosen not to respond to it. This, coupled with the obvious lack of transparency in explaining the issues touching on his then Advocate, raises the question of whether the Applicant is deserving of the exercise of the court’s discretion in his favour.

23. However, despite the Applicant’s evasiveness in explaining his indolence, the record does not show a deliberate attempt to delay the case. The record shows that Pretrial conference was held on May 19, 2022 and on that day the case was scheduled for hearing. It was the first time the matter was coming



up for hearing, and in my view it would be unfair to the plaintiff to use one occasion to conclude that he was attempting to delay the case, or derail the cause of justice.

24. Even though the plaintiff was not in court, he had a legitimate expectation that his advocate would be in a position to take care of his interest. I have already arrived at the conclusion that the reason why the plaintiff's counsel could not be given an audience was because he had not filed his Notice of appointment despite the court's earlier directive. This was therefore a mistake by an Advocate. In *Richard Leiyangu vs IEBC & 2 others* (2013)e KLR the court of Appeal cited with approval the case of *Belinda Murai & others vs Amos Wainaina* (1978)LLR 2782 the court had this to say about mistakes made by Advocates: "A mistake is a mistake. It is no less a mistake because it is unfortunate slip.....the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it, but it ought certainly to do whatever is necessary to rectify it if necessary, if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule"
25. There is something else that this court has found it necessary to consider: Even though the matter came for pre-trial conference on May 19, 2022, the defendant had not filed its defence, and the directions for hearing were made when there was no defence on record. The statement of defence was only filed a day before the hearing. Under order 17 Rule 1 of the *civil procedure Rules* the plaintiff was entitled to file a reply to the said defence within 14 days after service. whereas this may not be an issue when considering an application for setting aside it, raises the question as to whether the hearing would have gone on that day before the plaintiff could get the chance to reply to the defence, and hence the need for the court to exercise grace towards the plaintiff.
26. The court's discretion as stated in the *shah vs mbogo (supra)* is to prevent any injustice that may result from inadvertence, excusable mistakes and blunders that occasionally occur as parties litigate for their rights in courts. The main objective of the courts is to do substantive justice as stated in the case of *Wachira Karani vs Bildad Wachira* (2016)eKLR. The court held;

"The fundamental duty of the court is to do justice between the parties ..... fundamental to that duty is that parties should be allowed to prepare opportunity to put their cases upon the merits of the matter.....the court is not powerless to grant relief, when ends of justice and equity so demands, because the powers vested in the court are of a wide scope and ambit"
27. It is my view that any inconvenience that the defendant has suffered can be compensated by costs. On the other hand, chasing the plaintiff from the seat of justice, in the circumstances of this case is too drastic.
28. Therefore, taking everything into consideration, I am convinced that interest of justice calls for reinstatement of this suit. And in view of the fact that the plaintiff has not explained his own absence in court on the day of the hearing, he will pay costs for the inconvenience caused to the defendant.
29. In conclusion, I make the following orders.
  - a). The suit herein is hereby reinstated on the condition that the plaintiff shall pay throw away costs of kshs. 20,000 to the defendant.
  - b). This matter is to be listed for pre-trial conference on a date to be given during the ruling.
  - c). The costs in (a) above to be paid before the pre-trial conference



**DATED, SIGNED AND DELIVERED VIRTUALLY, AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF JULY, 2023**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Eric- Court Assistant.

JB Macharia for the Respondent.

No appearance by the Applicant.

