



**UAP Insurance Company Limited v Atenya (Civil Case
23 of 2019) [2023] KEHC 20515 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE 23 OF 2019
DO CHEPKWONY, J
JULY 18, 2023**

BETWEEN

THE UAP INSURANCE COMPANY LIMITED PLAINTIFF

AND

JARED KEFFA ATENYA DEFENDANT

RULING

1. This is a ruling in a Notice of Motion application dated September 30, 2022 filed pursuant to Article 159 of the [Constitution of Kenya](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#).
2. The application seeks the following orders:
 - a. Spent;
 - b. That this Honourable Court be pleased to issue an order reinstating Civil Suit No.23 of 2019 which was dismissed on September 22, 2022;
 - c. That this Honourable Court be pleased to fix the matter for formal proof at a time convenient to the court;
 - d. That the costs of this application be provided for.
3. The Application is based on the grounds on the face of it and the Supporting Affidavit of the Applicant, Victor Aminga Nyabuti sworn on September 30, 2022 in his capacity as counsel for the Plaintiff.
4. The Applicant states that he represents the Plaintiff in the matter and that it filed the Plaintiff but the Defendants failed to file their Defence on time, a result of which the Plaintiff filed a Request for Judgment dated June 22, 2021, and interlocutory Judgment was entered in its favour. The matter was then fixe for formal proof hearing on September 2, 2021 but the same did not proceed as counsel for Plaintiff was indisposed. The matter was adjourned to March 15, 2022 but it did not proceed due to the



absence of both counsel and was then scheduled for June 14, 2022. There was no attendance by both counsel and or any representation and the matter was then set for Notice to Show Cause on September 22, 2022. Neither the parties nor their Advocates were in attendance when the same was called out. In the absence of both parties and or their counsel, the suit was dismissed for non attendance.

5. The Applicant argues that its mistake as Counsel, should not be visited upon the Plaintiff. He states that the court has discretion to set aside the court orders as the Plaintiff has an arguable case and seeks to have the suit reinstated.
6. The Application is unopposed as the Defendant was duly served with the application and an Affidavit of Service filed on July 11, 2023. Be that as it may, this Court still consider the merits of the application before giving any orders since the Notice to Show Cause was initiated by it when both counsel for the parties failed to attend court on several occasions.

Analysis and Determination

7. From the court record, the Plaintiff dated October 18, 2019 was filed on October 23, 2019. Despite being served with the same alongside summons to enter appearance, the Defendant failed to enter appearance and/or file Defence and the Plaintiff filed a request for Judgment dated June 21, 2021. The Plaintiff's Counsel wrote a letter dated August 24, 2021 seeking a date for formal proof hearing . On September 2, 2021, the court fixed the formal proof hearing for November 17, 2021.
8. On the said November 17, 2021, the court was informed that the Counsel for the Plaintiff was ill and it adjourned the formal proof hearing to March 15, 2022. And on 1March 5, 2022 none of the parties were in attendance and the hearing was again adjourned to June 14, 2022, with directions that the Deputy Registrar informs the Plaintiff's Counsel.
9. On the June 14, 2022, there still was no attendance by either party and or counsel and the court directed Notice to Show Cause to issue upon the Plaintiff, and subsequently, on September 22, 2022, the Court dismissed the suit for non- attendance. The Plaintiff then filed the present application seeking reinstatement of the suit and matter to be fixed for formal proof hearing.
10. It is common ground that this suit was filed in the year 2019. From the time the suit was set down for hearing in 2021, the Plaintiff's Counsel only attended court once on the November 17, 2021 when he sought an adjournment over illness. And since then, neither the Plaintiff nor the Plaintiff's Counsel have not attended court which led to the court issuing a date for Notice to Show Cause.
11. It is trite law that it is the duty of the Plaintiff to prosecute his/her case to conclusion and to take adequate steps to expedite the hearing and determination of their suit. The court in the case of *Utalii Transport Co Ltd & 3 Others V NIC Bank & Another* [2014]eKLR, held that:-

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court.”
12. The Plaintiff's laxity in prosecuting the matter is what caused the dismissal of the suit which had been pending for years and was only awoken by the dismissal order.
13. Although the court has discretion to reinstate the suit, it should not be done so as to cause injustice. This was the position in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013]eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or



hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice."

14. In this case despite the fact that it is the Plaintiff's Counsel who was expected to follow up on the progress of the case in court, it is worth-noting that there is no evidence that the Deputy Registrar notified the parties of the date of June 14, 2022 and neither is there any evidence that the Notice to Show Cause slated for September 22, 2022 was served upon the parties and or their respective counsel.
15. For that reason, this Court, in exercise of its discretion, allows the application dated September 30, 2022 on condition that:-
 - a. Formal Proof hearing is fixed for hearing on October 2, 2023.
 - b. Notice to issue upon the parties and or their respective counsel.
 - c. Failure to attend court for the formal proof, the suit shall stand dismissed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18TH DAY OF JULY , 2023.

D. O. CHEPKWONY

JUDGE

