



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL SUIT NUMBER 127 OF 2015

ESTHER KALUMU MALOMBE and DISMAS MUTHUI MUTINDA

(Suing as the legal representatives of the estate of

BARNABAS MALOMBE MUTUA –Deceased.....APPLICANTS/PLAINTIFFS

VERSUS

PHYLIS KAVUSI & MUNYALO ISIKA

(Suing as the legal representative of the Estate of Willy Muema Isika)....DEFENDANTS/RESPONDENTS

R U L I N G

1. By a **Notice of Motion** dated **16th November, 2020**, the Applicants herein, **Esther Kalumu Malombe and Dismas Muthui Mutinda (Suing as Legal representatives of the estate of Barnabas Malombe Mutua deceased)** have moved this court for the following orders namely;

(i) That this Hon. Court be pleased to set aside the dismissal order made by this court on 7th October, 2020.

(ii) That Costs be in Cause.

2. The Applicants have listed the following grounds in the face of the application as a basis for the reliefs sought;

(i) That the application dated 26th January, 2020 was dismissed for non-attendance on 7th October, 2020 when it was scheduled for hearing.

(ii) That the Applicant's clerk fixed the date and failed to diarize the same hence failed to bring the matter to the attention of the office.

(iii) That the application was coming up for hearing for the first time.

(iv) That Counsel for the Plaintiff/Applicant was absent when the matter was called out.

(v) That the absence of Counsel was not deliberate and/or intentional.

(vi) That the Plaintiff is desirous of prosecuting this application to its conclusion and has a constitutional right to a fair hearing.

(vii) That it is only fair and in the interest of justice that the application herein be heard allowed and the suit heard on merits.

(viii) That the application has been brought without undue delay.

3. The Applicants' Counsel Musili Mbiti has sworn an affidavit, sworn on 16th November, 2020 blaming a clerk in his office named Alex Kilonzi for the predicament that saw the application dated 26th January, 2020 dismissed for want of prosecution on 7th October, 2020. Mr. Mbiti avers that, the said Clerk failed to diarize the matter leading to his failure to attend Court on the scheduled hearing date.

4. The Applicant submits that they were unaware of the inter-partes hearing dated 7th October, 2020 and that their Counsel only came to learn about it later when he requested for a hearing date.

5. The Applicants have invoked the provisions of **Order 12 Rule 7 of the Civil Procedure Rules** and have relied on the decisions in **Belinda Murai & 9 Others –versus- Amos Wainaina, Philip & Anor. versus Augustine Kibede (1982-88)Eklr 103 Mau West Ltd versus KAM Co. Ltd. [2018] eKLR**. In the above matters, the courts set aside dismissal orders and directed the matters to be heard on merit following nonattendance of advocates due to their mistakes.

6. The Respondent has opposed this application vide a replying affidavit sworn on 16th February, 2021 by her learned Counsel Dellah M. Mwanzile. The Respondent's main ground of opposition is that the Applicant has not given a proper or good explanation for failure to attend court on the 7th October, 2020 and blames them for not being keen to prosecute their application. She relies on **Bilha Ngonyo Isaac versus Kembu Farm Ltd [2018] eKLR**, where the court dismissed an application for reinstatement for non-attendance. The Court considered the age of the matter (6 years old) and the fact that the Applicant had failed to set the matter for hearing and when it finally did, the matter could not proceed for hearing due to non-attendance of the Applicant on three occasions.

7. The Respondent has also cited the decisions in **Bains Construction Co. Ltd. Versus John Mizare Ogowe [2003] eKLR, Peter Kiplagat Rono versus Family Bank Ltd. [2018] eKLR and Fran Investment Ltd. Versus G4S Security Ltd. [2015]eKLR**.

8. In the case of **Bains Construction Co. Ltd.**, The court found that, the Applicant had not given sufficient reasons why it had failed to prosecute his appeal for a period of 4 years.

9. In **Peter Kiplagat Rono**, the court noted that, the reasons advanced by the Applicant for the reinstatement of an application were unsatisfactory and the Counsel was not honest on the reasons given for non-attendance.

10. In **Fran Investment Ltd**, the court also held that the Applicant had not given good reasons why it did not prosecute its suit for four years.

11. This court has considered this application and the opposition mounted by the Respondent. The Applicants as noted above, have invoked the provisions of **Order 12 Rule 7 of the Civil Procedure Code** which gives discretion to this court to reinstate a suit that has been dismissed. The Rule provides;

“Where under this Order Judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just”

12. The **Order 12 Rule 7 of the Civil Procedure Code** above, relates to consequences of non-attendance of parties when the Main Suit is set down for hearing. When the Plaintiff fails to attend court and only the Defendant attends, the suit may be dismissed as provided under **Rule 3** of that same order. In my considered view, the Applicants ought to have invoked the provisions of **Order 51 Rule 15 of the Civil Procedure Rule**. But non citation of a rule or wrong citation of a rule in the Civil Procedure Rule, cannot be a ground to dismiss an application in court and the provisions of **Order 51 Rule 10 of the Civil Procedure Rule** is quite clear on that. This court is more inclined to look into the substance, rather than a mere omission or misstating of an applicable Rule of Procedure.

13. Having stated the above, it is apparent that the application before me has invoked the discretion of this court. In exercise of Judicial discretion, this court is minded by the principle that the court's discretion to set aside an Order made ex parte is intended to avoid injustice resulting from an excusable mistake or inadvertence arising from an advocate's error/mistake or Litigant's mistake. At the same time, such discretion is not meant to aid a litigant who deliberately seeks to obstruct or cause delay to the dispensation of justice.

14. The Applicants in this matter, filed an Application dated 26th January, 2020. The application was fixed for hearing on 7th October, 2020 but the Applicant failed to attend court through their advocate which led to the dismissal of the said application for non-attendance.

15. The reasons given by the Applicants' Counsel is that, he sent his Clerk to the Court's Registry to pick a date, and that the date given was 7th October, 2020 but according to him, the Clerk failed to diarize the date leading to the dismissal of the application.

16. The reasons given by the Applicants Counsel appears reasonable on the face of it because Clerks at times make mistakes of either misdiarizing or failure to diarize a given matter but a close scrutiny of the record, discredits the Applicants' position because the facts suggest that the Applicants Counsel is either being dishonest or is simply trying to look for an escape route after finding himself in a corner. I say this for the following reasons.

17. Firstly, it is a bit peculiar that Counsel for the Applicant wrote a letter dated 12th October, 2020, seeking for a hearing date for an application that had been dismissed five (5) days prior to the writing of the letter.

18. Secondly, and more importantly is that, though the Counsel for the Applicants indicates that he sent a Clerk by the name of Alex Kilonzo to pick a date from the Registry, a perusal of the Court proceedings shows that, on 24th July, 2020, a Mr. “Mwendwa” for the Respondent was the one who fixed the application dated 26.1.2020 for hearing. The said Alex had fixed the application on 4th March, 2020 for hearing of the application dated 26th January, 2020 on 9th June, 2020. There is no record to show what transpired on 9th June, 2020 but given the circumstances of the time, i.e. Covid-19 and the long absence of the Presiding Judge in this station, one can safely assume that this court did not sit on 9th June 2020.

19. Thirdly, the Clerk to the Applicants Advocates firm ought to have sworn an affidavit detailing how he got the date and why he failed to diarize. Looking at the facts presented by the Applicants Counsel, they simply do not add up. Why would the Applicants' Counsel swear an

affidavit that the said Alex Kilonzo took the hearing date when the record shows that someone else took the date? Again, if the matter could not proceed on 9th June, 2020 for whatever reason, why did the Applicants stay dormant for all that time until 12th October, 2020 after their application had been dismissed?

20. This court has posed the above questions because the Applicants conduct in this matter shows that they have been indolent and not keen to prosecute their suit. This is because, the initial application dated 26th January, 2020, sought to have the main suit reinstated after it was dismissed for want of prosecution. The suit herein, was filed way back in 2006 and the trend shown indicates that the Applicants are either not keen to prosecute their case or their advocates are not enthusiastic to represent them and finalize this case.

21. The main concern of any court is to do justice to the parties that approach it and dispensation of justice demands expedition and proportionality. **Section 1A and 1B of the Civil Procedure Act**, provide for the objectives and duties of this court. This court in exercise of its powers is required to facilitate the just, expeditious, proportionate and affordable resolutions of civil disputes. When matters delay in court for whatever reason, the costs and expenses will automatically increase, which in the end translates to increase of costs of litigation and hence negative impact on the dispensation of justice. For that reason, the provisions of **Section 1A & 1B of the Civil Procedure Act** were introduced into the **Civil Procedure Act** to address those concerns. **Section 1B (1)** provides;

“For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims;

- a) The just determination of the proceedings.**
- b) The efficient disposal of the business of the court.**
- c) The efficient use of the available and administrative resources.**
- d) The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties....”**

22. While this court is minded to dispense timely justice, the main concern is also to do justice to both parties and it is on that basis, that this court is prepared to exercise its wide discretion to achieve that critical objective. In the case of *Esther Wamaita Njihia & 2 Others versus Safaricom Limited [2014] eKLR*, the court had the following observations which I consider relevant;

“The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably have compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration versus Gasyali). It also goes without saying that the reason for failure to attend should be considered.”

23. This court takes the position that, while it is possible for parties and more to advocates to make mistakes including failing to take necessary steps to prosecute a matter, at times the mistake of omission or commission may be done without the knowledge or the fault of the client or party seeking justice in court. It is on that basis, that in promoting unfettered access to justice in line with **Article 48 of the Constitution of Kenya 2010**, courts are minded to exercise their discretion favouring access to justice rather than the draconian step of closing the doors of justice. This court in that spirit as observed above is minded to exercise its discretion in the interest of justice and that is the only basis why this application, despite the hurdles created by the Applicants’ own conduct, will find favour in this court.

In the end, I will allow this application for the afore-stated reason but I will give the following directions:

- a) The Applicant shall pay costs of Kshs. 5,000 to Respondents.
- b) The application dated 26th January, 2021 shall be prosecuted within 60 days from the date of this ruling, otherwise the same shall stand dismissed for want of prosecution.

DATED, SIGNED AND DELIVERED AT KITUI THIS 12TH DAY OF JULY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE