



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**MISCELLANEOUS APPLICATION NO. E026 OF 2021**

**IM (A minor suing through mother**

**and next Friend TWM).....RESPONDENT**

**-VERSUS-**

**LENSON PRODUCTS LIMITED.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> September, 2021, the Applicant herein seeks an order that the ruling/order delivered on the 9<sup>th</sup> March, 2021 dismissing the Applicant's Application dated 19<sup>th</sup> February, 2021 be set aside and that the said application be reinstated and be heard on merit.
2. On 9<sup>th</sup> March, 2021, this Court dismissed the application dated 19<sup>th</sup> February which had been certified urgent on 23<sup>rd</sup> February, 2021 due to non-attendance of the parties.
3. According to the applicant, its counsel **Ms. Abutika** was online but experienced difficulties in logging into the platform that was being used for the proceedings. As a result of the dismissal, it was deposed that the Respondent had threatened to execute the decree. According to the applicant this application was brought without unreasonable delay hence it was in the interest of justice to allow the same as no prejudice is likely to be occasioned to the Respondent which cannot be cured by way of costs.
4. In opposing the application, the Respondent averred that though the applicants filed the said application they never served the same but were enjoying the interim orders up to the time the said application was dismissed. According to the Respondent, the applicant had not sufficiently explained their failure to move the court for 7 months.
5. According to the Respondent, the said **Ms Abutika** left the firm of Kimondo Gachoka before March hence it was untrue that it was her mistake that led to the said dismissal.
6. It was therefore contended that there was unreasonable delay in seeking to reinstate the said dismissed application and this application ought to be dismissed with costs.

**Determination**

7. I have considered the application, the affidavits, both in support of and in opposition thereto and the submissions filed.
8. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**
9. In this case, while the reason for failure to attend appears, on the face of it reasonable, the Respondent has averred which averment was not controverted that the advocate who it is alleged was unable to join the online plat form in fact left the firm before March, 2021. No affidavit was filed subsequent to that averment to dispute the same.

10. Secondly, the dismissal was on 9<sup>th</sup> March, 2021 and the present application was not filed till 16<sup>th</sup> September, 2021, nearly 7 months after the dismissal. No attempt at all was made to explain the delay which was obviously inordinate. Without explanation, it has been held, there can be no indulgence.

11. The circumstances under which a **court** sets aside its default orders were set out in **Shah vs. Mbogo (1967) EA 166** in which the Court stated that:

***“this discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”***

12. It is now settled that wherever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted. **See Kenya Ports Authority vs. Silas Obengele Civil Application No. Nai. 297 of 2004; Reliance Bank Limited (In Liquidation); Grandways & 2 Others vs. Souther Bank Cororation Limited Civil Application No. 118 of 2007; Business and Economic Research Company Limited & 2 Others vs. Jimba Credit Corporation Limited Civil Application No. Nai. 281 of 2006.**

13. In this case apart from stating that there was no inordinate delay, no attempts whatsoever was made to explain the delay which spanned over half a year. In those circumstances, the Court can only conclude that the Applicant is seeking *either by evasion or otherwise to obstruct or delay the cause of justice* conduct. Such a party does not deserve any assistance from the Court.

14. In the premises I find that the applicant has not made out a case to warrant favourable exercise of discretion and the Motion dated 6<sup>th</sup> September, 2021 fails and is dismissed but with no order as to costs as none of the parties complied with the court’s directions to furnish the soft copies of the documents filed.

15. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**

**CA Susan**