



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPL. NO. 255 OF 2013

IN THE MATTER OF THE TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

AMING'A OPIYO, MASESE & CO. ADVOCATE.....ADVOCATE/RESPONDENT

-VERSUS-

UGANDA RAILWAYS CORPORATION.....RESPONDENT/APPLICANT

RULING

On 4th July 2019 this court dismissed the application dated 28th May 2019.

1. The reason for the dismissal of the said application was that the Applicant had failed to attend court to prosecute it.
2. These proceedings are between the Law Firm of Aming'a, Opiyo, Masese & Co. Advocates (hereinafter "*the Advocate*") and their erstwhile Client, Uganda Railways Corporation (hereinafter "*the Client*").
3. The application before me was brought by the Client, who is seeking to set aside the orders made on 4th July 2019. The application is supported by an Affidavit sworn by **AMULE YEKA** Advocate.
4. Advocate Yeka has explained that the Law Firm of Prof. Albert Mumma & Company Advocates had instructed him to hold their brief when the application dated 28th May 2019 was scheduled to be heard.
5. Advocate Yeka said that he was in the Court house by 8.50am on 4th July 2019, ready to carry out the instructions that had been entrusted to him.
6. Having taken note of the fact that the application was not amongst the first matters on the Cause List for the day, the said advocate decided to rush to the Environment and Land Court, with a view to mentioning the case of **NYANDO MILLERS LTD Vs SBI ELC NO. 150 OF 2012.**
7. According to Advocate Yeka, the said case was amongst the first cases on the Cause List of the Hon. Justice Kibunja. He was therefore confident that he would be through with that case quickly enough, and get back to this Court before the application dated 28th May 2019 was called out.
8. However, by the time Advocate Yeka got back to this Court, the Judge was already delivering a Ruling, dismissing the application.
9. When canvassing the current application, the Client acknowledged that Advocate Yeka had under-estimated the efficiency of the court, and he tendered his apologies.
10. The Client asked the Court to exercise its discretion, and to allow the reinstatement of the application dated 28th May 2019, so that the same could be determined on merit.
11. In answer to the application, the Advocate submitted that the Applicant had been guilty of indolence.

12. He said that the application which the Client was seeking to have reinstated, had been brought some 3 years after the learned Taxing Officer had rendered a Ruling on Taxation.
13. Secondly, the Advocate blamed Advocate Yeka for failing to get another advocate to hold his brief when he had dashed to the Environment and Land Court.
14. In the considered opinion of the Respondent, there was no good reason that could enable this court to exercise its discretion in favour of the Applicant.
15. Furthermore, although the Environment and Land Court has a jurisdiction that is at par with that of the High Court, the Respondent believes that Advocate Yeka should have taken into account the fact that the Judge before whom this case had been listed, was also the Presiding Judge.
16. Whereas, there is no doubt that I am the Presiding Judge at the High Court, Kisumu, I believe that that fact alone does not grant to me an enhanced jurisdiction, that would place me on a pedestal that was higher than my brother and sister Judges of the High Court and also of both the Environment & Land Court; and also of the Employment & Labour Relations Court.
17. In administrative issues, I may be the first among equals. But in terms of Judicial authority, the Judges of the 3 Courts have concurrent jurisdiction.
18. Prudence dictates that whenever an advocate finds himself/herself required to attend 2 courts at about the same time, he or she ought to have the courtesy to let the other court know that he or she was still before another court.
19. To my mind, it matters not that the advocate chooses to first appear before the High Court, when he or she also has another matter before the Magistrate's Court.
20. Even the Court whose jurisdiction may be lower than the court before which the advocate chooses to first attend, the said "*lower court*" cannot be taken for granted. If that court had no information on the whereabouts of the advocate, at the time the advocate's case was called out, the court could decide whether or not to dismiss the matter, for want of prosecution.
21. In this case, I find that Advocate Yeka made an error of judgment, when he thought that he could return to this court within time, to handle the application.
22. I find that that error on the part of the Advocate ought not to be visited upon his client.
23. I do emphasize that I have not taken into account the application dated 28th May 2019, because that application is not before me.
24. However, I find that the interests of justice would be best attained by granting to the parties an opportunity to canvass that application substantively.
25. Therefore, I now set aside the orders made on 4th July 2019, and thus reinstate the application dated 28th May 2019.
26. The Client will pay to the Advocate the costs of the application dated 6th September 2019, in any event.
27. The Client will also pay to the Advocate the costs for the day, on 4th July 2019, when the Advocate attended court after being given notice to do so.
28. Finally, in acknowledgement of the need to make determinations sooner rather than later, I order that Directions will be given forthwith on how the application dated 28th May 2019 shall be canvassed.

DATED, SIGNED and DELIVERED at KISUMU This 2nd day of December 2019

FRED A. OCHIENG

JUDGE