REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. E027 OF 2022

SAMUEL SOO MUINDE::APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LIMITED::::::::::::::RESPONDENT

JUDGEMENT

The Appellant being dissatisfied with the Ruling of the Senior Resident Magistrate at Machakos, Honourable B. Bartoo (Senior Resident Magistrate) delivered on the 15th day of April 2021 in Machakos CMCC. No. 290 of 2014 appeals to this Honourable Court against the said Ruling on the following principal grounds;

1. The learned trial Magistrate erred in law and in fact by failing to reinstate the CMCC No. 290 of 2014 and allow it to be heard on merits.
2. The learned trial Magistrate erred in law and in fact by failing to appreciate the fact that the delay in prosecuting the case was occasioned by the fact that the Defendant had proposed negotiations which were in very advanced stages.
3. The learned trial Magistrate erred in law and in fact by dismissing the Applicant's Application which clearly demonstrated the reason for failing to attend court by the Plaintiff's counsel.

The Appellant prays that;

a) THAT the trial Magistrate's Ruling delivered on 15th April 2021 be set aside in its entirety and that this Honourable Court do make its own finding on the grounds of the Appeal.
b) THAT the court do set aside the Orders dismissing the CMCC No. 290 of 2014 and Order that CMCC No. 290 of 2014 be heard on merits.
c) THAT the costs of this Appeal be provided.

This court has considered the application and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> *"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."*

This suit was dismissed for non-attendance of the Applicant when it came up on 14th November 2019. The relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules. It provides as follows;

> *"Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just"*

The determination of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a party is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of Shah vs Mbogo (1979) EA 116 quoted with approval in the case of John Mukuha Mburu vs Charles Mwenga Mburu (2019) eKLR, where that court stated that;

> *".....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."*

For the Court to exercise its discretion in favour of the Applicant, it has to be satisfied that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in Parimal vs

Veena which was cited with approval in the case of Wachira Karani vs Bildad Wachira (2016) eKLR. In the case, the said Supreme Court stated that;

> *"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*
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> *The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant*

honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

In the instant case the Plaintiff's suit herein was dismissed on the 14th November 2019 for the reason that Counsel on record for the Plaintiff inadvertently misdiarized the same. I have perused the court record and find that the parties had been given a mention dated on the 1st August 2019 by consent. On the said date the Plaintiff/Appellant was absent and so was the Advocate and a hearing date was given for the 14th November 2019 and hearing notice issued. Come the date of 14th November 2019 the Plaintiff was again absent and the matter was dismissed. This matter was filed way back in 2014. And as late as 2019 the Applicant had not complied with Orders 1. I find that both the Applicant and their advocate demonstrated inexcusable laxity in prosecuting this case, and not only on the material date but others. It is the role of the Plaintiff and his counsel to ensure that the case proceeds for hearing expeditiously. In the case of Utalii Transport Co. Ltd and 3 Others vs N.I.C. Bank and Another (2014) eKLR, the court 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."

33. It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in Gideon Sitelu Konchella vs Daima Bank Limited (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-

"It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ….the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

The Plaintiff/Applicant blames his advocate for the inadvertent mistake. This is the Plaintiff's case and they ought to have been vigilant. The case does not belong to the advocate. In the case of Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC397/2002, the court stated that;

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.

The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.

I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures (see the case of Kenya Power & Lightning Co. Ltd vs Alliance Media Kenya Ltd (2014) e KLR). The Plaintiff was indolent and this is inexcusable. Suits are meant to be prosecuted. From the facts before me, the law and authorities cited above I find that the appeal is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER 2025.

N.A. MATHEKA

JUDGE