

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

INSOLVENCY CAUSE NO. E001 OF 2021

SHAKESPEARE DISTRIBUTORS LTD.....APPLICANT

Versus

GILANIS SUPERMARKET.....INTERESTED PARTY

RULING

1. The motion dated 10th November, 2022 and brought under Articles 50, 51(1), 159 and Article 165 of the Constitution essentially seeks the reinstatement of this cause which the court dismissed on 31st October, 2022. The motion was supported by the affidavit of **Moses Wanjala Nyongesa** on behalf of **Shakespeare Distributors Ltd** (the Applicant herein).
2. The deponent stated that he was acting on behalf of the Applicant and was currently held in remand custody at Thika Main Prison. And that the matter had been scheduled for mention on 31st October 2022, when he expected the Applicant's erstwhile advocates, **Fatuma Mungoni & Co. Advocates**, to attend and himself, joined the virtual court session at 9:00a.m. However, both were muted

during the session and attempts to draw the court's attention were unsuccessful. Consequently, the matter was dismissed without their participation.

3. He stated that the matter was subsequently brought to the attention of the presiding judge who advised that an application for review be made. Asserting that the High Court has the power to review its own decisions, the deponent cited inter alia the decision in **Barrack Kazungu Mangi v Republic (2016) and Protas Buliba Shikuku v Attorney General (2011)**, regarding the court's residual jurisdiction. The deponent concluded with a plea for the court to review its earlier orders and reinstate the matter, asserting that no party but will be thereby prejudiced.
4. The motion was opposed by **Gilanis Supermarket**, the Interested Party and Respondent herein through the affidavit sworn on 23rd June, 2025 by **Gilbert Kiragu**. The deponent restated that the suit was filed in December 2021, adding that upon being served in February 2022, the Interested Party promptly entered appearance and filed the necessary responses.
5. The deponent recounted that on 31st October 2022, when the matter came up for hearing, the Applicant failed to attend court, leading to

the dismissal of the suit for non-attendance. Moreover, that even during subsequent proceedings, including on 27th February 2025 when the instant motion for reinstatement was scheduled, the Applicant again failed to appear, demonstrating a consistent pattern of non-participation. In his view, the Applicant and their advocates have shown clear disinterest in prosecuting the matter, having repeatedly failed to attend court despite being aware of the hearing dates. Which conduct he described as negligent, indicative of abandonment of the case, and amounting to an abuse of the process of the court.

6. Refuting the Applicant's explanation that they were present virtually but unable to participate, he asserted that the claims are unproven and insufficient to justify reinstatement. Especially as the Applicant has not demonstrated any diligent effort by their advocate to prosecute the case or attend court sessions as required. In conclusion, the deponent dismisses the motion as frivolous, vexatious, and intended to delay the matter while wasting judicial resources. He urged the court to dismiss it with costs.
7. The Interested Party also filed Grounds of opposition dated 23rd June, 2023 to the effect that the motion is legally incompetent, an

abuse of the court process, and in violation of Order 17 Rule 2(5) of the Civil Procedure Rules due to failure to prosecute the matter since its filing; that the court lacks jurisdiction as it is functus officio, having already determined the issues on 31st October 2022, and hence the application is res judicata there being no new or compelling grounds to justify reopening the matter.

8. The Applicant did not file submissions, choosing to rely on the supporting affidavit.
9. The submissions by the Interested Party support as proper, the dismissal of the cause on 31st October 2022 for want of prosecution due to the Applicant's failure to attend court. Reiterating their affidavit material, counsel asserted that the Applicant had failed to prosecute the matter since its filing in December 2021 and is thus guilty of unreasonable delay. Reliance was placed on **Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR** concerning undue delay in the prosecution of a case.
10. The Respondent further argued that reinstatement is a matter of judicial discretion which must be exercised judiciously and only where sufficient cause is shown. In support, citing **Thathini Development Company Limited v Mombasa Water & Sewerage Company &**

another [2022] eKLR, where the court emphasised that the discretion of Court to set aside an order for dismissal must be exercised judiciously, and a party seeking to reverse a dismissal order must give satisfactory grounds to persuade court to exercise its discretion.

11. Additionally, the Respondent highlights that reinstatement would occasion prejudice, as the Interested Party's debts owed by the Applicant remain unpaid and has been hindered from enforcing its lawful entitlements due to the pendency of these proceedings. Here echoing the court's caution in **Re Kenya Airfreight Handling Limited (2018)** against the abuse of insolvency proceedings as a shield against legitimate debts. Counsel contended that the delay herein has undermined the right to a fair and expeditious trial and caused injustice to the Respondent.

12. In conclusion, the Respondent maintains that the dismissal of the suit was proper, that no sufficient cause has been shown to warrant reinstatement, and that allowing the application would be a miscarriage of justice. The court was therefore urged to dismiss the application with costs.

Analysis and Evaluation

13. Having considered the material canvassed in respect of the motion, the court took the following view. First, although the motion seeks review of the dismissal orders of this court, in substance, the motion essentially seeks to set aside the dismissal order of 31.10.2022 and the reinstatement of the suit. And while the Applicant only invokes Articles 50 and 159 of the Constitution, the motion ought to be considered under the principles encapsulated in Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the CPR, rather than Order 45 Rule 1 of the CPR providing for review. Thus, contrary to the contention by the Interested Party, the court has the jurisdiction to entertain the instant motion.

14. While Sections 1A, 1B and 3A of the CPA provide for the overriding objectives of the CPA, and the court's inherent power, respectively, Order 51, Rule 1 of the CPR provides a general application procedure where no specific procedure is prescribed by the Rules. Articles 50 and 159 of the Constitution guarantee the right to a fair hearing and the duty of the court to uphold substantive justice above procedural technicalities, respectively.

15. Section 3A (supra) reserves the inherent power of the court **"to make such orders as may be necessary for ends of justice or**

to prevent abuse of the process of the court.” The Court of Appeal in **Rose Njoki King’au & Another v Shaba Trustees Limited & Another [2018] eKLR** stated concerning the provision that:

“Also cited was Section 3A of the Civil Procedure Act which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is

therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

16. The Supreme Court went further in **Board of Governors, Moi High School Kabarak and another v Malcolm Bell [2013] eKLR**, to add the following:

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

17. Evidently therefore, the court’s power to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. In addition, the onus is on an applicant to tender credible material upon which the court can be persuaded to exercise its discretion in his or her favor. In the case

of **Shah v Mbogo & Another [1967] E.A 116** the rationale for the discretion was spelt out in the following manner:

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

18. The principles enunciated in **Shah v Mbogo (supra)** were further amplified by the court in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal force in this matter.

19. Has the Applicant demonstrated accident, inadvertence or excusable mistake, error or any other sufficient reason for his and his counsel's non-attendance on the date of dismissal? He has claimed that both he and counsel were present virtually on 31.10.2022 but

were muted and unable to participate. While this claim may qualify as "*sufficient reason*" in appropriate circumstances, it must be supported by credible evidence. In this matter the Applicant did not tender any evidence to substantiate the alleged technical difficulty; further there was no indication of prompt action taken to alert the Court or registry.

20. The Applicant's subsequent conduct, including repeated non-attendance, undermines the credibility of this explanation. There has been inordinate delay in prosecuting both the suit and the application, giving credence to the Interested Party's complaint that the Applicant is guilty of dilatory conduct intended to delay the settlement of just debts, hence an abuse of the insolvency proceedings. The discretion to set aside cannot be exercised in favour of a party who appears to deliberately obstruct or delay the cause of justice.

21. The cause of action in this case allegedly arose prior to 2021 and given the nature of the claim and relationship of the parties as disclosed in the pleadings, it is the Respondents who stand to suffer the most prejudice from further delays. Although the Applicant's right to be heard is constitutionally guaranteed, it is not absolute and must

be balanced against the corresponding right of the party who has been dragged to court, to have the dispute expeditiously determined. At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute his case at leisure, and in total disregard of the overriding objection encapsulated in **Section 1A** and **1B** of the **CPA** by which parties and counsel are duty bound to cooperate with the Court in furthering the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.

22. Regarding the above provisions, the Court of Appeal stated the following in **Karuturi Networks Ltd & Anor v Daly & Figgis Advocates, Civil Appl. NAI. 293/09:-**

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or

implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”

23. The court having considered all the foregoing is not persuaded that the Applicant has made a case warranting the reinstatement of its cause. The Court is of the firm view that the justice of the matter lies in dismissing the motion dated 10.11.2024 with costs to the Interested Party. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF APRIL 2026.



C.MEOLI
JUDGE

In the presence of:

For the Applicant: N/A

For the Interested Party/ Respondent: Mr. Situma

C/A: Lepatei