



**Kuria v Kariuki & 4 others (Miscellaneous Civil Application  
574 of 2012) [2024] KEELC 1064 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1064 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS CIVIL APPLICATION 574 OF 2012**

**J OMANGE, J**

**FEBRUARY 15, 2024**

**BETWEEN**

**PAUL NGANGA KURIA ..... APPLICANT**

**AND**

**ERNEST MWANIKI KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE ATTORNEY GENERAL (SUED ON BEHALF OF THE CHIEF  
LAND REGISTRAR) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH NZYOKI MWANTHI ..... 1<sup>ST</sup> PROPOSED RESPONDENT**

**DEVELOPMENT BANK OF KENYA LIMITED . 2<sup>ND</sup> PROPOSED RESPONDENT**

**TAIFA AUCTIONEERS ..... 3<sup>RD</sup> PROPOSED RESPONDENT**

**RULING**

1. In the Notice of Motion application dated 3<sup>rd</sup> April 2023 the Applicant sought the following orders:
  - a. That the honourable court be pleased to set aside the orders dismissing the application dated 24<sup>th</sup> April 2022 for non-appearance by the plaintiff's counsel at the time the matter was coming up on the 23<sup>rd</sup> June 2022 and all consequential orders.
  - b. That the plaintiff's pleadings be reinstated and deemed to be on record.
  - c. That the application dated 24<sup>th</sup> April 2022 seeking for review be reinstated.
  - d. Costs of the application.



2. The Applicant depones that the matter was dismissed on the 23<sup>rd</sup> of June 2022 after the then counsel failed to attend court for hearing of their application for review dated 24<sup>th</sup> April 2022. That the failure to attend was an honest mistake as counsel who at time was on record, left the law firm he had been working at and communication was hindered due to his moving away.
3. The Applicant in her submissions highlighted that counsel on record failing to attend court was an honest mistake which mistake should not be occasioned to him. That at the time of the said case he was unaware of the courts processes and was also indisposed making the communication channels as between him and his counsel difficult, but on the discovery of the mistake, sort advise of another advocate who then instructed him to make an application for reinstatement.
4. He submitted in the case of *Gideon Mose Onchwati v Kenya Oil Co. Ltd & Another* [2017] eKLR quoting the decision in *Shah v Mbogo* and *Ongwom v Owota* the court held that mistakes of counsel should not be occasioned to a litigant unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions. Further, the Applicant relied on the provisions of Article 159 of the *Constitution* of Kenya that states justice shall be administered without undue regard to technicalities. He also relied on provisions of Order 12 Rule 7 of the *Civil Procedure Rules* that touch on setting aside an order of dismissal of a suit. Lastly, he submitted that his reasons were justifiable to have the suit reinstated as per the reasons given in *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015 eKLR.

#### **Analysis and determination**

5. The Respondents herein did not participate hence the Applicant's application is unchallenged and uncontroverted. Though the application is unopposed, it is the duty of the Court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. Indeed, in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR the Supreme Court of Kenya held that "as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It is for the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court..."
6. Order 12 Rule 7, the court has discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or no-attendance. In the cited case by the plaintiff/Applicant that is *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015 eKLR, the court held the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.
7. The court's main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from inadvertence or excusable mistake. Discretion should not be used to assist a person who has deliberately sought to obstruct the court of justice as was held in the case of *Bilba Ngonyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR.
8. The Applicant blames his former counsel on record for failing to attend to the matter due to him leaving the law firm he was acting at. A law firm should have systems that should ensure continuity even if an associate leaves a firm.



9. Be that as it may, the Applicant should have an opportunity to ventilate his application on merit. Articles 48 and 50 of the Constitution guarantees every Kenya right to access to justice and fair hearing.
10. Looking at the totality of the circumstances in this matter, the court makes the following orders.
  - a. The order made on 23<sup>rd</sup> June, 2022 dismissing the application for non-attendance is hereby set aside subject to clause (c) below.
  - b. application dated 24<sup>th</sup> April, 2022 is reinstated for hearing.
  - c. Subject to payment of thrown away costs of 20,000 and also adherence to time lines set aside by court for hearing.
  - d. Costs to abide outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF FEBRUARY 2024.**

**JUDY OMANGE**

**JUDGE**

In the presence of:

No appearance by parties

Steve - Court Assistant

