



**Imbochi v Leopard Beach Resort & Spa (Civil Application
E081 of 2023) [2024] KECA 726 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 726 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E081 OF 2023
GV ODUNGA, JA
JUNE 21, 2024**

BETWEEN

ZACHARIA IMBOCHI APPLICANT

AND

LEOPARD BEACH RESORT & SPA RESPONDENT

*(Being an application for reinstatement of the Notice of Motion dated
25th May 2023 dismissed for non-attendance on 11th December 2023)*

RULING

1. By his application dated 14th February 2024, the applicant herein seeks to reinstate the application dated 25th May, 2023 which was on 11th December 2023 dismissed for non- attendance. The applicant also seeks that leave be granted to the firm of C. Masinde & Company Advocates to come on record for him as well as provision for costs.
2. The appeal arose from a claim by the applicant for unfair termination of employment in which G. Kiage (SRM) on 5th March, 2020 found in favour of the applicant and awarded him 12 months gross pay compensation. On appeal to the ELRC, the learned Judge found that there was procedural fairness before the applicant’s termination, allowed the appeal and set aside the trial court’s decision.
3. Intending to appeal but finding himself out of time to do so, the applicant by a Notice of Motion dated 25th May 2023 sought an extension of time to file his Notice of Appeal. When the application came up for hearing on 11th December 2023, this Court dismissed the application for non-attendance since the applicant had neither filed submissions nor appeared at the hearing.
4. It is that decision that provoked the application that is the subject of the instant ruling.
5. According to the applicant, a hearing notice for the Notice of Motion dated 25th May, 2023 was served to an email address zachariahimbochi@gmail.com instead of his official email address



- zachariaimbochi@gmail.com; that the applicant learnt of the dismissal when he visited the Court Registry; that the non-attendance was not pre-meditated as the hearing notice was sent to the wrong email address and he never received it; that he has a prima facie case with chances of success and he stands to suffer prejudice and substantial loss; that the application has been brought without unreasonable delay; and that it is in the wider interest of justice that the orders sought be granted as he is desirous on prosecuting the appeal.
6. The application was opposed by an affidavit sworn on 3rd April, 2024 by Mwanaisha Suleiman Nizamdin, the respondent's Human Resource Manager who averred that the application is bad in law, incompetent, fatally defective and an abuse of the court process as it is not brought under any known provisions of the *Appellate Jurisdiction Act* or the *Court of Appeal Rules*, 2022; that the application is brought under inapplicable Civil Procedure Rules, 2010; that the prayer for the order that the firm of C. Masinde & Company Advocates do come on record for the applicant is misconceived; that the application is founded on material misrepresentation and concealment of material facts that are evident from the court record; that the Notice of Motion dated 25th May, 2023 provided two email addresses of the Applicant as zachariahimbochi@gmail.com and zachariaimbochi@gmail.com; that it is apparent that on 22nd November, 2023, the hearing notice was sent to both emails by the Court; that the present application was filed several months after the dismissal of the Notice of Motion dated 25th May, 2023.
 7. When the application was called out for hearing on the Court's virtual platform on 5th June 2024, learned counsel, Mr. Wachira was present for the respondent while there was no appearance for the applicant despite due service of the hearing notice. Nevertheless, since there were on record submissions filed on behalf of the applicant by the firm of C. Masinde & Co Advocates, dated 19th April 2024, the hearing of the application proceeded pursuant to the proviso to rule 58 of this Court's Rules.
 8. It was submitted on behalf of the applicant, while reiterating the contents of the supporting affidavit, that the respondent had not demonstrated the prejudice likely to be suffered if the relief sought is granted. Reliance was placed on *Kasturi Limited v Nyeri Wholesalers Limited* [2014] eKLR; *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR; and *Joseph Kinyua v GO Ombachi* [2019] eKLR to highlight the considerations for determining an application for reinstatement. According to the applicant, justice should be administered without undue regard to procedural technicalities in accordance with Article 159(2)(d) of *the Constitution*. Based on the foregoing, I was urged to allow his application.
 9. On behalf of the respondent, Mr Wachira relied on the submissions dated 26th April 2024 which he highlighted briefly. According to the respondent, in so far as the application is grounded on Civil Procedure Rules as opposed to the Court of Appeal Rules, the same was incompetent; that the applicant has not proffered any evidence to justify the reason for his non- attendance on 11th December, 2023; and that it has not been demonstrated that he was prevented by sufficient cause from appearing in court. On the necessity of demonstrating sufficient cause, the respondent cited the cases of *Kenya Wildlife Service v Sea Star Malindi Limited* Civil Application No. 44 of 2021 [2022] KECA 1339 (KLR); *Ngugi v Thogo* Civil Application No. 372 of 2018 [2021] KECA 88 (KLR) and *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2016] eKLR. Further reliance was placed on *Tana Teachers Co-operative and Credit Society Limited v Andriano Muchiri* [2018] eKLR in contending that overriding objective is not a panacea of all procedural shortfalls. The respondent also cited the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR to urge this court not to exercise its discretion.
 10. According to the respondent, the firm of C. Masinde & Company Advocates is not properly on record as the respondent was not served with any notice of appointment of advocates pursuant to Rule 23 of



the Court of Appeal Rules and for this submission, the respondent relied on *Symposia Consult Limited v George Gikere Kaburu & 2 Others* [2019] eKLR. The respondent asserted that this Court cannot provide cover to parties who exhibit scant respect for rules and timelines hence the application should be dismissed with costs.

11. I have considered the application, affidavits in support and in opposition to and the written submissions. An application for reinstatement of a dismissed application is governed by rule 58(3) and (4) of the *Court of Appeal Rules* which provides that:
 3. Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to rehear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.
 4. An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days after that party's first hearing of that decision.
12. The two conditions for the reinstatement of an application dismissed or allowed for non-attendance are: whether a sufficient cause has been shown and whether the application is made within 30 days of the decision or 30 days after a party who ought to have been served but was not served first hears of the decision.
13. However, as rightly pointed out by Shah, JA in *Peter Nyamu Kabuu v Eliud Karani* Civil Application No. Nai. 293 of 2000, in an application seeking to reinstate an earlier application which was dismissed for want of prosecution the Court must keep in mind the fact that it is not dealing with the merits or demerits of the application which is sought to be reinstated lest it trespasses upon the territory of another judge should that dismissed application ever come up for hearing.
14. In this case the reason advanced is that the hearing notice was sent to the wrong email address. The applicant contends that the hearing notice was dispatched to email address zachariahimbochi@gmail.com instead of his official email address zachariaimbochi@gmail.com. However, in the application dated 25th May 2023 which was the subject of the reinstatement application, the applicant disclosed both the two above email addresses as belonging to him. The hearing notice was addressed to both email addresses. In his submissions the applicant has introduced another email address being zakariaimbochi@gamil.com as his rightful address. It is clear that the Court relied on the email addresses supplied by the applicant in serving him with the hearing notice. If the applicant did change his email address, and he has not stated so, then it was upon him to inform the Court of that development.
15. The decision whether or not to reinstate a dismissed application for non-attendance is an exercise of discretion and a suppliant for the favourable exercise of discretion must demonstrate his bona fides. In this case the applicant is very economical with the truth. He approached this Court on the ground that the hearing notice was dispatched to an incorrect email address. When confronted with the fact that the hearing notice was in fact dispatched to the email addresses supplied by him, he changed the story and introduced a totally different email address in his submissions that was unknown to the Court. As Shah, JA held in *John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000*, (UR) a delay to file appeal within time, that is sought to be explained away by contrived grounds cannot be bona fide. Similarly, an explanation for failure to attend Court when the matter came up for hearing that is sought to be explained on contrived grounds cannot be bona fide and therefore does not meet the threshold of sufficient cause for the purposes of rule 58(3) of the Rules.



16. Apart from that, such an applicant is required by rule 58(4) of the Rules to be made within 30 days of the decision or 30 days after a party who ought to have been served but was not served first hears of the decision. In this case the applicant has not disclosed the date when he visited the registry and became aware of the dismissal of his application. Lack of such information deprives the Court of the power to exercise discretion in favour of the applicant for failure to bring himself within the ambit of rule 58(4) of the Rules.
17. In the circumstances the application dated 14th February 2024 lacks merit and is dismissed with costs.
18. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Signed

DEPUTY REGISTRAR

