



**Masai Investment Ltd v Kenya Ports Authority (Civil Appeal (Application)
38 of 2020) [2023] KECA 513 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 513 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 38 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MAY 12, 2023**

BETWEEN

MASAI INVESTMENT LTD APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

*(An application to set aside the order dismissing the appeal arising
from the ruling and orders of Honorable Lady Justice D.O. Chepkwony
delivered on 18th July 2019 in Mombasa High Court Civil Case 71 of 2018)*

RULING

1. Masai Investment Ltd, the Applicant herein seeks to set aside orders granted by this Court on November 1, 2022 dismissing its appeal for want of prosecution and to reinstate the said appeal for hearing and determination on merits. The Applicant states in its Notice of Motion application dated November 7, 2022 and written submissions dated December 13, 2022 that its appeal was scheduled for hearing on November 1, 2022, but that the absence of the Applicant or of its advocate and failure to attend Court on the material day was not deliberate or intended to delay the matter, but was due to technical difficulties which occasioned the said absence.
2. Shimaka N Leonard, the Applicant's advocate, deponed in an affidavit sworn on November 7, 2022 in support of the application that he was unable to log into the Court's online portal due to challenges that were beyond his control, and that he later realized the appeal had been dismissed for want of prosecution. Further, that the mistakes of counsel should not be borne by the client.
3. The applicant relied on the case of *Philip Chemowolo & Another vs Augustine Kubende*, [1982-88] 1 KAR 103 to submit that issues which ought to be determined on merit by the Court and the technical failure of the advocate to appear before the Court should not be borne by the Appellant. In addition, that the Respondent would not be prejudiced if the application is reinstated, heard and determined on



merit, and section 3A of the [Civil Procedure Act](#) gives this court inherent power to make such orders as may be necessary for the ends of justice to be met, while Order 51 rule 15 of the [Civil Procedure Rules](#) gives the court power to set aside any order made ex parte.

4. The Kenya Ports Authority, the Respondent herein, opposed the application by way of a replying affidavit sworn on December 13, 2022 by Amos Cheruiyot, its Senior Legal Officer in the Litigation and Disputes Department, who detailed the various mentions when the appeal was fixed for case management, and averred that when the appeal was fixed for case conference in November 30, 2021 Mr Shimaka attended for the Appellant and stated that he would file the Appellant's submissions within 7 days thereof. However, at a mention to confirm compliance on February 15, 2022, the Appellant's Advocates had neither complied with the above directions nor did they attend to the mention, and directions were given that the appeal be fixed for hearing. That on October 17, 2022, the Deputy Registrar consequently notified parties that the appeal had been fixed for hearing on November 1, 2022 and implored on the parties to file their written submissions within 7 days. However, that in the absence of any filings by the Appellant, the Respondent was left with little option but to file its written submissions, case and authorities digest and supplementary Record of Appeal which it did on October 31, 2022, and which were all served upon the Appellant's Advocates. The Respondent annexed a copy of notification by e-mail send by the Court of the hearing of the appeal.
5. We heard the application on December 14, 2022, and there was no appearance for the Applicant despite its advocate having been duly served with the hearing notice, while Mr Sanjeev Khagram was present for the Respondent. Mr Khagram made oral submissions and reiterated there were several case conferences held and the applicant did not comply with directions in terms of filing submissions on the appeal, and that the Court's discretion cannot be based on caprice or whim. It was urged that that the reasons given by the Applicant's counsel were not convincing, since the Applicant's appeal was called at the tail end on the hearing session on November 1, 2022, and that there are no details of the difficulties encountered by the Applicant's counsel for the applicant when logging in to the hearing. Therefore, that the counsel's conduct was not excusable, as also shown by his absence to prosecute the application for restoration of the appeal.
6. Rule 105 (1) of the [Court of Appeal Rules](#) of 2022 provides that where an appeal has been dismissed for non-attendance, the appellant may apply to the Court to restore the appeal for hearing, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing. This Court in a similar application for restoration of an appeal held in [Habo Agencies Limited vs Wilfred Odhiambo Musingo](#) [2016] eKLR that the exercise of discretion by this Court should be judicious and not arbitrary, and that the duty is on the applicant to give convincing and satisfactory reasons to explain the non-attendance. Further, that whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel as agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences.
7. In the present application, it is evident that despite having been given directions to file submissions on the appeal on November 30, 2021, there was no compliance by the Applicant's advocate one year down the line. In addition, given that the nature of the technical challenges face by the Applicant's counsel during the hearing held on November 1, 2022 were not explained nor demonstrated, we decline to exercise our discretion in favour of the Applicant. In our view, this is one of those cases where the client ought to have been more proactive in following up with its counsel on the state of its appeal, and should also bear responsibility for the dilatory conduct of its advocate.
8. We therefore find no merit in the Applicant's Notice of Motion application dated November 7, 2022, which is hereby dismissed with costs to the Respondent.



9. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY, 2023.

S. GATEMBU KAIRU (FCI Arb.)

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

.....

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

