



**Africa Blooms Limited v Gatari (Suing as the Legal Representative  
of the Estate of Samuel Karuga Gatari - Deceased) (Civil Application  
E021 of 2022) [2023] KECA 918 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 918 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E021 OF 2022  
F SICHALE, JA  
JULY 28, 2023**

**BETWEEN**

**AFRICA BLOOMS LIMITED ..... APPLICANT**

**AND**

**GADSON GATARI (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF SAMUEL KARUGA GATARI - DECEASED) ..... RESPONDENT**

*(Being an Application for Reinstatement of the Application dated 2nd August 2019, dismissed  
by Nambuye, Asike-Makhandia & Kantai JJ.A on 3rd February 2021, for want of prosecution)*

**RULING**

1. The application before me sitting as a Single Judge is a motion dated May 6, 2022, brought pursuant to the provisions of Sections 3A & 3B of the [Appellate Jurisdiction Act](#), rules 4, 5 (2) (b) , 42,43,47, 56 (3) 56 (4), & 57 (2) of the [Court of Appeal Rules, 2020](#), Articles 50 (1) & 159 (2) (d) of the [Constitution](#) and all other enabling provisions of the Law in which Africa Blooms Limited (the applicant herein), seeks *inter alia* an order for extension of time under Rule 56 (4) of the Court of Appeal Rules 2010, within which an application for reinstatement of a dismissed application may be made.
2. The motion is supported on the grounds on the face of the motion and an undated supporting affidavit, sworn by Inder Nain, the managing director of the applicant who gave a lengthy history of the matter and deposed that they had filed Nakuru ELC Case No 9 of 2019, on January 31, 2019, seeking inter alia, injunction orders against the respondent, which application was heard and dismissed by the ELC Court on the grounds *inter alia* that there was a valid decree in favour of the respondent in Nakuru HCCC No 11 of 2004 and that issuing the injunctive orders would impede execution of the said decree.



3. That, being aggrieved with the aforesaid decision of the court, they instructed their advocates to move on appeal to the Court of Appeal to challenge the said decision and on August 2, 2019, they made an application whose import was to maintain the status quo over the suit land pending the hearing and determination of the intended appeal. The application was set down for hearing on February 3, 2021, but unfortunately on the said date, their then advocates did not attend court prompting the Court to dismiss the application for want of prosecution.
4. He further deposed that it was on the basis of these events that they were making the present application of reinstatement of the dismissed application dated August 2, 2019 and that the order for enlargement of time was merited on the basis that the delay was occasioned by lack of diligence on the part of their then advocates and that had they known that the application had been dismissed, they would have taken all reasonable measures to lodge the application for reinstatement within 30 days of the decision made by the Court on February 3, 2021.
5. The motion was opposed vide a replying affidavit sworn by the respondent on May 19, 2022, in which he deposed that the applicant ought to have filed the application to reinstate the dismissed application within 30 days and that it was too late in the day for the applicant to come to Court when its advocate was duly served and chose not to appear and that in any event, no prejudice would be suffered by the applicant as there are no houses built on the suit property.
6. When the matter initially came up for plenary hearing on October 12, 2022, before a full Bench of this Court (Sichale (P), Achode & Korir JJA), Mr Situma learned counsel appeared for the applicant whereas Ms Nancy Njoroge appeared for respondent. Both parties relied on their written submissions dated May 20, 2022 and May 18, 2022, which they briefly orally highlighted in Court. The Bench heard the matter and subsequently slated a ruling date on December 8, 2022.
7. Vide a ruling delivered on December 8, 2022, the Court noted that the applicant was seeking a motley of prayers in the same application namely; enlargement of time, injunction and stay of execution. The Court subsequently, directed the application for enlargement of time be placed before a single Judge to be heard on merits or otherwise, before the other prayers could be considered. The matter was subsequently placed before me for hearing on May 24, 2023.
8. It was submitted for the applicant that the misdeeds of its former advocates should not be visited upon them and that the delay herein was occasioned by lack of diligence on the part of its former advocates. For this proposition, reliance was placed on the case of *Kasturi Limited v Thogo* (Civil Application 372 of 2018 ([2021] KECA 88 (KLR) CIV 22 October 2021).
9. On the other hand, it was submitted for the respondent that the applicant had not supplied sufficient reasons for reinstatement and that blaming its former advocates for non-attendance of Court on February 3, 2021, without disclosing the nature of engagement it had with its advocates with regard to when and how it last communicated with its advocates over the matter was not sufficient.
10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
11. The applicant's motion is brought *inter alia* under Rule 4 of this Court's Rules. The said Rule provides:

“ 4. Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the



doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

12. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* CA No NAI 332 of 2004, this Court stated as follows regarding its discretion under the Rule and the factors that ought to guide its exercise:

“The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

13. In the instant case, the impugned application that the applicant seeks to have reinstated was dismissed on February 3, 2021, on account of non- attendance on part of its then advocates whereas the instant application has been brought after a period of more than one year from the date of the dismissal of the impugned application as it dated May 6, 2022. A period of more than 1 year is certainly inordinate/ unreasonable given the circumstances of this case.
14. As regards the reasons for the delay, the applicant contends that the dismissal of their application dated August 2, 2019, is squarely attributable to the mistakes of its former advocates who failed to attend court on February 3, 2021, when the application was slated for hearing and that they only became aware of the dismissal towards the end of April 2022 when the respondent visited the suit land in the company of police officers ready to take possession of the portion in question and that was the reason why they did not take reasonable steps to lodge the application for reinstatement within 30 days as required by the Rules. From the circumstances of this case, can it be said that the reasons given by the applicant are reasonable/ plausible?
15. It is indeed trite law that mistake of counsel should not be visited on an innocent litigant. However, the contention by the applicant that they only became aware that their application had been dismissed after a period of 1 year and 2 months (ie, in April 2022), is in my opinion not plausible and reasonable as it only shows that they were not serious with the case. Additionally, it was not stated when was the last time that they communicated with their aforesaid former advocate. It must always be remembered that a case belongs to a client and not their advocates and clients have a corresponding duty to keep checking on the status of their case with their advocates.
16. In the instant case, the applicant “sat pretty easy” for a period of more than one year not bothering about the status of its case. Had they been diligent enough, they would have made efforts to find out the status of their case and move the Court appropriately.
17. In *Peter Kinyari Kibumba vs Gladys Wanjiru Migwi & Another* C.A Civil Application No NAI 121 of 2005 (6/05 NYR) (unreported) Waki JA, held that:

“With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them.



The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation....”.

Again, in *Alice Mumbi Nganga vs Danson Chege Nganga & Another* (2006) eKLR. Kimaru J (as the then was), stated persuasively thus: “This court has unfettered discretion to set aside any order which was entered ex parte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant.”.

18. I fully agree with the position taken by the Judges in the above two cases that I have cited. From the circumstances of this case, I am of the considered opinion that the reasons put forth for the delay are not reasonable and plausible.
19. With regard to the possibility of the appeal succeeding, I have looked at the issues raised by the applicant on the face of the motion and I am not in position to make a determination on this issue sitting as a Single Judge. I am also alive to the fact that the applicant is not seeking an extension of time to file an appeal out of time but rather extension of time under Rule 56 (4) of the *Court of Appeal Rules 2010*, within which an application for reinstatement of a dismissed application maybe made and under the Rule, an applicant needs to demonstrate sufficient cause/ reason that prevented their attendance and in the instant case and as I have already found none has been demonstrated.
20. The upshot of the foregoing is that there is no merit in prayer 5 of the applicant’s motion dated May 6, 2022, and the same is hereby declined. I make no order as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY,2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

