



**Golden Century Limited v Josef (Environment and Land Miscellaneous Application E224 of 2024) [2025] KEELC 688 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 688 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E224 OF 2024  
MD MWANGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**GOLDEN CENTURY LIMITED ..... APPLICANT**

**AND**

**SCIBORSKI ROMUALD JOSEF ..... RESPONDENT**

**RULING**

**Background**

1. The Applicant in the application dated 7<sup>th</sup> November 2024, seeks orders to set aside the dismissal order of 5<sup>th</sup> November, 2024 dismissing its application dated 17<sup>th</sup> October, 2024 and the reinstatement of that application. The Applicant alleges that its failure to attend court on the date scheduled for the hearing of the application was a result of an oversight on the part of its advocates. The hearing date issued for the hearing of the application being the 5<sup>th</sup> November, 2024 was not internally circulated within the law firm. The Advocate who was dealing with the matter was therefore not aware of the requirement to attend court on the material date.
2. The Applicant asserts that its application raises triable issues which ought to be heard on merit as the Respondent has been in unlawful occupation of the suit apartment having failed to complete payment of the same and without paying the licensee fee. It further asserts that this application was filed without undue delay and in good faith.
3. The Applicant states that it is ready to pay throw away costs should the court so order.
4. The Application is supported by the affidavit of Lan Xiao, a director of the Applicant company. The deponent reiterates the grounds on the face of the application enumerated above. He pleads that the mistakes of the advocate even if they are blunders should not be visited on the client when the situation can be remedied by an award of costs.



### **Response by the Respondent.**

5. The Application is opposed by the Respondent by way of his replying affidavit sworn on 15<sup>th</sup> November, 2024. The Respondent accuses the Applicant of handling the matter with a lackluster attitude. It was the Applicant who had served him with a hearing notice to appear in court on 5<sup>th</sup> November, 2024. The dismissal of the application by court was therefore lawfully, regular and within the court's discretion.
6. It is the Respondent's position that the Applicant has not provided sufficient and credible reasons for its failure to attend court on the date scheduled for the hearing of its application. Its claims are vague, unsubstantiated and mere afterthoughts. He urges the court not to exercise its discretion to assist a party who has deliberately sought to obstruct or delay justice. A party seeking reinstatement bears the burden of providing clear, credible and sufficient reasons for his/her failure to attend court. Mere negligence or a lack of diligence is not excusable.
7. The Respondent affirms that the Applicant has failed to meet the threshold for setting aside and reinstatement of the dismissed application as it has not demonstrated any excusable reason for its non-attendance.
8. The Respondent alleges that reinstatement of a dismissed application will subject him to unnecessary expenses, anxiety and delay thereby prejudicing his right to a fair and expedient hearing of his dispute. He urges the court to dismiss the application.

### **Directions**

9. On 25<sup>th</sup> November, 2024, the court directed that the application herein be disposed of by way of written submissions. Both parties complied and filed their respective submissions. The court has had the opportunity to read the submissions and consider them in writing this ruling.

### **Determination**

10. The Applicant in this matter approached this court by way of an application dated 17<sup>th</sup> October 2024 under certificate of urgency. The court considered the application ex parte on 22<sup>nd</sup> October 2024 and directed that it be served for inter partes hearing on the 5<sup>th</sup> November 2024. On the said date however the Applicant did not attend court. Only the Respondent was in attendance. Consequently, the court proceeded to dismiss the application for non-attendance with costs to the Respondent.
11. Two days thereafter, the Applicant filed the current application seeking to set aside the dismissal order and to reinstate the dismissed application. The application is made under the provisions of Order 12 of the Civil procedure Rules. The Applicant has also cited section 3A of the *Civil Procedure Act*.
12. Order 12 Rule 7 of the Civil Procedure Rules gives the court the discretion to set aside or vary its orders upon an application as it may deem just.
13. The Court of Appeal in *Patriotic Guards Ltd. -vs- James Kipchirchir Sambu* [2018] KECA 799 (KLR), had this to say about judicial discretion;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to



the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

14. The real purpose therefore of the discretion conferred upon a court is to real and substantive justice. In considering this application, I am therefore conscious of the calling of this court to do justice.
15. The Applicant pleads with this court not to visit the mistake of his Advocates upon it. It has further expressed its willingness to pay throw away costs should the court so order in order to allow its dismissed application be considered on its merits.
16. In the case of Belinda Murai & 9 others -vs- Amos Wainaina [1979] eKLR, the Court of Appeal again expressed itself as follows with regard to a blunder by an Advocate representing a party in a case;

“ A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

17. I take note that the Applicant filed its application seeking the setting aside of the dismissal order and reinstatement of the dismissed application on 7<sup>th</sup> November, 2024; two days after the dismissal of its application dated 17<sup>th</sup> October, 2024. That is a demonstration of diligence and commitment on the part of the Applicant.
18. I am persuaded that it is in the interests of justice to set aside the dismissal order of 5<sup>th</sup> November 2024 and reinstate the Notice of Motion application dated 17<sup>th</sup> October 2024 for hearing and determination on its merits. In the circumstances, I will exercise my discretion and conditionally allow the application dated 7<sup>th</sup> November, 2024. I direct that the Applicant pays thrown away costs of Kshs. 20,000/= to the Respondent in the next 14 days as the condition for reinstatement of the application.

It is so ordered

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Njoroge Ann for the Applicant

Ms. Nyambeki for the Respondent

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

