



Muikirima v Wanjohi (Administrators of the Estate of the Late Wanjohi Mesheck - Deceased) (Miscellaneous Civil Application E072 of 2024) [2025] KEHC 3964 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E072 OF 2024
EM MURIITHI, J
MARCH 27, 2025**

BETWEEN

SIMON KABERIA MUIKIRIMA APPLICANT

AND

JOSEPH MWANIKI WANJOHI RESPONDENT

**ADMINISTRATORS OF THE ESTATE OF THE LATE WANJOHI MESHECK -
DECEASED**

RULING

1. The applicant filed a notice of motion dated 18th December, 2024 seeking the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to set aside, vary and/or review the orders issued on the 11th November, 2024 dismissing the Applicants' Application dated 29th October, 2024 for non-attendance and reinstate the said Application.
 3. That the costs of this application be in the cause.
2. The applicant's case was based on the supporting affidavit of Valarie Akinyi setting out the facts relied on. The applicant's case is that he filed an application dated 29th October, 2024 seeking:
 1. Interim Order of Stay of Execution of the Judgment and Decree issued on the 19th March, 2024 vide Wang'uru CMCC E128 of 2024.
 2. An extension of time and/or leave and/or permission to the Applicant to lodge an Appeal out of time against the Judgment and Decree rendered on the 19th March, 2024 vide Wang'uru



CMCC E128 OF 2024., between Joseph Mwaniki Wanjohi (Administrator of the Estate of the Late Wanjohi Mesheck) v Simon Kaberia M'ikirima.

That on the 11th November, 2024, when the application came for hearing, the Advocate on record handling the matter was appearing at Wanguru Magistrates Court before Honourable F.Mutuku in Wanguru CMCC E153 OF 2023, Wanguru 161 of 2021, Wanguru E040 of 2020, Wanguru CMCC E185 OF 2023 and Wanguru E001 of 2024. Further, she attempted to log into court before Honourable Justice Richard Mwongo Mururu which efforts turned futile as by the time she managed to log in the court session, the Application dated 29th October, 2024 had already been dismissed/struck out for non-attendance.

3. She said that the failure to attend court on the 11th November, 2024 was inadvertent and the same is highly regretted. That it is trite law that the mistake of an advocate should not be visited on the clients when the situation can be remedied. Finally, the Applicant stand to suffer prejudice and irreparable substantial loss if the subject Application is not allowed as the Respondent will proceed and execute the said Judgement and/or Decree of the Honourable Court given on 19th March, 2024.
4. The Respondent on 18th December, 2024 filed Replying Affidavit indicating that contrary to the Applicant allegations that he is at risk of being condemned unheard is farfetched since he was fully aware of this matter when he filed the application dated 9th August, 2024 in court but failed to attend court for hearing of their application despite having knowledge of the Hearing date. In fact, it is the Applicant who served us with the Application thereof, a fact which the Applicant admits to. That the Applicant was fully aware that the matter was coming up for hearing of their application on 11th November, 2024 however him and his advocates on record failed to attend court deliberately and the application was dismissed with costs for non-attendance and want of prosecution. That it is unfair and unjust for the applicant to seek to reinstate the hearing of the application dated 9th August, 2024 in which this Honourable court rendered its decision and dismissed the application for non-attendance and want of prosecution hence is functus officio. The applicant has belatedly woken up from deep slumber too late in the day to file this application with the intention to steal a match against the respondent. Further the respondent will suffer prejudice if this application is allowed.

Issue

5. The issue for determination is whether the application should be reinstated to hearing.

Analysis

6. The applicant seeks for this Honourable Court to set aside, vary and/or review the orders issued on the 11th November, 2024 dismissing the Applicants' Application dated 29th October, 2024 for non-attendance and reinstate the said Application.
7. It is trite that reinstatement of a suit is at the discretion of the Court, which discretion ought to be exercised in a just manner. As well said in the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, (Naikuni, J.):

“The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”



8. Section 1A (1) of the *Civil Procedure Act* which provides for the overriding objective of the court so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the Act, to assist the court to further the overriding objective by participating in the processes of the court and to complying with the directions and orders of the court as directed.
9. The applicant has explained that failure to attend court was because she was attending to matters in another court. She attempted to log into court via the online platform but the matter had already been dismissed/struck out for non-attendance. The applicant deposed that the failure to attend court on the 11th November, 2024 was inadvertent and the same is highly regretted. That it is trite law that the mistake of an advocate should not be visited on the clients when the situation can be remedied.
10. In the words of the oft-cited dictum of *Apaloo JA in Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR,:

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
11. The respondent deposed that the Applicant was fully aware that the matter was coming up for hearing of their application on 11th November, 2024 however him and his advocates on record failed to attend court deliberately and the application was dismissed with costs for non-attendance and want of prosecution.
12. Nevertheless, the applicant deposed that he would suffer irreparable substantial loss if the subject Application is not allowed as the Respondent will proceed and execute the said Judgement and/or Decree.
13. I consider that it would be fair to reinstate the application dated 29th October, 2024 so that it can be heard on merit. The same will not prejudice the respondent, which cannot be compensated by an award of costs.
14. I respectfully agree with the consideration given by the Court in *Dennis Odiambo v Elius Njoka & another* [2021] eKLR (Chepkwony J.) that:

“I am inclined to avail the Applicant another chance to prosecute his case rather than having the case dismissed on grounds of omissions by his former advocates. I am also satisfied that the loss which the Respondents might suffer as a result can be compensated by an award of damages. In the upshot, the prayer requesting this Court to set aside the dismissal order is hereby allowed.”
15. In the end the dispute shall be heard and determined in a fair hearing by a competent court as is envisaged in the right to fair hearing under Article 50 (1) of *the Constitution*.



Orders

16. Accordingly, for the reasons set out above, the Court finds merit in the application dated 18th December, 2024 and it is granted as prayed.

17. The Costs of the application shall be paid by the Applicant to the Respondent.

Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Akinyi for the Applicant.

Mr. Mugane for the Respondent.

