



**Co-operative Bank of Kenya v Otuoma (Miscellaneous Civil Application
E004 of 2023) [2024] KEHC 704 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E004 OF 2023
PJO OTIENO, J
JANUARY 26, 2024**

BETWEEN

CO-OPERATIVE BANK OF KENYA APPLICANT

AND

BONIFACE CEPHER OTUOMA RESPONDENT

RULING

1. On the 9.2.2023, Notice of Motion dated 01.2.2023 was placed before Musyoka J. as the duty Judge. The matter was certified urgent, interim orders granted and directions issued for the progression of the application. It was directed that the matter be heard on the 4.4.2023 after submissions would have been filed and exchanged.
2. it would appear that the Court did not sit on the 4.4.2023 and the file was thus placed before the Court on the 11.4.2023 for the purposes of extending the interim orders when the orders were indeed extended and matter ordered to be heard on the 25/5/2023.
3. The Minutes of the file show that Counsel for the Applicant attended Court on the 19/5/2023 and took the same date for hearing of the same application.
4. On the 25/5/2023, when the matter was called out, Ms. Andia, Advocate for the Respondent was present but none appeared for the Applicant. The Counsel present told the Court that the date had been taken by consent and prayed that in the absence of Counsel for the Applicant, the application be dismissed for want of attendance. The Court acceded to the request by dismissing the said application.
5. That decision aggrieved the Applicant who then moved the Court by yet another Notice of Motion dated the following day 26.5.2023 but filed on the 30.5.2023 seeking that the dismissal order be set aside. The reasons preferred for failure to attend Court was given to be that there was a Counsel instructed to hold brief who failed to attend Court but the Applicant had nevertheless filed Submissions in compliance with the Court orders. To Counsel, that the Submissions had been filed,



what remained was the giving of a ruling date and that on the 25/5/2023 when the application was dismissed, it ought not to have been so dismissed because the date was purely for Mention hence the dismissal order was erroneous.

6. The application was supported by the Affidavit of a Counsel called Ms. Owuor which reiterated the grounds on the face of the application, albeit under oath. It is worth pointing out that in both the face of the application and the Affidavit the identity of Counsel detailed to hold brief on the 25/5/2023 is not disclosed. That shows lack of candour upon Counsel.
7. The application was resisted by the Replying Affidavit sworn by Counsel for the Respondent, Ms. Maobe Mukhwana whose gist is that the matter was dismissed for non-attendance at the motion of the Court and not by the Counsel for the Respondent. It is however underscored that it is the duty of Counsel to attend Court every time matter is scheduled and all assertions by the Applicant were denied.
8. The Court's power to set aside is intended, to correct errors and omissions that are genuine and or inadvertent but not intended to benefit any litigant who has by evasion or design sought to delay, obstruct or otherwise interfere with the due administration of justice. The power to set aside ought to be exercised freely every time there is a plausible explanation for the default leading to a default order.
9. In this matter, that there was a default to attend is readily and graciously admitted and court's indulgence sought to rectify the mistake which is blamed on an unnamed Counsel who failed to attend Court and hold brief in this matter. Upon reading of the Court file, the Court has noted that the directions of 9.2.2023 had indeed been complied with by both side by filing of Submissions. When Submissions are filed, pursuant to directions by the Court that the matter be heard by such submissions, the matter is deemed prosecuted by the dint of filed Submissions and what remained on the date of Mention was the Court's further directions whether it would require parties to highlight Submissions or if the Court would issue a date for a decision. Such the Court ought to do even in the absence of parties in order that it achieves its overriding objective to deal with a matter both proportionately and expeditiously.
10. In this matter the Court finds that the application had been argued and it did not count much, that Counsel was not in Court. The Court had the duty to look at such Submissions and give further directions. On that basis alone, the Court finds that the dismissal order was in error. Being in error, the interest of substantive justice demands that the error be corrected by an order for setting aside.
11. The consequence of the foregoing is that the orders of 25.5.2023 are set aside, the application dated 01.2.2023 is reinstated to be determined on the merits and on the basis of the Submissions on record.
12. The Court will look at those Submissions and deliver its Ruling on 27.3.2024 at 3.00 p.m.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF JANUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Owuor for the Applicant

Ms. Mukhwana for the Respondent

Court Assistant: Polycap Mukabwa

