



**Kamau v Kaguura (Miscellaneous Application E035 of 2023)
[2024] KEHC 4219 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS APPLICATION E035 OF 2023
RM MWONGO, J
APRIL 25, 2024**

BETWEEN

HEZEKIAH KAMAU APPLICANT

AND

SIMON KAGUURA RESPONDENT

RULING

1. In the lower court proceedings MCCC/E126/2021, the counsel for the applicant/plaintiff herein was late for the hearing held on 22nd June 2023. Accordingly, the trial court dismissed the suit. Counsel arrived late and was denied the opportunity to explain himself.
2. Dissatisfied, the applicant filed this motion seeking that the court be pleased to set aside the lower court's judgment and reinstate the suit so that it could be heard on its merits.
3. The application is premised on the grounds that the plaintiff had been prepared by counsel and was present and ready to proceed with the hearing; and that the defendant will suffer no prejudice if the plaintiff is allowed to prosecute his case.
4. The applicant filed an affidavit in support of his application. He avers in the affidavit, amongst other things, that he filed the suit on 7th February 2023; That he had occasioned only one judgment on 25.4.2023 on account of a medical appointment which coincided with the hearing date; That he had written to the court to explain his predicament and the court indulged him and asked him to provide medical records; That the matter was then fixed for hearing on 22nd June 2023 but his vehicle broke down at Karatina; That he nevertheless remained logged on to the virtual court platform but was not admitted in; That he explained his predicament to the plaintiff so that the court could indulge him, but the suit was dismissed.



5. The respondent filed a replying affidavit opposing the application. He stated that allowing the application will give opportunity to delay the already closed matter; that he had already wasted time and resources in the suit and that the attends court from far away in Limuru Kiambu County.
6. Parties filed submission as directed by the court.
7. The applicant argued that he was aware of the principles in Article 159 for timely disposal of suit and Oxygen Principle which impress upon the parties the overriding objective to ensure expeditious disposal of suits.
8. The applicant stated that the court had discretion to reinstate the suit. He relied on the case of *Ivita v Kyumbu* [1984] KLR 441 where Chesoni J, stated that the test applicable in such cases is whether the delay is prolonged and inexcusable, that both parties to the suit must be considered; that prejudice to be suffered by the defendant must be shown; and that even if delay is prolonged, if the court is satisfied on the plaintiff's excuse for the delay, the suit will not be dismissed.
9. Further reliance was placed on *Bilba Ngonyo Isaac v Kumbu Farm Ltd & Anor* [2018] eKLR which echoed the decision in *Shah v Mbogo & Anor* (1967) EA 116 where it was held that the court's discretion is intended to be exercised to avoid injustice of hardship resulting from inadvertence or excusable mistake or error, but not to assist a person who has sought be evasion or otherwise to obstruct the cause of justice.
10. The respondent submitted that the application is without merit; that the applicant was well aware of the hearing dates and that there were no credible reasons given for reinstatement.
11. Reliance was placed in ELC Case No. 87 of 2018 *Kitale Julius Kibiwott Tuwei v Reuben Argut & 7 Others* where the court noted that the plaintiff had occasioned an adjournment due to absence; and had later occasioned adjournment up to 3.00 pm but was unable to get his house in order, leading to dismissal of the suit.
12. The only issue for determination is whether in the circumstances of this case, the suit should be reinstated.

Analysis and Determination

13. The applicant averred in his supporting affidavit that the suit had proceeded with mention on 7.7.22; 30.8.22, 4.10.22, 22.11.22, and 7.2.23. It was fixed for hearing on 21.3.23 but not proceeded and new dates were taken. That on 25.4.23 when it was fixed for hearing he was engaged in a medical appointment and the court indulged him. These assertions have not been contested.
14. The applicant further stated he prepared the plaintiff and their witnesses for the hearing fixed for 22.6.23, and that his vehicle had a breakdown; that he availed his client to explain his predicament; but the suit was dismissed due to his absence.
15. Order 12 Rule 3 *Civil Procedure Rules* provides for the consequences for none attendance.

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- (1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court; only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.” (Emphasis added).



16. The court has not had the opportunity to review the lower court’s record. However, the applicant asserted in his supporting affidavit that the plaintiff was in court and that he, counsel arrived some minutes late and:

“The honourable court dismissed the suit despite me arriving some minutes later and being denied an opportunity to explain myself to the court”.

17. The above assertion is not contested or denied. Nor was it denied that the plaintiff was at the court. Order 12 Rule 3 (1) calls for dismissal when only the defendant attends. Further it is not denied that counsel attended late and was denied audience.

18. In *Shah v Mbogo (supra)* the court held that:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

19. The respondent cited the case *Julius Kibiwott Tuwei (supra)*. There, the judge held that for an applicant seeking that the court exercise discretion in his favour:

“He must satisfy it that there is sufficient cause or reason to warrant it to be put onto use in seeking aside the order of dismissal and subsequently reinstate the suit”

20. In Julius Kibiwott reliance was placed on the Indian Supreme Court case of *Parimal v Veena* cited in *Wachira Karani v Bildad Wachira* [2016] eKLR. The Indian Supreme Court discussed “sufficient cause” as a ground for discretion to reinstatement and held:

“The test to be applied is whether the defendant [read in part] honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause of which the [party] could not be balanced for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied special circumstances in the case at hand. There cannot be strait – jacket formula of universal application. This the [party] must demonstrate that he was prevented from attending court by a sufficient cause.”

Conclusions and Disposition

21. In my view, the applicant discharged that burden of showing sufficient cause by his explanation that his vehicle broke down, and then that he appeared in court, albeit late. Further the plaintiff was also at court showing that this was not a deliberate scheme to obstruct or delay the case.

22. Accordingly, I will allow the application for reinstatement, on condition that the court’s costs of the adjournment, and the respondent’s costs for the attendance on 22nd June 2023, shall be borne by the applicant/plaintiff.

23. The lower court’s order of dismissal is therefore hereby set aside and the suit reinstated.

24. Order accordingly.

DELIVERED AT KERUGOYA ON THIS 25TH DAY OF APRIL, 2024.

R MWONGO



JUDGE

Delivered in the presence of:

1. Gichuki - for Applicant/Plaintiff
2. Simon Kaguura Ngigi - Respondent in person
3. Murage, Court Assistant

