



Malplast Industries Limited (Under Administration) v Omar & another (Civil Case E511 of 2020) [2025] KEHC 35 (KLR) (Commercial and Tax) (13 January 2025) (Ruling)

Neutral citation: [2025] KEHC 35 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E511 OF 2020
RC RUTTO, J
JANUARY 13, 2025**

BETWEEN

**MALPLAST INDUSTRIES LIMITED PLAINTIFF
UNDER ADMINISTRATION**

AND

**ABDI KANI OMAR 1ST DEFENDANT
ABLUN EAST AFRICA LIMITED 2ND DEFENDANT**

RULING

1. The plaintiff /applicant herein has moved this court by way of a Notice of Motion Application under the provisions of Section 1A&1B, 3 and 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the Civil Procedure Rules. The applicant seeks that;
 - i. Spent
 - ii. The order dismissing the suit made on 4th November 2024 on a mention to confirm whether the defendant filed application to cease acting.
 - iii. The costs of this application and the suit be borne by the defendants.
2. The application is supported by the affidavit of Dennis Muriithi sworn on 8th November 2024 and is premised on the grounds that; the failure to attend court on the part of the plaintiff was due to the downlow of the Court Tracking System which affected counsel's ability to obtain the link to the court's session and by the time of receipt of the virtual court link, the court session had ended; the order for dismissal was a substantive order which ought not to have been made at a mention and in the absence of parties; the plaintiff is still under administration with the administrator making all efforts



to recover monies for settlement of creditors who stand to be prejudiced if the matter stands dismissed; the plaintiff's advocates have at all times attended court and have always been ready to proceed with the suit and lastly that the application has been made without delays.

3. This application was served upon the defendant/respondent who as of the date of this Ruling, had neither filed their response nor submissions. Consequently, the application remains unopposed. Notably, proof of service is evidenced by the Return of Service sworn by Maureen Njuku, a licensed Court Process Server, on the 28th November 2024.
4. In their supporting affidavit counsel for the applicant avers that the failure to attend court was owing to the outage of the Court Tracking System which affected their ability to obtain the link for the courts session on time. That by the time they received the virtual court link, the court session had ended and were later only able to confirm what had transpired. To support this averments counsel has produced a copy of the email from the Registrar confirming intermittent outage of the Court Tracking System.
5. A review of the email from the Registrar, marked as DM3, confirms that the judiciary's online platforms, including the e-filing and cause list portals, experienced intermittent access issues on 4th November 2024, that is the same day this suit was dismissed for non-attendance of the parties.
6. Order 12 Rule 7 gives this court discretionary powers to set aside or vary orders as it deem fit. Thus, the key question is whether the applicant has demonstrated sufficient merit to warrant the exercise of this discretion. In the classical case of *Shah v Mbogo* (1967)EA 116 the court held that;

“discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice.”
7. Guided by the above holding, and after due consideration of the reasons offered by the applicant, I find the justification offered by the applicant reasonable and sufficient to warrant this court's exercise of the discretion. I have also perused the court file and noted that the applicant has consistently attended court as deposed in his affidavit. Thus, I find no compelling reason not to allow the application. Consequently, in the interest of justice, and given that the application is unopposed, I hereby allow the application as prayed in prayer No 2 of the Application.
8. The upshot of the above is that the orders issued by this court on 4th November 2024, dismissing the suit is hereby set aside. The suit is reinstated for hearing and determination. Costs of this application shall be in the cause.

It is so ordered

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

