



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL SUIT NO. 22 OF 2016

SOVEREIGN HOTEL LIMITED.....APPELLANT/APPLICANT

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....1ST RESPONDENT

RULING

1. By a notice of motion dated 8th December, 2018 brought under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Section 1(A), 110.3.17 and Order 51 rule 1 of the Civil Procedure Rules, the applicant prays for orders **THAT**: -

1) This court be pleased to set aside the court proceedings of 4th December, 2018 and order issued there upon dismissing the plaintiff's suit with costs

2) Costs be provided for

2. The application is based on the grounds among others that failure to attend court by the counsel and applicant's witnesses was not deliberate and that the applicant stands to suffer irreparable loss if it is condemned unheard. The application is also supported by two affidavits sworn on 8th December, 2018 by RAYOLA OCHIENG OLEL and JAMES MICHAEL MCTOUCH respectively who aver that they arrived in court late and found that the matter had been called and dismissed.

3. The application is opposed by way of a replying affidavit sworn on 6th March, 2019 by ASHA K. SALIM who describes herself as the 1st Respondent's Debt Enforcement Manager. She avers that the application is calculated to delay the determination of this case.

4. I have considered the notice of motion in the light of the affidavits on record and submissions filed on behalf of the Applicant. In support of the application, the Applicant cited **John Nahashon Mwangi vs Kenya Finance Bank Ltd (In Liquidation) 2015 eKLR** , **Wanjiku Kamau v Tabitha N. Kamau & 3 Others (2014) eKLR** , **Esther Wamaitia Njihia & 2 Others v. Safaricom Limited (2014) e KLR** , **Lochab Bros. Limited V Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 Others[2013]eKLR** and **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR** and **Muwanga Estates and Another Versus N. PART CA 49/2001**.

5. This application was filed 4 days after the dismissal order and was therefore brought without delay. In ***Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76***, Sir William Duffus P held:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

6. It should be the court's last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all, vested on this court by Article 159 of the Constitution cannot be said and be seen to be exercised if the court were to deny a party a chance to be heard on merit especially where failure to attend court has been explained and the party has moved the court without delay.

7. Failure by counsel and witness to attend court has been explained to the satisfaction of the court. The prejudice suffered by the 1st Respondent can be compensated by an award for costs.

8. Consequently, the notice of motion dated 8th December, 2018 is allowed in the following terms: -

a) The order of dismissal of the suit issued on 4th December, 2018 is hereby set aside and the suit be and is hereby reinstated for hearing

b) The applicant is condemned to pay Kshs. 10,000/- to the respondent as throw away costs within 14 days from today's date.

DATED AND DELIVERED IN KISUMU THIS 30th DAY OF May 2019

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistant - FELIX

For the Applicant/Plaintiff - N/A

For the 1st Defendant/Respondent - Ms Onyango/Sijenje