



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 499 OF 2011

SAMEER AFRICA LIMITED (Formerly FIRESTONE EAST AFRICA

(1969) LIMITED APPELLANT

VERSUS

MOLO MUOKI1ST RESPONDENT

KESHRA & SONS LIMITED2ND RESPONDENT

(Being an appeal from the ruling of Hon. A.K. Ndungu, Principal Magistrate at the Chief Magistrate's court (Milimani) Nairobi dated the 15th day of September, 2011 in Civil Suit No. CMCC 266 OF 2008)

J U D G M E N T

The Appellant's suit in the lower court was dismissed on the date it was scheduled for hearing because its advocate was not in court. Thereafter an application was made to reinstate the suit which application was also dismissed by the same court.

Aggrieved by the said order, the appellant filed this appeal.

There are several grounds set out in the Memorandum of Appeal dated 3rd October, 2011 the thrust of which is that, the lower court erred in failing to take into consideration the reasons advanced by the appellant's advocate for his failure to be present in court when the case was called out for hearing. The lower court was also faulted for not appreciating the provisions of Sections 1A and 1B of the Civil Procedure Act and also Article 22 (3) (d) of the Constitution.

Both parties have filed their submissions in canvassing of this appeal and cited several authorities.

It is true that litigation must be conducted expeditiously and efficiently. However, such principles should not be used to lock out the party who has conceived a legitimate expectation to approach the court for justice.

The Advocate for the appellant annexed the cause list of cases he was attending to before he eventually went before the lower court that dismissed the case. He did not abandon his client as such, but unfortunately when he reached the lower court the suit had already been dismissed at the instance of the advocate for the respondents.

I have looked at the record of the lower court. This was not the first time the case was coming up for hearing. On two previous occasions, the case had been listed for hearing and on one occasion it was taken out by consent to allow the respondent to amend the plaint. On one other occasion it was taken out at the instance of the respondents. It is on the third occasion that the advocate for the respondents asked for the dismissal of the suit.

The record does not say whether, other than the advocate, the respondent's witnesses were in court.

I have looked at the pleadings. This was a material damage claim. It has not been alleged that any prejudice shall be visited upon the respondents if the appeal is allowed. I am of the view that the appeal presents several issues which should be canvassed by way of a full trial. I have formed the view that the appeal should be allowed by setting aside the two dismissal orders made on 17th May, 2011 and 15th September, 2011 respectively. The appellant's suit is hereby reinstated.

The lower court file shall be returned for hearing before another magistrate of competent jurisdiction. The costs shall be in cause.

Dated, signed and delivered at Nairobi this 28th day of May, 2019.

A. MBOGHOLI MSAGHA

JUDGE