



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 583 OF 2008

ACHIENG & ACHIENG COMMUNICATIONS LTD.....PLAINTIFF

VERSUS

SAFARICOM LIMITED.....DEFENDANT

RULING

The Plaintiff/Applicant moved this court by way of a Notice of Motion dated the 23rd February 2019 under Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Order 12 Rule 7 and 51 Rule 1 of the Civil Procedure Rules seeking for an order to set aside the order made on 7th February, 2019 dismissing the suit and that the suit be reinstated for hearing.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavits sworn by Thomas K. Bahati and Millicent Odhiambo on 23rd February, 2019. In the said affidavit, the deponent, who is the advocate on record for the plaintiff depones that there was a reasonable cause for the non- attendance of the plaintiff's witness when the matter came up for hearing on the 7th February, 2019, that the defendant proposed to settle the matter through mediation and that the plaintiff's witness had a patient who was admitted in hospital and was undergoing surgery on the day of the hearing.

He avers that the plaintiff is still interested in prosecuting the matter and the delay in prosecuting the same has not been caused by the plaintiff but mostly by lack of Judicial Officers or time and that the Plaintiff has never been faulted or warned by the court to prosecute the matter due to laxity or disinterest in it. He has also laid blame on the defendant for adjourning the matter in all occasions that the same has been adjourned and has urged the court to spare the suit as dismissing it would amount to punishing the plaintiff for agreeing to consider proposals for out of court settlement, including mediation.

In her affidavit in support of the application, Millicent Odhiambo who is one of the directors of the Plaintiff depones that she was aware of the hearing date but on the 25th January, 2019 her advocate on record called her to inform her that the defendant had written to him proposing mediation of the matter. She further deponed that parties herein have had on and off negotiations which did not fully resolve some aspects of the dispute and hence the need to have the dispute resolved by way of mediation.

She averred that on the day of the hearing, her husband and who is a co-director of the Plaintiff was in hospital and was due to be discharged the following day and she could not be able to attend court as she was attending to him.

In its replying affidavit sworn by Grace Wairimu Kinyanjui, on the 29th May, 2019 the defendant essentially supports the application stating that, counsel for the defendant who is the deponent of the affidavit was aware that the matter was not going to proceed as the plaintiff's witnesses were not in court and that parties intended to request that the matter be referred to mediation to enable them explore an out of court settlement and possible amicable settlement of the dispute between them.

The court has considered the application, the supporting affidavits and the replying affidavit. The main reason given by both parties is that they had agreed to refer the matter for mediation. The court has seen and has noted the annexed discharge summary marked as annexure AA by Millicent Odhiambo. It confirms that her husband was in hospital at the material time and she was taking care of her and hence her inability to attend court on the date when the matter was scheduled for hearing.

The court notes that the defendant has not opposed the application going by the contents of the Replying affidavit. However, the court notes that this is a very old matter whose hearing and/or mediation should be expedited by all means. The record shows that since it was certified ready for hearing on 10th June, 2013, nothing much has been done to have the hearing of the case commence. It has been adjourned on a number of occasions at the request of the parties to give them time to negotiate the matter out of court yet they have not been able to agree on a settlement and that is why the matter was dismissed on 7th February, 2019 when a similar reason was given.

Be that as it may, the court shall grant the plaintiff herein a chance to explore settlement by way of mediation process. Consequently, the application dated the 23rd February, 2019 is allowed in terms of prayer 2. The Plaintiff's suit is hereby reinstated for hearing. Costs of the application shall be in the cause.

Dated, Signed and Delivered at Nairobi this 26TH Day of SEPTEMBER, 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Plaintiff

..... For the Defendant