



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 13 OF 2012

JOY MERCY MUTHONI NYAGA.....PLAINTIFF

VERSUS

JACKSON KANYALE NYAPELA.....1ST DEFENDANT

KAMPALA COACH.....2ND DEFENDANT

CHABHADIYA ENTERPRISES.....THIRD PARTY

RULING

1. In the Notice of Motion dated 25th July 2017, the advocates on record for the defendants, Ms. *Kairu & McCourt Advocates* (the applicants), moved this court seeking to have the orders made by the Hon. Deputy Registrar on 23rd March 2017 dismissing their application dated 17th February 2017 set aside. The applicants also pray for reinstatement of the aforesaid application and that costs of the instant application be costs in the cause.

2. The application is premised on the grounds stated on its face chief among them being the claim that the advocate in the firm who was seized of the case on behalf of the defendants was unable to attend the court on 23rd March 2017 due to an inadvertent error which is highly regretted; that if the application is not reinstated, the applicant will be prejudiced but if the application was allowed, the respondents are not likely to suffer any prejudice; that the application has been made in good faith and it is in the interest of justice that it be allowed.

3. These grounds were reiterated in the depositions made in the affidavit supporting the motion sworn on 25th July 2017 by Ms. *Paulina Waruhiu*, the General Manager in charge of claims at *Directline Assurance Limited* which is the insurance company which had insured motor vehicle registration number KBJ 990E which was involved in the accident forming the subject matter of this suit.

4. On 6th June 2018 when the main suit was fixed for hearing, parties agreed that since the instant application was pending, it should be disposed of first to clear the way for hearing of the main suit.

During the hearing of the application, it transpired that no formal response had been filed in opposition to the motion since the motion had not been served on the plaintiff and the 3rd party.

5. In support of the motion, learned counsel for the applicants, Ms *Omay* submitted that failure by the applicant's counsel to attend court on 17th February 2017 was not deliberate but was caused by failure to diarize his diary to show that the application was scheduled for hearing on that day; that counsel was therefore not aware of the hearing date and it was in the interest of justice that the dismissed application be reinstated.

6. On their part, learned counsel for the plaintiff Mr *Nyangito* and learned counsel for the 3rd party Mr *Sileche* relied on the grounds of objection filed by the 3rd party in response to the application dated 17th February 2017. They both urged the court to find that the application amounted to an abuse of the court process as it was mainly meant to frustrate and delay the hearing of the plaintiff's case; that if the instant application was allowed, their clients would be prejudiced; that the application is not merited and it should be dismissed with costs.

7. I have given due consideration to the application, its supporting affidavit and the parties' rival submissions. I have also perused the court record.

I note that some of the submissions made by learned counsel for the plaintiff and the 3rd party touch on the merits of the application dated

17th February 2017 which are matters which should not concern this court in determining the instant application although one cannot help noting the reasons that had been advanced in support of the dismissed application.

In order to determine the application under consideration, the only question that this court should answer is whether the applicants have demonstrated good and sufficient cause to warrant the exercise of the court's discretion in their favour by granting the orders sought.

8. I wish to start by observing that the dismissal order sought to be set aside was made by the Hon. Deputy Registrar and the instant application ought ideally to have been canvassed before the Deputy Registrar. Be that as it may, it is my finding that the explanation given for failure by the defendant's counsel to attend the court on the day the application dated 17th February 2017 was scheduled for hearing is not well founded as it is not substantiated by any evidence. The affidavit supporting the motion was not sworn by any of the advocates practicing in the firm of *Kairu & McCourt Advocates* which is the applicant in both the dismissed and the instant application. Instead, it was sworn by the claims manager of the insurance company who had instructed the advocate's firm to defend the suit. In the circumstances, the depositions in the affidavit as far as they relate to the reasons for failure to attend the court on the material date amount to hearsay and they do not have any probative value.

9. In the submissions made by learned counsel for the plaintiff and the 3rd party, it was claimed that the two parties were not served with the instant application prior to the date fixed for hearing of the main suit despite the fact that the application was filed on 3rd August 2017.

This claim was not denied by counsel for the applicants. It is trite that what is not disputed is deemed to be admitted. I therefore find as a fact that the applicants for undisclosed reasons failed to serve the plaintiff and the 3rd party with the instant application for a period of about ten months yet they must have known that hearing of the suit could not proceed before the application was determined.

10. In the absence of any explanation regarding lack of service of the application even after 20th September 2017 when all parties were represented in court and were reminded by the court about the pendency of the application, I am persuaded to accept the submissions made by *Mr Nyangito* and *Mr Sileche* that the application was not made in good faith and was aimed at delaying the hearing of the plaintiff's suit.

11. In view of the foregoing, I have come to the inevitable conclusion that the applicants have totally failed to establish sufficient cause to warrant the exercise of the court's discretion in their favour by setting aside the dismissal orders made on 23rd March 2017. In the premises, I am satisfied that the application dated 25th July 2017 is devoid of merit and it is hereby dismissed with costs to the plaintiff and the 3rd party.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 27th day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Oduor h/b for Mr Nyangito: for the Plaintiff

Mr Kiptum h/b for Mr Sileche: for the 3rd Party

Ms Mathenge h/b for Ms Omayya: for the Defendants

Mr Fidel Salach: Court Clerk