



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 540 OF 2005

MOSES

DIRU ENZIANO T/A KIMOJOR

BUILDING AND GENERAL CONTRACTORS.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

On 20th April 2015, the Court (Mbogholi, J) dismissed the Plaintiff's suit herein for his non-attendance at the hearing.

The Plaintiff then filed this Notice of Motion dated 27th May 2015 seeking an order to set aside the dismissal and reinstatement of the suit for hearing. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act (the Act) and Order 12, rule 7 of the Civil Procedure Rules (the Rules) which rule bestows on the Court an unfettered discretion to vary or set aside such orders of dismissal "upon such terms as may be just".

The main ground for the application appearing on the face thereof is that, the failure to attend the hearing of 20th April 2015 by the Plaintiff was due to his infirmity. The infirmity is explained in the supporting affidavit sworn by the Plaintiff through the 'medical report' annexed to it showing that he attended hospital on the hearing date where he was diagnosed with diabetes and hypertension.

He further explained that by the time he was able to communicate with his advocate on record to explain his absence, the matter had already been dismissed due to non-attendance; that the non-attendance was neither deliberate nor premeditated; that it is in the interest of justice that the dismissal order is set aside for the suit to be determined on its merits.

The Defendant has opposed the application by replying affidavit sworn by its Legal Manager, Debra Ajwang' on 23rd July 2015. The grounds of opposition emanating therefrom are that the Plaintiff has not availed the attendance card from Kenyatta National Hospital confirming that he visited the hospital on the said date as indicated in the treatment note nor has he annexed receipts showing payment of consultation fees, payment of tests conducted for the diagnosis and medication bought to prove medical treatment of the alleged ill health; that the suit has been set down for hearing on numerous occasions all of which the Plaintiff exhibited laxity in proceeding with hearing; that the Defendant has always been keen to proceed with the matter at all times having complied with pre-trial requirements; that it has been 10 years since

the inception of this suit and the failure to prosecute amounts to obstruction of justice; that the Plaintiff has been indolent and lethargic in pursuing the suit which conduct should not excite leniency from the court.

The application was argued by way of written submissions. The plaintiff filed their written submissions on 6th November, 2015 while the defendant filed its written submissions on 19th November, 2015. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit in opposition to the application and the parties respective written submissions. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules which confers upon the court, the power to set aside an order for dismissal of a case for non-attendance by a party. Whether or not to exercise the power is a matter for the discretion of the court. Like any other judicial discretion, the same must be exercised judiciously on well established principles.

As stated by Potter JA. in **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1KAR 171**, the discretion of the court to set aside judgment entered in default of a party attending a hearing is not limited or restricted. The main concern of the court should be to do justice to the parties and if the court exercises its discretion to set aside the judgment, it should do so on such terms as may be just. In **Shah – vs- Mbogo and Another [1967] E. A 116**, it was held that the court's discretion to set aside an ex parte judgment is not meant to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice rather it is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

What I need to determine is whether the Plaintiff's failure to attend court on 20th April, 2015 constituted an excusable mistake or error or it was meant to deliberately delay the cause of justice. The other issue connected to that is whether it would be just to all the parties to this suit that the orders of that date are set aside. A party who seeks the exercise of the court's discretion in its favour must lay a basis on which that discretion should be exercised. The party should also demonstrate that it is deserving the exercise of such discretion.

The plaintiff has contended that he was unwell and could not attend court on the said date, instead he went to hospital. The plaintiff did not give the name of the Doctor who attended to him and the attempts he had made to have his Advocate informed that he could not attend the hearing.

The plaintiff has also not tendered in evidence enough information on his hospital attendance as rightly pointed out by the Defendant in the Replying Affidavit. It therefore can be inferred that the Plaintiff is not being candid with the court.

I take note that when this suit was dismissed, it had been pending in court for about 10 years. The plaintiff has not explained why the case had not proceeded earlier and attempts if any that they had made to have the case heard. In fact, upon perusal of the file, it is evident that from the conduct of the plaintiff all along in this matter, he has been indolent and exhibited lethargy in prosecuting this case. I am also of the view that a party lacking in candour is not deserving the exercise of the court's discretion in his favour. As correctly submitted by the defendant, litigation must come to an end for the ends of justice to be met.

In conclusion, it is my finding that the plaintiff has not laid a proper basis on which this court can exercise its powers under Order 12 Rule 7 as no credible explanation has been offered for his failure to attend court on 20th April 2015. The application is unmeritorious and is hereby dismissed with costs to the defendant. Orders Accordingly.

Dated, signed and delivered at Nairobi this 17th day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE