



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.191 OF 2011

M/S QUASAR LTD PLAINTIFF

VERSUS

MOGUSII FARMERS CO. LTD DEFENDANT

RULING

1. The plaintiff's Notice of Motion application before me dated 28th October 2014 is seeking the setting aside of the order made herein on 27th October 2014 dismissing this suit with costs for non-attendance. This suit was listed for hearing on 27th October 2014 at the registry by consent of the parties. On 27th October 2014 only the defendant's representatives and the defendant's advocate appeared in court. On application by the defendant's advocate the court dismissed the plaintiff's suit with costs under order 12 rule 3 of the Civil Procedure Rules, 2010. In the present application, the plaintiff has contended that failure by the plaintiff and its advocate to attend court on 27th October 2014 was not deliberate and that it was caused by the plaintiff's advocate's failure to put in the hearing date in his diary. The plaintiff has contended that it is still keen on prosecuting this suit and that it should not be punished as a result of a mistake of its advocate. In his affidavit in support of the application, the plaintiff's advocate Mr. Soire has deposed that although this suit was listed for hearing on 27th October 2014 by consent of both parties, he inadvertently failed to insert that date in his diary. That explains why neither the plaintiff's representatives nor he appeared in court on 27th October 2014 for the hearing. He deposed further that the plaintiff's failure to attend court on 27th October 2014 was due to the failure by his firm to notify it of the hearing date.
2. The plaintiff's application was opposed by the defendant through a replying affidavit sworn by the defendant's advocate Joash Momanyi Nyagwencha on 2nd December 2014. In his affidavit, Mr. Nyagwencha denied that the plaintiff and its advocates failed to attend court on 27th October 2014 due to the failure by the plaintiff's advocate to put the hearing date in his diary. Mr. Nyagwencha argued that on the copy of the diary that the plaintiff's advocate annexed to his affidavit in support of the application, there is an entry "HG HCC" which counsel interpreted to mean "Hearing in the High Court". Counsel argued that the hearing referred to in the said diary was of this case and as such the plaintiff's advocate was aware of the hearing date and cannot blame his alleged failure to diarize the same for the plaintiff's failure to attend court on 27th October 2014. Mr. Nyagwencha deposed in conclusion that this is an old matter which should come to an end.
3. When the plaintiff's application came up for hearing on 11th December 2014, Mr. Soire appeared for the plaintiff while there was no appearance for the defendant. Mr. Soire adopted the contents of his affidavit in support of the application and urged the court to grant the prayers sought. I have

considered the plaintiff's application and the affidavit filed in opposition thereto. This court has unfettered discretion under order 12 rule 7 of the Civil Procedure Rules, 2010 to set aside an order for the dismissal of the suit for non-attendance. This discretion must however be exercised judicially with the sole aim of ensuring that justice is done to the parties. When deciding whether to exercise the discretion or not, the court would consider among others the nature of the case, the reason if any for the plaintiff's failure to attend court and the conduct of the plaintiff before and after learning of the order. The dispute herein between the plaintiff and the defendant revolves around a lease agreement which the plaintiff claims to have entered into with the defendant on 7th July 2006 over the defendant's parcel of land known as LR No. Mombasa/Block II/79 the existence of which lease the defendant has denied. When this suit was dismissed by the court on 27th October 2014, it was the first time that it came up for hearing. The hearing date as I have stated above was taken by consent. The excuse that the plaintiff has given for its failure to attend court on 27th October 2014 is that its advocate through an oversight failed to insert the hearing date once the same was taken in his diary. He also failed to notify the plaintiff of the said date. The present application was filed the following day after the suit was dismissed. The defendant has not contended that it will suffer any injustice or prejudice if the dismissal order is set aside.

4. I am of the opinion that having regard to all the circumstances surrounding this case, the court should exercise its discretion in favour of setting aside the order made herein on 27th October 2014. The dispute between the parties is over a parcel of land. The suit was dismissed the first time it came up for hearing. There is no evidence that the plaintiff intentionally failed to attend court or that it has not been keen on having this suit heard. Setting down the suit for hearing was a sign that the plaintiff wanted to have the case heard. The act of filing the present application immediately the plaintiff's learnt of the dismissal of the case is also an indication of the plaintiff's desire to proceed with the matter. I am of the view that the inconvenience or prejudice that the defendant may suffer as a result of granting the order sought can be compensated for by cost.
5. Due to the foregoing, I am inclined to allow the Notice of Motion application dated 28th October 2014. The same is allowed with costs to the defendant assessed at Kshs. 5,000/= payable forthwith.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Momanyi h/b for Mr. Soire for the plaintiff

Mr. Bigogo h/b for Nyagwencha for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE