



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 100 OF 2013

LEMSOFT CONSULTANCY LTD.....APPELLANT

VERSES

KABASA GUEST HOUSE LTD.....RESPONDENT

Being an appeal from the original ruling of Hon J. Sala, Resident

Magistrate delivered on 17th October 2013 in Kisumu Chief

Magistrate's Court, Civil Suit No.114 of 2013 in Lemsoft

Consultant Ltd –vs- Kabasa Guest House Ltd

JUDGMENT

1. On 25/3/2013, the appellant filed a plaint seeking Kshs.82,104/40 from the respondent in respect of the work done and services rendered in the month of November, 2011. The respondent filed a defence on 17/4/2013 to deny the claim. On 9/5/2013 the appellant went to the registry and took the 4th July 2013 as the date for the hearing of the suit. There was no invitation to the respondent to take a mutually convenient date. When the day came, the respondent was present but the appellant was not. At the request of the respondent the suit was dismissed for want of prosecution. On 5/9/2013 the appellant filed a motion under **Order 12 Rule 7** of the **Civil Procedure Rules** to have the dismissal order set aside. The reason was that the hearing notice that was issued by the court read 114/7/2013, and not 4/7/2013. They went to court on 11/7/2013 to find out and were surprised when told that the case had been heard on 4/7/2013. The respondent's case was that, even if there was confusion about the date, the appellant had enough time to go to the registry and check. Otherwise, they were the ones who had taken the date and caused a hearing notice to issue and cannot be heard to be complaining about it. The trial magistrate declined the request to set aside. Hence this appeal.

2. The hearing notice annexed to the affidavit to support the appellant's application to set aside shows that the hearing notice indicated that the case would be heard on 114/7/2013. The appellant had gone to the registry and given 4/7/2013. That was the date the matter came for hearing. It was the date that was served on the respondent who obediently turned up. I have perused the court record. There is a copy of the hearing notice. It indicated the hearing date as being 4/7/2013. In any case, after the appellant took a hearing date there was no way he required to be served with a hearing notice. He is the one who was causing the hearing notice to be issued and served on the respondent. It is clear, and I agree with the trial court, that the appellant, after failing to come to court on the date he had taken, forged the hearing notice to show 114/7/2013. Otherwise, in the court record, including the copy of the notice, it was clear that the case was to be heard on 4/7/2013.

3. A litigant who is dishonest in his dealings with the court is not deserving of any discretion in his favour. This is the same litigant who had, as it were, ambushed the respondent with a hearing date.

4. I know that under **Order 12 Rule 3(1)**:

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part on the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

The court did not find any reason to adjourn the matter, and was therefore under obligation to dismiss it. It is clear that justice is best served when the matter in question is heard and determined on merits. But this assumes that the parties have been reasonably diligent and honest in their dealings.

5. In conclusion, I find no merit in the appeal and dismiss it with costs.

SIGNED at NAIROBI this 6TH AUGUST 2014.

A.O. MUCHELULE

JUDGE

DELIVERED at KISUMU this 25TH SEPTEMBER 2014.

H. CHEMITEI

JUDGE