



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 124 OF 2015**

**KAHAMA PROPERTIES AGENCIES LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**OCPD, JOMO KENYATTA INTERNATIONAL**

**AIRPORT POLICE STATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 15<sup>th</sup> February, 2018, this suit was fixed for hearing on 4<sup>th</sup> April, 2019 in court in the presence of the advocates for the plaintiff and the 1<sup>st</sup> defendant. On 4<sup>th</sup> April, 2019 only the 1<sup>st</sup> defendant's advocate appeared in court for the hearing of the suit. On his application, the court dismissed the suit for non-attendance by the plaintiff. What is now before me is the plaintiff's application brought by way of Notice of Motion dated 31<sup>st</sup> day of December, 2019 seeking the following orders;

1. That the Honourable Court be pleased to set aside or vary the orders issued on 4<sup>th</sup> April, 2019 dismissing the suit herein.
2. That this Honourable Court be pleased to reinstate the suit.
3. Costs of the application.

The application that was supported by the affidavit of the plaintiff's advocate, Francis Munyororo sworn on 31<sup>st</sup> December, 2019 was brought on the following main grounds: The court dismissed this suit on 4<sup>th</sup> April, 2019 on account of the failure by the plaintiff and its advocates to attend court for the hearing. The plaintiff and its advocates failed to attend court due to the inadvertent mistake by Mr. Arthur Wamae Advocate who had failed to enter the hearing date in the diary after the date was given in court. The plaintiff's advocates attended court on 4<sup>th</sup> June, 2019 with a view to take a hearing date for the suit but the court file could not be traced.

The plaintiff's advocates attended court on several occasions subsequently in search of the court file and it was not until 2<sup>nd</sup> December, 2019 that the said file was traced. Upon perusing the file, the plaintiff's advocates learnt that the suit was dismissed on 4<sup>th</sup> April, 2019 on account of non-attendance by the plaintiff and its advocates. Failure by the plaintiff and its advocates to attend court was as a result of inadvertent mistake by the plaintiff's advocates which mistake ought not to be visited upon the plaintiff.

The Application was opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn by Joseph Ng'ang'a Waitheru on 29<sup>th</sup> June, 2020. The 1<sup>st</sup> defendant averred that the hearing date of 4<sup>th</sup> April, 2019 was fixed in open court in the presence of the advocates for the parties and that when the matter came up for hearing on 4<sup>th</sup> April, 2019, the 1<sup>st</sup> defendant was ready to proceed with the hearing. The 1<sup>st</sup> defendant averred that when the matter was called out, neither the plaintiff nor its advocates were present resulting in the matter being dismissed for non-attendance. The 1<sup>st</sup> defendant averred that the plaintiff had been indolent as it had not taken steps to prosecute its case.

The 1<sup>st</sup> defendant averred further that no useful purpose would be served by reinstating the suit in that, the parcel of land owned by the plaintiff and that owned by the 1<sup>st</sup> defendant are separate and distinct and both have titles. The 1<sup>st</sup> defendant averred that although the 1<sup>st</sup> defendant's property is adjacent to the plaintiff's parcel of land, the 1<sup>st</sup> defendant was not claiming ownership of the plaintiff's property neither was it in physical possession thereof. The 1<sup>st</sup> defendant averred that the plaintiff's application was misconceived, frivolous, lacked merit and was an abuse of the court process. The 1<sup>st</sup> defendant averred that there was no dispute between the parties to warrant the intervention of the court.

Determination:

The application was argued orally on 2<sup>nd</sup> November, 2020. I have considered the plaintiff's application and the affidavit filed by the 1<sup>st</sup> defendant in opposition thereto. I have also considered the submissions by the advocates for the parties. What I need to determine is whether valid grounds have been put forward by the plaintiff to warrant the setting aside of the order made herein on 4<sup>th</sup> April, 2019 dismissing this suit for non-attendance. There is no dispute that the court has power to reinstate a suit that has been dismissed for non-attendance. The power is however discretionary. An applicant for reinstatement of a suit has to satisfy the court that he deserves the exercise of the court's discretion. It is not in dispute that the hearing date of 4<sup>th</sup> April, 2019 was fixed in court in the presence of the advocate for the plaintiff. The plaintiff's advocates were therefore aware of the said hearing date. In the circumstances the suit was regularly dismissed for non-attendance when the plaintiff and its advocates failed to attend court for the hearing. The reason that has been given by the plaintiff's advocates for the plaintiff's failure to attend court is the old tired one, namely, that the advocate who took the hearing date inadvertently failed to put the date in the diary. I say old and tired because it is used more often by advocates who fail to attend court and the truthfulness thereof cannot be easily ascertained by the court.

That said, I have noted from the letters attached to the plaintiff's affidavit in support of the application that the plaintiff made attempts in June and December, 2019 to fix the suit for hearing not knowing that the same had been dismissed on 4<sup>th</sup> April, 2019. I have also noted that this application for reinstatement of the suit was filed by the plaintiff about 2 months after its advocates learnt of the dismissal of the suit. This in my view is a demonstration that the plaintiff is interested in prosecuting the suit. There is no evidence on record that the plaintiff had attempted at any time in the course of the proceedings in this suit to delay or to frustrate the prosecution of the suit. The fact that the plaintiff may not have a strong case against the 1<sup>st</sup> defendant is in my view not a valid ground to deny the plaintiff an order for reinstatement of the suit. In Nchapi Leiyagu v I.E.B.C & 2 others, Civil Appeal No. 18 of 2013, [2013] eKLR, the court stated that:

**“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”**

In Essanji & Another v Solanki [1968] EA 218 the court stated that:

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”**

In Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 1033 at 1040, Apaloo J.A. Stated as follows:

**“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

Due to the nature of the dispute between the parties, I am inclined to give the plaintiff a chance to prosecute its suit. I am not persuaded that the defendants would suffer such prejudice that cannot be put right by payment of costs if the plaintiff's application is allowed.

In conclusion, I find merit in the Notice of Motion application dated 31<sup>st</sup> December, 2019. The order made on 4<sup>th</sup> April, 2019 dismissing this suit for non-attendance is set aside and the suit reinstated for hearing on merit. The 1<sup>st</sup> defendant shall have the costs of the application assessed at Kshs. 30,000/= payable forthwith.

**Delivered and Dated at Nairobi this 18<sup>th</sup> Day of March 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Munyororo for the Plaintiff

Ms. Akonga for the 1<sup>st</sup> Defendant

Ms. C. Nyokabi-Court Assistant