



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISUMU**

**ELC CASE NO. 106 OF 2017**

**MOHAMED GODAN JASRO.....PLAINTIFF**

**VERSUS**

**ENG. MAXWEL OTIENO ODONGO.....DEFENDANT**

**RULING**

The applicant has brought the application dated 6<sup>th</sup> November, 2019 seeking the following orders namely that pending the hearing of this application the court does reinstate the consent order dated 16<sup>th</sup> October, 2007. The Court be pleased to set aside the orders made on 6<sup>th</sup> November 2019 dismissing the suit for non-attendance and reinstate the same for hearing on its merit. Costs be provided for. The Respondent opposed the said application vide a replying affidavit dated 11<sup>th</sup> November 2019 by Mr Geoffrey Yogo.

The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 16.10.2007 and reinstate this suit. In the case of **John Nahashon Mwangi v. Kenya Finance Bank Ltd (in Liquidation) [2015]eKLR** the Court laid down the principles governing reinstatement of suit as follows:

**“The fundamental principles of Justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of Judgement. Such acts are comparable only to the proverbial “sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”**

In the present case, the applicant in his sworn affidavit contends that on the hearing date he was in court together with his advocates, some few minutes before 9.00 o'clock when the court assistant came in few minutes after 9.00 O'clock and informed them that their matter had already been handled at 8.30 o'clock and matter dismissed for non-attendance.

In the case of **Belinda Murai & Others vs. Amoi Wainaina (1978), Madan J.** set out the following approach to be adopted when dealing with the question as to whether or not a party should be locked out completely from the seat of justice on account of a mistake;

**“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of Justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule”**

The right to hearing, in my view has always been a well-protected right in our Constitution and is also the Cornerstone of the Rule of Law. The applicant having demonstrated that he was actually present in court before 9.00am when normally the court begins, and together with his advocate, and that no express notice was given to show that for this particular hearing, the court will begin before its normal time, the applicant thus has, in my view, a reasonable ground for reinstatement of his suit.

I find that it has not been demonstrated anywhere that the applicant herein with his advocate had developed a habit of absconding from court.

I also do not find any casual posture demonstrated by Counsel for the applicant in the manner he handled his client's case.

The power to dismiss a suit should only be exercised sparingly as was held in the **Court of Appeal** decision of **D.T Dobie & Co. (K) Ltd vs. Joseph Mbaria Muchira CA 3 of 1978**, where the Court stated that,

**“No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment...”**

In the present case the applicant has demonstrated that his case discloses reasonable action and that he stands to suffer colossal loss of his investments to the tune of Kshs. 34,000,000 if the suit is not reinstated and heard on merit. It is only just that this suit be reinstated and heard on merit.

I do find that the application is meritorious and is hereby allowed. The upshot of the above is that the court hereby sets aside the orders made on 6<sup>th</sup> November 2019 dismissing the suit for non-attendance and reinstates the same for hearing on its merit.

**DATED AT KISUMU THIS 18<sup>th</sup> DAY OF MARCH, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**