



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 40. OF 2019

REUBEN NZUVE MWANGANGI.....PLAINTIFF/APPLICANT

VERSUS

MUKENE MUSAU.....1ST DEFENDANT/RESPONDENT

NDELE MUTUKU.....2ND DEFENDANT/RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 4th February, 2021 brought pursuant to **Order 12, Rule 7, Order 45 Rule 1 (1) and 2** of the **Civil Procedure Rules** and **Sections 1A, 1B & 3A** of the Civil Procedure Act seeking the following orders: -

1.Spent.

2. That the honourable court be pleased to set aside the order dismissing the suit and the same be reinstated.

3. That the plaintiff be allowed to file and serve the defence to counter claim and list of witnesses and documents he wishes to rely on in prosecution of his matter.

4. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and more particularly as set out in the supporting affidavit of Samuel M. Kasyoka, counsel for the plaintiff/applicant sworn on 4th February, 2021. The counsel for the plaintiff/applicant stated that his clerk in the office wrongly diarized the date for hearing as 22nd January, 2021 instead of 21st January, 2020. That he sought indulgence from counsel for the defendant/respondent as he had an appointment with his doctor on 22nd January, 2021. He further avers that he informed the defendant's counsel of his health condition and that he also realized witness statements and other necessary documents were not filed.

3. The counsel deposed that he communicated to the defendant's/respondent's counsel that he thought the matter was coming up for hearing on 22nd January, 2021 and if not the case, then the counsel would have corrected him on humanitarian grounds. That failure to attend court together with the plaintiff/applicant was not deliberate but an unmitigated belief that hearing was on 22nd January, 2021. The counsel further deposed that on 22nd January, 2021 he attended court with his client and discovered that the matter had already been dismissed for non-attendance and it is out of this discovery that the plaintiff/applicant instructed him to file the instant application.

4. In addition to the unmitigated belief, the counsel deposed that the defendant's/respondent's counsel contributed to the confusion as he had served him with an erroneous hearing notice indicating the matter was for hearing on 21st January, 2020 which was received under protest for the reason that his health condition was not favourable for him to conduct a hearing and he had another matter before another court.

5. The counsel deposed that when the matter came up for pre-trial, his clerk instructed the counsel to hold his brief as he was hospitalised but the same was certified ready for hearing even though the reply to defence, defence to counter claim, witness statements, and other documents were not on record. That it is in the interest of justice that this application is allowed for the reason that he has been ailing and recently resumed back to the office.

6. The counsel for the defendants/respondents filed his replying affidavit dated 9th April, 2021 in which he deposed that the plaintiff/applicant has lost interest in prosecuting his case as the record clearly manifests the same. That the plaintiff/applicant has frustrated all the efforts to process the suit for hearing including failing to instruct his former advocates, failing to attend court himself, and failure by his counsel to comply with pre-trial directions.

7. That counsel deposed that this application is filed not at the instigation of the plaintiff/applicant but counsel's cover up of his failure to comply with the court's directions on several occasions. The counsel deposed that since the suit was transferred to this court, the plaintiff/applicant has not made effort in moving the suit for hearing, and on every occasion the court or the defendants/respondents do so, the counsel has caused unnecessary delays. The counsel has outlined in detail the sequence of events that took place when the matter was coming up in court. The counsel is of the view, that the dismissal order was premised on non-compliance with the court's orders and non-attendance of the plaintiff/applicant or his advocate. That even if the counsel was present during hearing, the suit would be dismissed as the counsel failed to comply with the pre-trial directions given by the court.

8. The counsel further deposed that the issues of mis-diarising and medical appointments are irrelevant since they were not raised when the hearing notice was served and no evidence has been adduced to confirm incorrect entry in the diary.

9. The counsel for the plaintiff/applicant filed his written submissions dated 25th March, 2021. The counsel submits that the issues leading to the dismissal of the plaintiff's/applicant's suit by this court were all occasioned by himself and not the plaintiff/applicant and that this court ought not to vest the mistakes of the counsel on the plaintiff/applicant and instead see the desires of the plaintiff/applicant to achieve the ends of justice. The counsel relies on the cases of **Jim Rodgers Gitonga Njeru versus Al-Husnain Motors Limited & 2 Others [2018] EKL**R and **Julius Njagi Mbui versus Kenya Nut Company Limited [2018] eKLR**.

10. The counsel for the defendants/respondents filed his written submissions dated 17th May, 2021 wherein he submits that the suit was dismissed on valid grounds, reasons and justification. That no good cause was shown on 21st January, 2021 as required by law for non-attendance. That a valid hearing notice was served in good time and counsel for the plaintiff/applicant was notified through telephone and email communication that an adjournment would not be agreeable. The counsel further submits that the present application is not premised on the grounds given for the protest as endorsed in the hearing notice served. That there is no proof at all of the Nairobi court engagement on 21st January, 2021 or medical appointment by the counsel and the allegations are all pegged on falsehoods.

11. The counsel submits that based on the foregoing, it shows that without any doubt, that there was no mistake or error on the part of the plaintiff's/applicant's advocate so as to afford an escape route for the plaintiff/applicant. That counsel for the plaintiff/applicant was negligent or reckless which the plaintiff/applicant has redress against the advocate personally. The counsel submits that the defendants/respondents have been greatly prejudiced as they have come to court on numerous occasions since 9th July, 2020 date, during which period the plaintiff/applicant has failed to attend and or given excuses for non-attendance. That the plaintiff's/applicant's submissions do not raise any substantive legal points to warrant the application being granted. Also, that the plaintiff/applicant himself is at fault and cannot blame his advocate, he has not sworn any affidavit to show that the advocate was at fault or explain his absence from court on the date of the hearing. The counsel relies on **Order 11 and Order 12 Rule 3 of the Civil Procedure Rules** and the case of **Sammy Maina versus Stephen Muriuki [1984] eKLR**. As such the plaintiff/applicant is guilty of his conduct and is not entitled to the discretion of the court.

12. I have considered the application, the replying affidavit and the written submissions filed by both parties. The only issue for determination is whether the plaintiff/applicant has satisfied this court to move it to reinstate the suit. For the record, I wish to state that having carefully read the authorities relied on by plaintiff's/applicant's counsel, I find them irrelevant as they do not address or reflect the issues in the instant application.

13. Reinstatement of a suit dismissed for want of prosecution and non-attendance is discretionary. The discretion is provided under **Order 12 Rule 7 of the Civil Procedure Rules 2010** as follows: -

“Setting aside judgment or dismissal.

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

14. From the record, this suit came up for mention on 11th November, 2019. The plaintiff/applicant was present, as well as the counsel for the defendant/respondent as well. I directed that parties do comply with **Order 11 of the Civil Procedure Rules** within 60 days. I also directed that the matter be mentioned on 5th February, 2020. On 5th February, 2020, the counsel for both parties were present before the deputy registrar. Counsel for the defendants/respondents had complied with Order 11. The Deputy Registrar directed that parties take a date for pre-trial at the registry. The record shows that defendants'/respondents' counsel was present at the registry and there was no appearance by the plaintiff/applicant or his advocate. The suit was fixed for pre-trial conference on 25th March, 2020 and a pre-trial notice to issue. On 16th October, 2020 the matter was before the deputy registrar. The defendants' counsel was present, there was no appearance from the plaintiff or his advocate. The matter was fixed for pre-trial directions on 9th December, 2020. On 9th December, 2020 the matter was before the Deputy Registrar. The plaintiff/applicant sought for 21 days to comply and was indeed granted 21 days. In the meantime, the matter was certified ready for hearing. On the same date the matter was fixed for hearing at the registry on 21st January, 2021 and a hearing notice was to issue.

15. A look at the documents relied upon by the defendants/respondents show that a hearing notice dated 10th December, 2020 was received by the plaintiff's/applicant's counsel's law firm under protest on 14th December, 2020 for the reason that the counsel had another matter in Nairobi.

16. The counsel for the plaintiff/applicant has cited conflicting reasons for his failure to attend court for hearing. On one hand he alleges a medical condition without adducing proof, on the hand he alleges wrong entry into the diary by his staff, on the other hand he alleges attendance of another matter in Nairobi and most of all blames it on the counsel for the defendants/respondents for service of a wrong hearing date. From the hearing notice, the date indicated reads 21st January, 2020 instead of 2021. I believe this is a typing error which can easily be remedied by common sense for the reason that the plaintiff's counsel knew very well that hearing could not take place in the year 2020. In the case of **Shah -v- Mbogo (1967)EA 116**, it was stated that the exercise of discretion of the court to set aside ex-parte orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has

deliberately sought by evasion or otherwise to obstruct or delay the course of justice

17. In the circumstances of this case, it is the defendants'/respondents' who are prejudiced by the plaintiff's/applicant's failure to prosecute the case without unreasonable delay. Pendency of a case in court when it is obvious that the plaintiff/applicant is not interested to prosecute it costs time and money to the defendants/respondents not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. I am mindful of the fact that dismissal of cases in summary procedure such as done here may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures. The motion before me is devoid of merit and is accordingly dismissed with costs to the defendants/respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH FEBRUARY, 2022

MBOGO C.G

JUDGE

8/2/2022

In the presence of: -

CA: Chuma