



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 475 OF 2015

LUKE OUKO ODHIAMBO.....PLAINTIFF

VERSUS

WAITHAKA MWANGI.....DEFENDANT

RULING

(In respect of the Plaintiffs notice of motion application seeking to set aside an order dismissing the suit for non-attendance.)

Background:

1. The Plaintiff's Application is brought under the provisions of Order 12 rule 1 & 7 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The Plaintiff prays that the Order of this court of 3rd February 2022 dismissing the suit for non-attendance be set aside and the suit be reinstated for hearing.
2. The Plaintiff's Application is based on the grounds on the face of it and on the supporting affidavit of Alice Jonathan Gulenywa Advocate.
3. In a nutshell, the Advocate for the Plaintiff states that she was unable to log into the online (virtual Court) platform on the material day due to a failure of the device she was using. Thereof, the failure to attend court was not intentional on her part. While admitting the error, the Advocate pleads with the court not to visit that mistake on her client whom she states is keen to proceed with the matter.
4. Though the Defendant/Respondent was served with the application as evidenced by the Affidavit of Service on record, he did not file a response to the application. He did not appear during the hearing of the application too.

Determination

5. Order 12 rule 7 provides that

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

6. The orders sought by the Plaintiff are therefore discretionary. The plaintiff pleads with the court to exercise its discretion in his favour. In exercising judicial discretion, the court must caution itself as the Court of Appeal stated in the case of **Murtaza Hussein Bandali t/a Shimoni Enterprises Vs P.A Willis (1991) KLR, 469** that:-

“This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously.”

7. I have considered the reasons advanced by the Plaintiff's Advocate as to the reasons why she was unable to attend the virtual court session on the material date. I am persuaded that the failure to attend court was not intentional.
8. I also noted that on the date of the hearing of the application under consideration, the Plaintiff was present in person, I believe to demonstrate his commitment to have his case heard on its merits.
9. I further note that, whereas the suit was dismissed on 3rd February 2022, the Plaintiff moved to court without undue delay. The application

was filed on 11th February 2022, 8 days after the dismissal of the suit.

10. The discretion of this court is meant to ensure that no party suffers injustice or hardship as a result of amongst others, excusable mistake, inadvertence, accident or error (**CMC Holdings Ltd Vs Nzioki (2004) eKLR, 173**)

11. The court's finding is that the Plaintiff's application dated 11th February 2022 is merited. It is allowed as prayed.

12. Accordingly, the suit is hereby reinstated and shall be set down for hearing forthwith.

13. The costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 8th day of March 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mrs. Gulenywa for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE