



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 107 OF 2010**

**MARKROSCAR KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**GOODHOPE CHRISTIAN CHURCH KASARANI & 12 OTHERS.....DEFENDANTS**

**RULING**

On 23<sup>rd</sup> October, 2018, Macharia Njuguna, David Mutua Masaku and Elijah Kaniu Chege (“the applicants”) filed an application by way of Notice of Motion dated 23<sup>rd</sup> October, 2018 seeking leave to join this suit as interested parties. The application was opposed by the plaintiff through grounds of opposition dated 31<sup>st</sup> October, 2018 and a replying affidavit dated 19<sup>th</sup> September, 2019. The applicants’ application was fixed for hearing on 17<sup>th</sup> December, 2019. When the application was called out for hearing on 17<sup>th</sup> December, 2019, the applicants’ advocate was absent and on application by the plaintiff, the application was dismissed for non-attendance.

What is now before me is the applicants’ application dated 29<sup>th</sup> July, 2020 seeking the setting aside of the said order of dismissal of their application dated 23<sup>rd</sup> October, 2018 that was made on 17<sup>th</sup> December, 2019 and the reinstatement of the application for hearing on merit. The application was brought on the grounds that when the applicants’ application dated 23<sup>rd</sup> October, 2018 came up for hearing, the applicants’ advocate had just come back from India where he had sought treatment and had been advised by his doctor to take some days off to rest. The applicants averred that their advocate’s failure to attend court on 17<sup>th</sup> December, 2019 was due to medical reasons. The applicants averred that their advocate had instructed another advocate to hold his brief and to prosecute the application but the advocate did not turn up in court at the time that was allocated for the hearing of the matter. The applicants averred that their advocate’s failure to attend court was not deliberate and that it was beyond his control.

The application was opposed by the plaintiff through a replying affidavit sworn on 25<sup>th</sup> August, 2020 by its advocate Simeo M. Keyonzo. The plaintiff averred that there was no evidence that the applicants’ advocate had been advised to be on bed rest by his doctor at the time when the applicants’ application that was dismissed came up for hearing. The plaintiff averred that the applicants had filed their own case which was dismissed for want of prosecution on 21<sup>st</sup> July, 2007. The plaintiff averred that it was not true as claimed by the applicants that the applicants had no other forum to ventilate their grievances apart from this suit. The plaintiff averred that the applicants could not obtain any remedy in this suit and that the application for the setting aside of the dismissal order was brought after unreasonable delay.

The parties filed written submissions. I have considered the applicants’ application together with the supporting affidavit. I have also considered the replying affidavit filed by the plaintiff in opposition to the application. This court has power to set aside orders made in the absence of parties and to reinstate suits and applications dismissed for non-attendance. That power is discretionary. Like any other discretionary power, it has to be exercised judiciously. I am satisfied that the applicants have given reasonable explanation why their advocate did not attend court on 17<sup>th</sup> December, 2019 when their application dated 23<sup>rd</sup> October, 2018 was dismissed. It is not disputed that the applicants’ advocate was sick during that period and had even sought medical attention in India. Whether or not the advocate was advised to be on bed rest may not have been established. However, what is clear is that the advocate was sick. I am of the view that an advocate’s sickness is a reasonable excuse for not attending court. I am also not persuaded that the plaintiff would suffer any prejudice if the application before the court is allowed. The issues raised by the plaintiff in the replying affidavit go to the merit of the application that was dismissed. The court will consider the same at the hearing of the application.

For the foregoing reasons, I find merit in the Notice of Motion dated 29<sup>th</sup> July, 2020. The same is allowed in terms of prayers 2, 3 and 4 thereof.

**Delivered and Dated at Nairobi this 17<sup>th</sup> day of June 2021**

**S. OKONG’O**

**JUDGE**

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

Mr. Keyonzo for the Plaintiff

Mr. Kariuki E.G for the Defendants/Applicants

