



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1285 OF 2014

SAMUEL OLUOCH HELU.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

RULING

1. This suit came up for hearing on 10/2/2020. Counsel for the defendant attended court. There was no attendance on part of the plaintiff. Counsel for the defendant orally applied for dismissal of the suit. Consequently, the court issued an order dismissing the suit for non-attendance.

2. On 3/3/2020, the plaintiff brought a notice of motion dated 25/2/2020 seeking reinstatement of the suit. The application was supported by an affidavit sworn on 25/2/2020 by Samson Alosa, counsel for the plaintiff. The defendant did not file a replying affidavit/grounds of opposition to the application. They nonetheless opposed the application through written submissions. The said application is the subject of this ruling

3. The explanation tendered by the plaintiff for their non-attendance is that they mis-diarized the case as coming up for hearing on 24/2/2020 instead of 10/2/2020. Counsel for the plaintiff deposed that their failure to attend court on 10/2/2020 was as a result of the above inadvertency. He explained that he became aware of the dismissal order when he was preparing for the hearing which he mistakenly thought was scheduled for 24/2/2020.

4. The application was canvassed through written submissions dated 25/11/2020 which I have perused and considered. I have also perused the defendant's written submissions dated 12/1/2020. I have similarly considered the relevant legal framework and the applicable jurisprudence. The single question falling for determination in this application is whether the plaintiff/applicant has demonstrated a proper basis for the court to exercise its discretion to set aside the dismissal order made on 10/2/2020.

5. The plaintiff has explained, through counsel, that their failure to attend court was occasioned by a mis-diarization. The defendant contends that the application is devoid of merit and is frivolous, misconceived and an abuse of the process of the court.

6. **Order 12 rule 7** of the **Civil Procedure Rules** grants this court discretionary jurisdiction to reinstate a dismissed suit by setting aside the dismissal order. The court's discretionary power should, however, be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties.

7. The guiding principle in the court's exercise of its judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. The court's discretion to set aside an ex-parte order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

8. 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 completely locked out of a court 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.....”

9. **Apaloo JA** outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

“Blunder will continue to 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 fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

10. In my view, a mistake that leads to failure to attend court should not automatically lead to the shutting of the door to the court seized of a dispute. The court’s overriding objective is to do justice. Before the door of justice is closed on a plaintiff, the defendant must satisfy the court that he will be prejudiced by the reinstatement and that justice will not be done owing to the circumstances of the case. I would add that the right to a hearing is secured under **Article 50(1)** of the **Constitution of Kenya 2010**. In exercising judicial discretion, courts are obligated to do all that is possible within their discretion to give effect to that right. The plaintiff and the defendant lay claim to the same property. Ends of justice will be better served by allowing the suit to be heard and determined on merits. There is no evidence that the defendant will suffer prejudice which cannot be compensated by an award of costs.

11. In conclusion, I would say I am convinced the plaintiff has offered an excusable reason for his advocate’s failure to attend court on 10/02/2020. The inconvenience caused to the defendant by the counsel’s failure to attend court on the material day can be compensated by an award of modest costs.

Disposal Orders

12. Consequently, I make the following orders in disposing the plaintiff’s notice of motion dated 25/02/2020.

a. The order made on 10/2/2020 by this Honorable Court dismissing this suit is hereby set aside and the suit is reinstated.

b. The Plaintiff shall pay the defendant throwaway costs of Ksh 15,000. The same shall be paid within 45 days and in default the order herein shall stand vacated and the suit shall stand dismissed.

c. Parties are directed to file and exchange, within 45 days, bound, paginated and indexed bundles containing pleadings, witness statements, documents and statement of issues.

d. The court shall give further directions at the time of delivering this Ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Odoyo for the Defendant

Mr Ochieng holding brief for Mr Mr Alosa for the Plaintiff

Court Assistant: June Nafula