



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 206 OF 2016

TINA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA (HFCK).....DEFENDANT

AND

HOTEL CONNECTIONS LTD.....INTERESTED PARTY

RULING

1. In the Notice of Motion dated 21st September, 2018, the Plaintiff is seeking for the following orders:

- a) That the Honourable Court be pleased to set aside its orders dismissing the Plaintiff's Application dated 28th February, 2018.***
- b) That the said Application dated 28th February, 2018 be and is hereby reinstated for hearing on priority basis.***
- c) That costs of the Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff's advocate who has deponed that the Plaintiff's Application dated 28th February, 2018 came up for hearing on 20th September, 2018 and was dismissed for non-attendance on the part of the Plaintiff.

3. The Plaintiff's counsel deponed that the Application dated 28th February, 2018 was intended to amend the Plaintiff's suit and bring on board Hotel Connections Limited which purchased the suit property; that the Plaintiff's advocate did not diarize the date of 20th September, 2018 and that the Plaintiff's advocate has always been attending court.

4. The Plaintiff's advocate finally deponed that it was an error on the part of his office not to diarize the date when the Application came up for hearing and that he is still interested in prosecuting the Application dated 28th February, 2018.

5. The Interested Party filed Grounds of Opposition in which he averred that the reasons advanced for the Plaintiff's advocates' failure to attend court are unproven, not satisfactory and do not amount to a sufficient cause to warrant the reinstatement of the dismissed Application.

6. The Interested Party further averred that the explanation given by the Plaintiff's advocate leaves unexplained gaps in the sequence of events; that the Interested Party is *a bona fide* purchaser for value of the suit property and that in any event, the amendment being sought is misplaced and an afterthought raised by the Plaintiff.

7. The Plaintiff's advocate submitted that he was in court when the Application dated 28th February, 2018 was allocated the date of 20th September, 2018 and that he forgot to diarize the matter hence the reason for not attending court on 20th September, 2018.

8. The Plaintiff's advocate finally deponed that he has always attended court; that the suit property was sold to the Interested Party after the filing of the suit and that the Plaintiff needs to amend its Plaint so that the current position can be known by the court.

9. The Interested Party's advocate submitted that the reasons advanced for the Plaintiff's advocate's failure to attend court as and when required on account of the Application dated 28th February, 2018 which was dismissed for non-attendance are unconvincing and unproven; that no copy or abstract of the diary operated by the Plaintiff's Advocates has been annexed on the Plaintiff's advocate's Affidavit and that the alleged explanation for non- attendance leaves unexplained gaps in the alleged sequence of events.

10. The record shows that the Plaintiff herein filed an Application dated 28th February, 2018 seeking to amend its Plaintiff. The intended 2nd Defendant/Interested Party opposed the Application vide a Replying Affidavit sworn on 26th March, 2018 and filed on 27th March, 2018. On 12th June, 2018, the clerks from the law firms of the Plaintiff and the Interested Party fixed a date in the registry for the said Application. The Application was fixed by the consent of the parties for 20th September, 2018.

11. On 20th September, 2018, the Plaintiff's advocate was not in court. The Plaintiff's Application dated 28th February, 2018 was dismissed by the Court for non-attendance and want of prosecution.

12. The Plaintiff's advocate and his Secretary have deponed that out of error, they did not diarize the date of 20th September, 2018; that the Plaintiff's advocate has always attended court and that the Application dated 28th February, 2018 should be reinstated for hearing.

13. I have perused the record and noted that since this matter was filed, the Plaintiff's advocate has always attended court. Indeed, the date of 20th September, 2018 was fixed by the Plaintiff's advocate's clerk and not the advocate himself. It is therefore possible that the said clerk or the Plaintiff's Secretary failed to diarize the date in the Plaintiff's advocate's diary, thus his failure to attend court on 20th September, 2018.

14. Considering that the non-attendance of court by the Plaintiff's advocate was caused by the non-diarization of the hearing date by his Secretary, and in view of the fact that the Plaintiff's advocate has always attended court, I find that the Plaintiff's advocate has given a plausible reason why he did not attend court on 20th September, 2018. In the circumstances, I shall exercise my unfettered discretion in his favour.

15. For the reasons I have given above, I shall allow the Application dated 21st September, 2018 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE