



**Rusnell & 2 others v Joseph Bushebi sued in his personal capacity and also
Trading as Bushnell Auto Scanners (Commercial Civil Case 45 of 2017)
[2021] KEHC 222 (KLR) (Commercial and Tax) (12 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 45 OF 2017
DAS MAJANJA, J
NOVEMBER 12, 2021**

BETWEEN

**CARL DOUGLAS RUSNELL 1ST PLAINTIFF
FERNWOOD DEVELOPMENTS LIMITED 2ND PLAINTIFF
BUSHNELL DEVELOPERS LIMITED 3RD PLAINTIFF**

AND

**JOSEPH BUSHEBI SUED IN HIS PERSONAL CAPACITY AND ALSO
TRADING AS BUSHNELL AUTO SCANNERS DEFENDANT**

RULING

1. On 19th July 2021, the court allowed the Plaintiffs' application dated 13th July 2021 seeking to reinstate the suit that had been dismissed for want of prosecution on condition that the Plaintiff paid the Defendant costs of KES 10,000.00 within 7 days of the ruling. The court further ordered the Plaintiffs to show cause why the suit should not be dismissed and set a hearing date for 21st September 2021. In the meantime, the Defendant filed an application dated 10th September 2021 seeking to review the order reinstating the suit and directing the Plaintiffs to show cause why the suit should not be dismissed.
2. The Defendant's case is that there is an error of law on the face of the record as the court recorded that the Plaintiffs' application dated 15th July 2021 be allowed yet the application was dated 13th July 2021 hence the order reflecting the erroneous date ought to be set aside. The Defendant complains that the affidavit in support of the application seeking to set aside the judgment was sworn before the application was filed and therefore offends the provisions of the *Oaths and Statutory Declarations Act* (Chapter 15 of the Laws of Kenya). The Defendant adds that the deponent misstated the name of the



judge who issued the dismissal order. The Defendant also complains that the Plaintiffs never served it with the application giving rise to court's order of 19th July 2021.

3. In response, the Plaintiffs contend that the reinstatement of the suit was conditional as cause still ought to be shown why the suit should not be dismissed thus the court provided all parties with the opportunity to be heard. They further submit that the Defendant purports to urge the court to set aside the orders yet he accepted the costs awarded to him.
4. I have considered all the arguments and I am of the view, that the order I made reinstating the suit referred to a non-existent application was an error on my part. The order was made in presence of both parties and it was clear that it is the Plaintiffs' application to reinstate the suit that was listed for hearing on the material date and it is that application I allowed. I am in agreement with the Plaintiffs that the court's reinstatement of the suit was conditional as they still have to show cause why the suit should not be dismissed and that failure to convince the court means that the suit stands dismissed.
5. Since the Plaintiffs are still required to show cause, I do not think that any prejudice may be occasioned to the Defendant who has already been compensated by an award of costs. I dismiss the Defendant's application dated 13th September 2021 with costs to the Plaintiffs.
6. Let the Plaintiffs show cause why the suit should not be dismissed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Muyuri instructed by Ogetto, Otachi and Company Advocates for the Plaintiffs.

Mr Okao instructed by Okao and Company Advocates for the Defendant.

