



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 401 OF 2017**

**PROFESSIONAL MARKETING SERVICES LIMITED...PLAINTIFF/APPLICANT**

**VERSUS**

**L'OREAL EAST AFRICA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. In the application dated 26<sup>th</sup> September 2019, the applicant/plaintiff herein seeks the reinstatement of the suit.
2. The application is supported by the affidavit of the applicants advocate **Mr. James Wanjeri** and is premised on the grounds that:
  - a. **The plaintiff's case was dismissed for non-attendance on the day of hearing.**
  - b. **No notice to show cause why the suit should not be dismissed was served on the plaintiff's advocates to enable them file a suitable deposition to explain the non-attendance on the hearing day.**
  - c. **It is in the interest of justice and fairness that the orders sought herein are granted.**
  - d. **No prejudice will be suffered by the defendant if the orders sought herein are granted.**
  - e. **This application is brought in good faith and without undue delay.**
3. At the hearing of the application, **Mr. Wanjeri**, learned counsel for the applicant explained the circumstances under which the suit was dismissed for non attendance and stated that he had sent an associate advocate to inform the court of his inability to proceed with the matter due to non – availability of the plaintiffs witness only for the advocate to find the court room locked. He further explained that unbeknown to them, the Deputy Registrar had issued a notice that the court would start its sittings at 10.15 am and that when the matter was called up for the hearing, the counsel sent to court had already left the court premises. It was submitted that the overriding objective should be to do justice to the parties in order to meet the ends of justice.
4. The respondent opposed the application through the replying affidavit of its advocate **Mr. Wycliffe Oyoo** who avers that indeed the matter came up for hearing on 2<sup>nd</sup> September 2019 during the service week and that the hearing dated had been taken by consent of both parties. He further avers that the matter was dismissed at 11 am when the court noted that there was no appearance by the plaintiff.
5. At the hearing of the application, **Mr. Kahura** for the respondent conceded that the Deputy Registrar put up a notice that the court would start at 10am and that it was only after 11 am that the matter was dismissed for non-attendance.
6. I have considered the instant application, the respondent's response and the submissions by counsel. The only issue for determination is whether this court should reinstate the plaintiff's suit following its dismissal. It is trite law that the court has the discretion to set aside its orders and reinstate suits in order to avoid hardship due to mistake or error. This is the position that was adopted in the famous case of **Patel v EA Cargo Handling Services Ltd** [1974] EA 75 at 76 C and E b) wherein, while discussing the discretion granted to the court to set aside interlocutory judgment the court observed that there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The court observed that its main concern is to do justice to the parties, and that it will not impose conditions on itself to fetter the wide discretion given it by the rules.

7. Similarly in *Shah v Mbogo* [1967] EA 116 at 123B the court observed that its discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

8. In the present case, I find that the plaintiffs counsel has explained to the satisfaction of the court, the reason for his absence in court at the time that the matter was called up for hearing. It was not disputed that the Deputy Registrar posted a notice that the court would commence its sittings at 10am a fact that was not within the knowledge of the plaintiffs counsel at the time he left the court when he states that the found the court room locked.

9. This court takes judicial notice of the fact that courts ordinarily begin their sessions at 9am except in rare instances when the Deputy Registrar may put up a notice to indicate any changes in the court's schedule. It is possible that not all parties and their advocates get to know of these notices on time or at all so as to act on them appropriately.

10. In the present case, I find that the plaintiff's counsel should have exercised diligence to find out, from the court registry, why the court room was still locked at 9.30am. This was not done even though it was the plaintiff's case coming up for hearing. The plaintiff has however filed this application within reasonable time after the suit was dismissed for want of prosecution. I find that the plaintiff acted promptly and cannot be said to be on a mission to obstruct or delay justice.

11. It is also clear to me that in the circumstances of this case, the failure to attend court in time or at all was a mistake by the plaintiff's which should not be visited on his client. In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 at 1040 Apaloo JA as he then was stated thus:-

**“Blunders 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”.**

12. Similarly, in *Mbaki & Others V Macharia & Another* (2005) 2 EA 206, at page 210, the Court stated as follows:

**“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”**

13. In the circumstances of this case, I find that there was no reason grave enough that would warrant the locking out of the plaintiff from pursuing its case by allowing the trial to proceed to its logical conclusion. For the above reasons, I find that it would be in the interest of justice to reinstate the plaintiffs and to set aside the orders of 2<sup>nd</sup> September 2019.

14. Consequently, I allow the application dated 26<sup>th</sup> September 2019 but on condition that the plaintiff pay thrown away costs to the defendant together with the costs of this application.

**Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wanjeri for the plaintiff.

Mrs Mbuthia for Njeru for the defendant

Court Assistant – Sylvia