



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 322 OF 2017

SAIDA MOHAMMED.....PLAINTIFF

VERSUS

AIRTEL KENYA.....1ST DEFENDANT

HUSSEIN ABDI YARE.....2ND DEFENDANT

AND

KENYA TOWERS LIMITED..INTERESTED PARTY

RULING

1. Vide the notice of motion dated 18/2/2019, the plaintiff applicant is seeking orders to have the suit reinstated, the same having been dismissed on 22/11/2018. The grounds in support, of the application are that Plaintiff was indisposed on the date of hearing. Plaintiff has availed a medical document (SM-1) to show that she was sick and this information was communicated to the advocates on the opposite side via annexure sm-2.

2. It was argued for the plaintiff that the matter was coming up for the hearing for the very first time when plaintiff was sick. It was submitted that failure to attend court was not deliberate and that the interested party will not be prejudiced. The applicant further submitted that a party should not be dislodged from the seat of justice in such circumstances.

3. The interested party has opposed the application vide the grounds of opposition filed on 26/6/19, where it is averred that plaintiff has not yet set out any new or compelling issue which should entitle the court to exercise discretion in favour of the applicant. It is averred that the medical document is unsigned, undated and illegible and has no letter head and hence the document is not sufficient proof that plaintiff was sick. It is further contended that the pleadings do not raise weighty issues, that the application has not been fixed in a timely manner and that the said application is an abuse of the court's processes.

4. During the hearing of the application, it was argued that the plaintiff owed the court a duty to explain why she was not ready to proceed, that the record of the court only shows that plaintiff allegedly lacked transport only for the court again to be told that plaintiff was sick. It was therefore submitted that a court cannot indulge the whims of the litigants, and the court cannot fill the gaps of what could have happened.

5. It is further argued that since the case was dismissed on 22/11/18, 7 months have passed by and it will not be in the interest of justice to have the case reopened even if there are triable issues. Further, the interested party argued that the application itself was fixed 5 months after the dismissal of the suit, yet the dismissal occurred in the presence of plaintiff's counsel.

6. In support of their arguments, the interested party has proffered the following authorities:-

(i) Bilha Ngonyo Isaac V Kumbu Farm Ltd and another (2018)eKLR.

(ii) Wendano Matuu Company Limited V Stephen Ndambuki Muli and 2 Others (2018) eKLR.

(iii) Shah V Mbogo and Another (1967) EA 116.

7. The defendant did not participate in this application as they were not served. Nevertheless, the court allowed the application to be heard vide my ruling delivered on 9/10/2019.

Determination.

8. I have considered all the issues raised herein as well as the cited authorities. The court will consider whether the applicant has advanced plausible grounds to warrant the issuance of the orders sought, whether the pleadings raise triable issues and whether there was delay in bringing forth the present application.

9. It is averred that plaintiff was sick on 22/11/2018 hence her failure to attend court. This information was given to the court on that day of 2.8.2018. The interested party therefore contends that there are no new or compelling reasons to warrant the issuance of the orders and that the medical document is not proof of the ailment.

10. I have scrutinized the document marked sm-1 (the medical document) which is actually legible contrary to what the interested party has stated. It reads as follows:-

“Saadia Mohammed,

The above named has been unwell since 17.11.2018 she has diabetis and hypertension. Lately she developed swollen feet and currently on medication. Kindly accord her the necessary support”.

11. The document is also signed and is dated 24/11/18. It means that it was not there on 22/11/2018, hence plaintiff’s counsel could not have presented it to court on 22/11/18. It is also apparent that plaintiff’s counsel had made efforts to inform the opposite side of their predicament going by the email communication.

12. The circumstances surrounding the present case are clearly distinguishable from the authorities cited by interested party. In the case of **Bilha Ngunyo Isaac V Kembu Farm Ltd and another (2018)eKLR (Supra)**, the applicant/ plaintiff had a sloppy history where the case had been listed for hearing not once, not twice but severally on 23/4/13, 2/8/13 and 14/3/2014 but matter could not take off due to absence of plaintiff. In the instant case, the matter was coming up for hearing for the very first time on 22/11/18 when it was dismissed.

13. In the case of **Wendano Matuu Company Limited V Stephen Ndambuki Muli and 2 Others (2018) eKLR (supra)**, the advocates for the parties on both sides simply agreed to take out the matter without giving the slightest reason. In the present case, a reason was given to the opposite advocate and the court as to why plaintiff was unable to attend court.

14. In the case of **Shayono Timber Limited VS Kenya National Highway Authority (2018)eKLR** the court while allowing an application to reinstate a suit stated as follows:

“The court therefore has the discretion to reinstate a suit that has been dismissed for non-attendance. As in my other discretion, the same need to be exercised judiciously....”.

15. This court is not in a position to question the authenticity of the medical document produced by plaintiff. However, on the faces of it, and considering that the same was produced after 22/11/2018, I would give the applicants the benefit of doubt and therefore exercise discretion of this court in her favour.

16. As to whether the pleadings raises triable/weighty issues, I find that the plaintiff is claiming a plot in Moyale town. Land is a very sensitive and emotive subject hence the need to hear the case on its merits.

17. On the issue of delay the present application was filed 3 months after the dismissal of the suit. Considering that plaintiff’s counsel was present on 22/11/2018, then there was certainly a delay in filing the application on 18/2/2019. However, I would not term such a delay as inordinate.

18. Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion – see **Mwangi S. Kaimenyi VS Attorney General and another (2014) eKLR**. I have taken into account that this case is not part of the backlog in this station, and that the matter had only been listed for hearing once. In the circumstances, I allow the application on the following terms:-

1) That parties file their documents and statements of witnesses in a paginated bundle within a period of 45 days and the matter is to be listed down for the pre-trial conference.

2) That applicant serves this order upon the defendants within a period of 15 days.

3) If there is none compliance on the part of the plaintiff in terms of clause 1 or 2 above, then the order allowing this application shall automatically lapse.

4) Applicant is condemned to pay costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22ND JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Otieno holding brief for Ogindo for plaintiff/appellant

Ojiambo holding brief M/s Ndirangu or interested party

HON. LUCY. N. MBUGUA

ELC JUDGE