



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT No. 23 OF 2017

SHADRACK MUASYA MUTUNGA.....PLAINTIFF/APPLICANT

VERSUS

ST CATHERINE SCHOOLS LTD.....1ST DEFENDANT/RESPONDENT

JACKSON MUASYA.....2ND DEFENDANT/RESPONDENT

RULING

1. The Applicant, Shadrack Muasya Mutunga brought this Application by Chamber summons dated 18th January, 2019 under **Section 3A and 80** of the Civil Procedure Act and **Order 12 Rule 7, Order 45 and Order 51 Rule 15** of the Civil Procedure Rules. The Application sought orders that; the orders of Hon. Odunga J. issued on the 21st day of February, 2019 dismissing the plaintiff's suit be set aside and the same be reinstated; that the time within which the plaintiff may set down the suit for hearing be extended; that directions as to an early hearing date of the plaintiff's suit; and provisions be made for the costs of the Application.

2. The Application is supported by the affidavit of Aywa Samuel deponed on 22nd February, 2019 and the grounds briefly are;

- a) The plaintiff/ applicant was admitted in on 13th December 2018 in India for urgent medical treatment as evidenced by an acknowledgement from the Hospital and that the admission period was extended for a further 4 months.*
- b) Counsel in personal conduct of the matter was instructed to seek adjournment of the matter that came up for hearing on 21st February, 2019 and he set out to attend the hearing using public transport, however due to ongoing construction on Mombasa-Nairobi Highway he was prevented from being in Court at the time when the matter was called up for hearing.*
- c) The matter before Court is one that the plaintiff is keen to prosecute as the same raises triable issues and the plaintiff may not be able to file a fresh suit due to the operation of limitation of actions. Further that the plaintiff continues to incur expenses in medical treatment.*
- d) The defendants are yet to execute the dismissal order and would not be prejudiced in any way if this application was granted.*
- e) It is just that this application is granted and determined on priority basis.*

3. The application was opposed by the Respondents with the following grounds of opposition dated 11.6.2019 filed by their counsel:

- a. The application is devoid of substance.*
- b. The applicant had not satisfied the legal principles that guide the court in considering an application for reinstatement of dismissed suits.*

Brief back ground:

4. The Applicant filed **Civil suit 23 of 2017** on 22nd December, 2017 seeking general and special damages, interest and costs. The suit was fixed for directions on 1.8.2018 and on 8.11.2018 the hearing date of 21.2.2019 was given in the presence of all parties. On the said 21.2.2019, the counsel for the defendant attended court while the plaintiff's counsel was absent. The defendant's counsel made an

application that the suit be dismissed. The Learned Justice Odunga found that since there was no appearance for the plaintiff and as the defendant did not admit any of the claims the suit was dismissed with costs hence the instant Application.

5. The court directed that the application be canvassed by written submissions that both parties filed.

6. The plaintiff's counsel submitted that the issue for determination is whether there is basis for grant of the orders sought. Counsel cited the provisions of Section 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules. Also listed were the cases of **Mbogo & Another v Shah (1968) EA 93**, **Murai & Others v Amos Wainaina (1979) eKLR**, **Philip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103** and it was submitted that the plaintiff's absence in court on 21.2.2019 was not intentional and counsel's mistake ought not to be visited on the plaintiff. The case of **Gold Lida Ltd v NIC Bank Ltd & 2 Others (2018) eKLR** was cited and it was submitted that the application be allowed in the interests of justice.

7. The defendants' counsel submitted that the issue for consideration is whether there was sufficient cause for non-attendance by the plaintiff's advocate. Counsel invited the court to consider the case of **Shamsa Mohammed Hassan & Another v Salah Rage Bulle & Another (2019) eKLR**. Counsel offered to accept throw away costs as an alternative however urged the court to dismiss the chamber summons with costs to the defendants.

Having considered the pleadings and the respective submissions of counsel, I am commended to find the following issues necessary for consideration;

a) Whether the Applicant has shown sufficient cause to warrant grant of the orders sought?

b) What orders may the court make?

9. Before proceeding to resolve the issues for consideration, I wish to point out that the jumbled up application was also brought as a review application for the chamber summons was indicated as being brought inter alia under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. If that was the position of counsel, then I find it rather mischievous that the instant file found its way before me, rather than it being placed before the Hon. Justice Odunga who made the dismissal order. Be that as it may it is noted that the parties agreed to take directions before this court regarding the disposal of the plaintiff's application aforesaid and have presented their submissions. Remitting the matter to the other court might cause delay in the finalization of the matter as that is the concern of the parties herein. Suffice to add that the counsel for the defendant vide his submissions is ready to accept throw away costs so as to enable the plaintiff's suit to be reinstated. Under those circumstances I find that there is no prejudice suffered by the parties herein if this court handles the matter. It is also noted that the court falls under the cluster of those with high backlog of cases and thus the need to work towards reduction of such backlog.

10. From the record, the dismissal was made within the purview of Order 12 Rule 3(1) of the Civil Procedure Rules. The instant application was also brought under Order 12 Rule 7 of the Civil Procedure Rules that provides that "Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

11. The reinstatement order is a discretionary one and case law has given guidance on how the discretion may be exercised. In the case of **Shah v Mbogo (1967) EA 166** as;

"to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all of the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit..."

12. From the affidavit in support of the application, it was claimed that the plaintiff was away in India on treatment. It was also claimed that the counsel in conduct of the matter was caught up in traffic. I have not seen any affidavit by the plaintiff to that effect and a scrutiny of the annexures relied upon indicates that the same have not been marked and have not been commissioned by a commissioner for oaths hence offending Rule 9 of the Oaths and Statutory Declarations Rules that provides that:

"all exhibits to Affidavits shall be securely sealed thereto under the

seal of the Commissioner, and shall be marked with serial letters of identification."

13. In **Francis A. Mbalanya v Cecilia N. Waema [2017] eKLR**, the court declined to accept documents that were not sealed by the Commissioner for Oaths. In this regard when exercising my discretion in considering the evidence available before me, I find that there is no evidence to support the fact that the plaintiff was away for treatment because the annexures that speak to that averment are not sealed by the commissioner for oaths. I quickly add that the failure to mark is indicative of mischief and lack of seriousness by counsel on record for the applicant.

14. I am not satisfied that sufficient cause has been made to warrant the order sought. However, in the interest of justice I shall consider the nature of the case as can be gleaned from the pleadings. The plaintiff seeks compensation from the defendants and that the defendants have not raised any matters of fact by way of affidavit or otherwise from which this court can elicit any reason as to why they are opposed to the application. In Black's law dictionary, 6Th Edition page 58, it is stated that;

"An affidavit is a statement of declaration in writing on oath or

affirmation before a person having authority to administer oath

or affirmation.”

15. I therefore find that in the absence of the same, it is not demonstrated what prejudice the defendants will suffer if the application is allowed. Consequently, I will grant only prayer 1 in the application.

16. With regard to the 2nd issue, it suffices to cite the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584**, where Kneller, J (as he then was) stated as follows:-

“Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances...If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates...It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position...”

17. I find that though sufficient cause has not been shown by the Applicant to warrant the setting aside of the dismissal order, the matter seemed to have been at its formative stages and that the defendant has not commenced the execution process. The defendants' counsel offered to accept throw away costs that I am certain shall cater for the steps he had taken to attend court to defend the suit.

18. In the result the plaintiff's application dated 18.1.2019 is allowed in terms of prayer 1 on condition that the plaintiff pays the defendant throw away costs of Kshs 20,000/ within the next fourteen (14) days from the date hereof failing which the orders setting aside the dismissal shall lapse. It is further ordered that upon the payment of the throw away costs the plaintiff do set down the matter for hearing as a matter of priority.

It is so ordered.

Dated and delivered at **Machakos** this **6th** day of **May, 2020**.

D. K. Kemei

Judge