



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 361 OF 2011

TANAD TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS

AFRICAN MERCHANT ASSURANCE CO. LTD.....DEFENDANT

RULING

1. The plaintiff, *Tanad Transporters Limited* (the applicant) moved this court in its Notice of Motion dated 8th November 2019 seeking reinstatement of its suit which was dismissed on 6th November 2019 for non-attendance. The application is anchored on *inter alia* Article 50 (1) of the Constitution, Sections 1A, 1B and 3 A of the Civil Procedure Rules as well as Order 12 (7) of the Civil Procedure Rules. It is supported by the grounds stated on its face and the averments made in the supporting affidavit sworn on 5th November 2019 by Mr. Justus Wabuko, the applicant's learned counsel.
2. The application is opposed through a replying affidavit sworn on 15th January 2020 by the respondent's learned counsel Mr. Zacharia Mwambi.
3. The application was argued orally before me on 8th June 2020 by learned counsel Mr. Wabuko who held brief for Ms Ligunya for the applicant and learned counsel Mr. Mwambi who appeared for the respondent.
4. In his oral submissions and in his supporting affidavit, Mr. Wabuko explained that failure to attend court on 6th November 2019 was not deliberate but was caused by an inadvertent error which arose from miscommunication between the firm's court clerk and the court registry when taking a date for hearing of the suit; that the court clerk, Mr. Alando diarized 7th of November 2019 as the hearing date while the registry clerk minuted in the court record that suit had been fixed for hearing on 6th November 2019; that acting on information given by Mr. Alando, he noted in his diary that the suit was fixed for hearing on 7th November 2019 and actually attended the court on that day only to find that the case had not been causelisted. On enquiry from the registry, he discovered that the case was dismissed on the previous day for the plaintiff's non-attendance.
5. It is the plaintiff's contention that it has always been diligent in pursuing its case which had already been certified ready for hearing and it would be against the interest of justice to deny it an opportunity to be heard on merit on its claim against the defendant. The plaintiff stated that it was ready to prosecute the suit at the earliest opportunity and urged the court to find merit in the application and allow it as prayed.
6. In opposition to the motion, the defendant through its learned counsel advanced the view that the applicant had failed to give a good and credible explanation for its failure to attend court on the hearing date and added that the application ought to be dismissed because in any event, the plaintiff has never demonstrated seriousness in prosecuting the suit which had been pending for about eight years.
7. I have considered the application, the affidavits filed in support and in opposition thereof and the parties' rival submissions. I have also perused the court record.
8. I wish to start by pointing out that under Order 12 Rule 7 of the Civil Procedure Rules (CPR), the court has wide and unfettered discretion to reinstate a suit which had been dismissed for non-attendance on terms it finds just. However, just like any other judicial discretion, this discretion must be exercised judiciously taking into account the peculiar facts and circumstances of each case.
9. In an application such as the one before me, the courts discretion can only be exercised in favour of an applicant who satisfies the court that there was sufficient cause to justify his failure to attend court on the hearing date.
10. In this case, the applicant has asserted that its failure to attend the court on 6th November 2019 was not deliberate but was caused by an inadvertent error in diarizing the hearing date owing to the lack of proper communication between the court registry and the court clerk who had attended the registry for purposes of obtaining a hearing date on behalf of the plaintiff. Counsel explained that due to this inadvertent

error, the plaintiff was not aware of the hearing date of 6th November 2019 hence its lack of representation in court on that date.

11. I have read the annexures annexed to the supporting affidavit. I note that they include an affidavit sworn by the aforesaid court clerk *Mr. Damanius Okongo Alando* explaining the circumstances in which the confusion regarding the correct hearing date occurred and extracts of both *Mr. Wabuko's* and *Mr. Alando's* respective diaries showing that they had wrongly diarised the hearing date as 7th November 2019 instead of 6th November 2019. I have also noted hearing notices issued by the firm of advocates representing the plaintiff addressed to the plaintiff and the defendant notifying them that the case was fixed for hearing on 7th November 2019. These annexures in my view confirm the applicant's assertion that failure to attend court on 6th November 2019 was not intentional but was caused by circumstances beyond its control. They also explain the defendant's absence on 6th November 2019.

12. On perusing the court record, I find that though this suit was filed on 26th August 2011, it was not certified ready for hearing until 16th April 2018 after it was transferred to the High Court Civil Division from the Environment and Land Court where it had been taken for hearing by mistake. The record confirms that the plaintiff was represented by counsel at all times the matter was fixed for mention either before this court or the Environment and Land Court; that the only date the plaintiff missed court attendance was on the date the suit was dismissed.

13. Given the foregoing, I find the explanation given by the plaintiff for failure to attend the court on 6th November 2019 both plausible and satisfactory. There is nothing in the court record to support the defendant's contention that the plaintiff is undeserving of the exercise of the court's discretion allegedly because it has been indolent and responsible for the delay in prosecution of the suit. In fact, the court record confirms the opposite. In the premises, I find merit in the Notice of Motion dated 8th November 2019 and it is hereby allowed in terms of prayer 1 with no orders as to costs. The parties are directed to approach the court registry to take a mutually convenient hearing date on a priority basis.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 16th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wabuko for the Plaintiff/applicant

Mr. Mwambi for the Defendant/respondent

Ms Mwinzi: Court Assistant