



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 717 OF 2007

INSURANCE COMPANY OF

EAST AFRICA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ERNEST JACOB KISAKA.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant has moved this court by way of the Notice of Motion dated the 24th February, 2020 seeking to re-instate the suit and set aside the order of dismissal made on the 28th January, 2020.

The application is supported by the annexed affidavit sworn by Harriet Akwissa Advocate, on the 24th February, 2020. In the said affidavit she avers that on the 28th January, 2020, she had to take her sick husband to hospital and since she was the only associate in the firm of Njeri Kariuki Advocate, which is on record for the plaintiff, she called a pupil at the 11th hour and instructed her to attend court and seek an adjournment through as advocate.

She averred that regrettably, the matter had already been dismissed being an old matter where the court had granted the plaintiff a last adjournment. She states that the events that led to the dismissal of the suit were entirely beyond her control and the plaintiff should not be penalized for mistake of counsel.

In the replying affidavit sworn by Ernest Jacob Kisaka on the 16th day of June, 2020, he depones that there has been unexplained inordinate delay in filing the application herein. According to him, the plaintiff has never been ready or keen to prosecute the suit. He further deponed that the firm of Njeri Kariuki has more than three (3) advocates who would have been available to handle the matter on the 28th January, 2020 when the same was dismissed.

The application was disposed off by way of written submissions which the court has considered together with the affidavits both in support of and in opposition to the application.

Though the plaintiff has urged the court to reinstate the suit, the defendant raised a fundamental issue on whether there exists a suit that can be reinstated. He brought the attention of the court to its order that it made on the 22nd February, 2017 in which it had ordered that the suit be prosecuted within (120) days failing which it would stand dismissed. This court can confirm from the record that the said order was made on the material date and it is on record.

Upon further perusal of the record there is no indication that the order was either set aside and/or varied. It is also clear that the suit was not prosecuted within the stipulated period of (120) days and therefore, the suit stood dismissed upon expiry of the (120) days ordered by the court.

In the circumstances foregoing, there was no suit capable of dismissal as at 28th January, 2020 when the order sought to be set aside was made and therefore the application dated 24th February, 2020 is an abuse of the court process. The same is hereby dismissed with costs to the respondent. The respondent is also awarded the costs of the suit.

Orders accordingly.

Dated, Delivered and signed at Nairobi this 15th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant