



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO 103 OF 2012 (OS)

JOHN MUANGE KITHIOKOIPLAINTIFF

- VERSUS -

ESQUIRE INVESTMENT LIMITED & 5 OTHERS.....DEFENDANTS

RULING

1. This is a Ruling in respect of a Notice of Motion dated 19th March 2019 in which the Plaintiff/Applicant seeks to have the orders of 19th November 2018 dismissing this suit set aside and the suit reinstated for hearing. This suit had been fixed for hearing on 9th November 2018. When the matter was called out, neither the Plaintiff nor his Advocate was in Court. The Court proceeded to dismiss the suit for non-attendance.

2. The Applicants counsel through a supporting affidavit has explained that failure to attend court on the date of hearing was inadvertent because the advocate's secretary failed to diarise the date in the office diary. The Advocate has annexed a copy of the office diary which is blank. The Applicant's counsel pleads with the Court to set aside the orders arguing that a mistake of an advocate should not be visited upon a client.

3. The applicant's application has been opposed by a replying affidavit sworn by the counsel for the Respondent. The Respondent's advocate argues that the suit was dismissed for failure to comply with the directions of the court and for non-attendance. The Advocate further argues that the Applicant has tried to mislead the court that this matter was consolidated with ELC 952 of 2016 and ELC 1215 of 2014. The Advocate argues that there has never been any consolidation of this suit with any other and that ELC 1215 of 2014 was withdrawn.

4. The Advocate further argues that this suit has no merits and that reinstating it will be a waste of judicial time and will prejudice the Respondent. The Advocate further argues that reinstating the suit will go contrary to findings of this court made in ELC 952 of 2014.

5. I have carefully considered the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the oral submissions made during the hearing of this application. The only issue for determination is whether the Applicant has demonstrated that there was a reason for non-attendance to warrant the court exercise its discretion in his favour.

6. The Applicant has explained that failure to attend court was due to an inadvertent mistake which was due to failure to diarise the date in the diary. The advocate for the Applicant has exhibited an extract from his office diary which shows that the case number was not put in the diary. This court's discretion can only be exercised to assist a person who has demonstrated that failure to attend court was inadvertent.

7. In the case of **Martha Wangari Karua Vs Independent Electoral & Boundaries Commission and 3 others** the court of appeal stated as follows:

“ The rules of natural Justice require that the court must not necessarily drive any litigant from the seat of justice without hearing however weak his or her case may be “.

8. In **Philip Chemwolo & another Vs Augustine Kubende (198 – 88) KAR 103 at 1040 Apaloo JA** (as he then was) held as follows:-

“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 . I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

9. I have considered the two decisions hereinabove in light of the circumstances of this case. The Applicant has given a convincing reason as to why the Advocate did not attend Court. I am not convinced that the decisions cited by the Respondent are applicable in the instant case. Most of those decisions were on dismissal for want of prosecution and not on dismissal for non-attendance. I am therefore convinced that this is a proper case where the court's discretion should be exercised in favour of the Applicant. I therefore allow the Applicant's application and set aside the orders of the Court made on 9th November 2018 dismissing this suit. The suit shall be reinstated for hearing on condition that the Applicant's lawyers pay Kshs.50,000/= to the Respondent within 14 days from the date of this ruling. The Applicant shall also amend the Plaintiff within 14 days from the date of this ruling failure to comply with any of the two condition shall mean that the order shall cease to operate and this suit shall stand dismissed.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 6th day of February 2020.

E.O.OBAGA

JUDGE

In the presence of:

M/s Masumi for Mr Osundwa for Plaintiff and Mr Muinde for M/s Awori for 1st Defendant.

Court Assistant: Hilda

E.O. OBAGA

JUDGE