REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 29 OF 2012

DAVID GEORGE KATIBA RUTHI.....PLAINTIFF/APPLICANT

-VERSUS-

NATION MEDIA GROUP LTD.....1ST DEFENDANT/RESPONDENT

BARCLAYS BANK (K) LTD.....2ND DEFENDANT/RESPONDENT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the Notice of Motion dated 23rd February, 2019 supported by the grounds set out on its face and the affidavit sworn by his advocate, *Namada Simoni*. The applicant is seeking to set aside the dismissal order made on 21st January, 2019 and consequently, the reinstatement of his suit.

2. The abovementioned deponent stated in his affidavit that his firm through the office clerk fixed the suit for hearing on 21st January, 2019 and which date was taken *ex parte*. That subsequently, a hearing notice was drafted and served upon the respective defendants/respondents through their advocates.

3. It is the deponent's assertion that nevertheless, his clerk forgot to diarize the date or inform the applicant of the same and hence when the suit came up for hearing as scheduled, neither the applicant nor his advocate were in attendance, thereby leading to the dismissal thereof. The deponent was careful to add that the applicant is still keen on prosecuting his suit.

4. The Motion stands opposed. The 1st defendant/respondent put in Grounds of Objection dated 20th June, 2019 as well as the replying affidavit of *Vera Kemunto Nteng'a* sworn on the same date, by and large averring inter alia, that the applicant's failure to attend court was intentional and that the previous conduct of the applicant points to a disinterest in the prosecution of his case. The deponent added that in the meantime, the 1st respondent continues to suffer unnecessary anxiety and uncertainty resulting from the delay in the matter.

5. On their part, the 2nd and 3rd defendants/respondents in their Grounds of Opposition dated 25th June, 2019 reiterated their counterpart's averments that the applicant has shown no keenness in prosecuting his case and is only out to delay the matter and prejudice the said respondents.

6. The application was argued orally before this court, with *Mr. Namada* learned counsel for the applicant reiterating that his failure to attend court was purely the result of negligence on the part of his clerk, who has since been relieved from duty at his firm.

7. In his opposing arguments, *Mr. Kemunto* advocate for the 1st respondent submitted that the averments made by the applicant's counsel are hearsay in the absence of the clerk's affidavit and the same should be disregarded as a result.

8. Mr. Maina advocate for the 2nd and 3rd respondents associated himself with his counterpart's submissions, adding that the applicant has on previous occasions adjourned the suit and is now using the application as a delaying tactic. It is equally his view that there has been inordinate delay in bringing the application and this court should not exercise its discretion in the applicant's favour.

9. In his rejoinder arguments, *Mr. Namada* urged this court to consider the record which establishes that the applicant has all along attended court and only sought for an adjournment in unavoidable circumstances. The counsel maintained that the application has been brought without unreasonable delay.

10. I have carefully considered the grounds set out on the face of the Motion, the affidavits in support of and in opposition thereto as well as the opposing Grounds. I have also considered the rival oral arguments.

11. In first answering the argument of inordinate delay brought forth by Mr. Maina counsel acting for the 2nd and 3rd respondents, I have established that the application was filed approximately one (1) month following the dismissal order which to my mind does not portray inordinate delay.

12./ Turning to the record, I confirm that the suit was last in court on 21st January, 2019 when it was dismissed on the basis of non-attendance on the part of the applicant. The record also reveals that the said date was taken by the applicant's advocate *ex parte*. I am also able to confirm from the record that whereas this is a fairly old matter, the same has been active in court prior to its dismissal which goes to show that the applicant previously took reasonable steps to prosecute his case.

13. The explanation for the non-attendance has been set out hereinabove. The question to be answered is whether such explanation is reasonable or not. The courts have on previous occasions appreciated that mistakes are made from time to time by advocates and it would generally be unfair to fault a client for such mistakes. Take for instance the rendition by the Court of Appeal in ***Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR*** as hereunder:

> **"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"**

14. In the current instance, the applicant's advocate admitted that there was inadvertence on the part of his employee and which inadvertence inevitably cost his client. In the premises, it would not be proper to punish the applicant on the sole basis of his advocate's mistake.

15. Be that as it may, I cannot fail to consider the prejudice that will befall either of the parties as it were. On the part of the applicant, it is fair to state that he stands to be prejudiced given that he filed the suit with the hope of being awarded damages against the respondents for alleged grievances arising from an alleged defamatory publication made by way of an advertisement relating to certain properties belonging to him. To deny him the chance of prosecuting his case would be equal to denying him access to justice.

16. On the other part, each of the respondents have also argued that they too stand to be prejudiced; however, this has not been clearly demonstrated. In any event, I have already established that previously, the matter was in court regularly. Moreover, while there are instances where the suit was adjourned, the record shows that all the parties contributed to such adjournment at one point or another. I therefore have no basis on which to find that the respondents will be prejudiced should the orders sought be granted.

17. I must remind the parties that whether or not to set aside a dismissal order calls for nothing short of the court's discretion and which discretion ought to be exercised judiciously given that, courts of law are equally courts of justice. Such was the position taken in the well-known case of *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* as hereunder:

> **"…courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do."**

18. I am convinced that this case forms a good example of an instance where justice would surely be upheld in granting the applicant the opportunity of prosecuting his case, without ignoring the age of the suit.

19. In the end, I will allow the Motion as prayed. Consequently, the dismissal order made by this court on 21st January, 2019 is hereby set aside and the suit reinstated on condition that the same is prosecuted within 120 days from today, failing which the suit shall stand dismissed. The Defendants are awarded the costs of the application.

Dated, signed and delivered at NAIROBI this 11TH day of JULY, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the 1st Defendant/Respondent

.....for the 2nd and 3rd Defendants/Respondents