



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.34 OF 2013

JACK KAGUU GITHAE.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA COMMERCIAL BANK LTD.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 29th March 2019. It seeks court order of 15th July 2019 dismissing plaintiff's application dated 28th February 2019 for non-attendance. It further seeks to reinstate the said Notice of Motion and it be set down for hearing.
2. Grounds on the face of the application are that reasons for non-attendance by plaintiff's Advocate were beyond his control as he was caught up in traffic grid occasioned by an accident at Gilgil on his way to court from Nairobi; that he instructed Nyamwange Advocate to hold his brief but by the time he arrived, the matter had been called out and Notice of Motion dated 28th February 2019 dismissed.
3. Further that the plaintiff's Advocate has been keen and vigilant in prosecuting the application to a conclusion going by the number of times he has fixed the application for hearing; that this application has been brought without unreasonable delay and the defendant will not suffer any prejudice if this application is allowed; that the interest of justice will be served if this application is allowed.
4. The application is supported by the affidavit of **Anthony Gikaria Advocates**. He restated grounds of the application.
5. In response, the defendant/respondent filed grounds of opposition dated 23rd May 2019 and replying affidavit dated 17th September sworn by **Isaac Cheruiyot**. The ground raised in response is that the application is an afterthought and an abuse of court process.
6. Respondent averred that it would be prejudicial to the respondent if the applicant is allowed to prolong the proceedings herein contrary to the letter and spirit of expeditious disposition of suits.
7. Further that no proof has been rendered to confirm that an accident occurred in Gilgil on 15th July 2019 to occasion inconvenience and lateness of the applicant's Advocate to attend court; neither is there proof that he instructed Nyamwange Advocate to hold brief.
8. The 1st respondent further averred that the applicant in bad faith and with malicious intention never notified the 1st respondent of the hearing date which was fixed without the 1st defendant's knowledge.; that the applicant has not offered plausible explanation for non-attendance and this application is aimed at engaging the 1st defendant in unending litigation hence delay of justice and waste of resources.

ANALYSIS AND DETERMINATION

9. I have perused the court record and confirm that the application dated 28th February 2019 was filed. It was fixed for hearing on 4th June 2019 but failed to proceed because the court was not sitting.
10. The plaintiff attended court registry on 19th June 2019 to take another hearing date for the application. On the said date the application was fixed for hearing on 15th July 2019 when the application was dismissed for nonattendance by Advocate.
11. From record, it is evident that the plaintiff has shown interest in setting the application down for hearing. The Advocate has explained reason for failure to attend court on 15th July 2019. This application was filed shortly after the dismissal. I have considered averments by the Advocate for the plaintiff and find the explanation given satisfactory. By fixing the application for hearing and bring this application shortly after dismissal of application on 15th July 2019, the plaintiff has demonstrated interest in prosecuting the application dated 28th February 2019.

12. From the foregoing, I find that it would be in the interest of justice to allow the plaintiff prosecute the said application before this suit is set down for hearing.

13. FINAL ORDERS

1. Order issued on 15th July 2019 dismissing application dated 28th February 2019 is set aside.
2. Application dated 28th February 2019 is hereby reinstated
3. Costs of this application in the cause.

Ruling dated, signed and delivered at Nakuru this 9th day of October, 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jeniffer - Court Assistant

Biko holding brief Gikaria Counsel for Appellant

No appearance for Counsel for Respondent