

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 57 OF 2011 (OS)

NAZLIN UMAR RAJPUT.....PLAINTIFF

VERSUS

MADATALI SABERALI CHATUR.....DEFENDANT

RULING

1. On 8th February 2015 I delivered a ruling where I dismissed an interlocutory application and directed that the main suit proceeds for full hearing. I allocated the matter dates for full hearing on 17th and 30th April 2015. The ruling was delivered and the dates for hearing were allocated in the presence of the plaintiff who acts in person and Mr. Mwangi, the advocate who represents the defendant.

2. When the matter came up for hearing on 17th April 2015, Mr. Mwangi appeared for the defendant but the plaintiff was not in court. No explanation was given for her absence, nevertheless the matter was put off to the other date given on 8th February 2015, that is to say 30th April 2015. On the said date, again, Mr. Mwangi came to court but the plaintiff did not. Mr. Mwangi applied for the dismissal of the suit for want of prosecution. The court conceded to that request and dismissed the matter for want of prosecution by and non-attendance on the part of the plaintiff.

3. It transpired later that day that the plaintiff came to the courthouse, and appeared before me at 11.15 am. She informed me that she was aware of the two dates but she had absented herself from the proceedings as she had filed a notice of appeal and assumed that the notice sufficed for stay of proceedings purposes. She said she was alerted by an advocate friend of hers who called her to inform her that an advocate was applying to have her case dismissed, and it was for that reason that she rushed to court only to find that the matter had been disposed of.

4. The plaintiff thereafter filed a Motion dated 24th May 2016 seeking stay of the order made on 30th April 2015 and all consequential orders. In her affidavit in support of the application she pleads that she was always diligent with respect to the proceedings that have been conducted so far. She also avers that she has been unwell over the period.

5. The defendant filed a reply to the application through an affidavit sworn on 19th December 2016. He avers that the only order made on 30th April 2015 was for dismissal of the suit and there is therefore nothing to be stayed. He states that the plaintiff ought to comply with the law and should have filed the appropriate application. Given the nature of applications that she has been applying so far and prosecuted she cannot claim to be ignorant of the law. He adds that her application seeks certification of an application dated 30th April 2015 yet there is no application of that date on record.

6. The application was urged orally before me on 19th January 2017. Both sides breathed life to the matters averred in their respective filings.

7. It is common ground that the dates for hearing were given in open court in the presence of the plaintiff, she was therefore aware of them. She concedes that she chose to stay away because she assumed that the notice of appeal she had filed entitled her to a stay of proceedings. The law is clear that the court has discretion to dismiss a suit for non-attendance and want of prosecution. The court exercised that discretion when the plaintiff failed to attend court on the two dates that had been allocated for the hearing

of her case. See Order 12 rule 3 and Order 17 rule 3 of the Civil Procedure Rules. Order 12 rule 3(1) in particular provides:-

'If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, THE SUIT SHALL BE DISMISSED EXCEPT FOR GOOD CAUSE TO BE RECORDED.' (Emphasis added).

8. Upon dismissal of a suit for want of prosecution or non-attendance, there is provision in the Civil Procedure Rules for setting aside of the orders or reinstatement of the suit. The power to reinstate a suit or to set aside orders is discretionary. The court ought to be persuaded to exercise discretion in favour of the applicant. A case has to be made out for it. In this case the plaintiff was at all times aware of the dates, but she chose to stay away. She has not given reasons that in my view are plausible. I agree with Mr. Mwangi that she cannot possibly plead ignorance. She has filed numerous applications in this cause and ably prosecuted them. A person operating in ignorance cannot have the track record that she has in this cause.

9. The Motion that forms the basis for these proceedings is dated 24th May 2016. It seeks certification of an application dated 30th April 2015. There is no such application on record. The plaintiff during oral hearing asserted that she had made an oral application on 30th April 2015 and that that was what she sought to have certified. Well, the basic truth is that there is no application on record dated 30th April 2015. The plaintiff made no such application on 30th April 2015 as the other side was not before the judge at the time, and she had only been given an audience for the court to understand what her concern was at that time. The other prayer is that she asks for stay of the order made on 30th April 2015. That order is not available for stay. It is an order that merely dismissed the suit. It is not for execution in any way. The suit was dismissed and that was it. The prayers sought are therefore not tenable.

10. The plaintiff also claims that she was unwell over the relevant period. I have carefully gone through the medical documents attached. None of them cover April 2015. They cover the period September and December 2015 and January 2016. The fact that she had medical issues in the latter part of 2015 and early 2016 are clearly not relevant. She in fact found time to come to court when she heard of the dismissal of the suit. She was fit enough to attend court on the due dates if she was minded to.

11. Having taken everything into consideration I have come to the conclusion that the plaintiff has not persuaded me that I should exercise discretion in the manner proposed. I find no merit in the application dated 24th May 2016 and I hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE