



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1657 OF 2007

JANE WAITHIRA KIHARA.....PLAINTIFF

=VERSUS=

NJIHIA MUCHEKE.....DEFENDANT

RULING

1. On 16/3/2015, Gitumbi J dismissed this suit following a notice to show cause issued under Order 17 rule 2 of the Civil Procedure Rules. The plaintiff subsequently brought an application dated 31/8/2015 seeking reinstatement of the suit. In exercise of discretion, this court conditionally reinstated the suit through a ruling rendered by Eboso J on 8/10/2018. The suit was subsequently listed by the Deputy Registrar for hearing on 31/10/2018 before Mutungi J. On 31/10/2018, neither the plaintiff nor her advocate attended court when the matter was called out for hearing. Consequently, Mutungi J dismissed the suit for want of prosecution. Following this second dismissal of the suit, the plaintiff brought a notice of motion dated 26/11/2018, seeking reinstatement of the suit in the following terms:

1) Spent.

2) That this honourable court be pleased to set aside its orders herein dismissing the plaintiff's suit for want of prosecution and/or non-attendance and all consequential orders ensuing therefrom.

3) That pursuant to the grant of order 2 above, this honourable court be pleased to reinstate the plaintiff's suit.

4) That costs of the application be provided for.

2. The said application is the subject of this ruling. The application was opposed by the defendant through a replying affidavit sworn on 3/6/2019. It was canvassed through brief written submissions dated 7/10/2019. The defendant responded through a replying affidavit dated 3/6/2019 and written submissions dated 15/1/2020.

3. I have considered the application together with the supporting affidavit and written submissions. Similarly, I have considered the defendant's response and written submissions. I have also considered the relevant legal framework and the applicable jurisprudential principles on the key question in the application. The key question for determination is whether the plaintiff has satisfied the criteria upon which this court exercises jurisdiction to set aside an order dismissing a suit.

4. The case of the plaintiff is that her advocate took the hearing date and was aware of the hearing. Because the advocate had "some other matters" where his presence was mandatory, he asked his clerk to request an advocate to hold his brief and cause the file to be placed aside. He later learnt that the advocate who had been requested to hold his brief walked out of the courtroom the moment he concluded his matter and left the clerk stranded. This matter was subsequently called out and dismissed before the clerk could get another advocate to hold the plaintiff's advocate's brief. He contends that if the dismissal order is not set aside, she will suffer great prejudice.

5. The case of the defendant is that on 16/3/2015, Gitumbi J dismissed this suit for want of prosecution. On 8/10/2018, this court conditionally reinstated the suit on the following terms: (i) the plaintiff was to pay the defendant throwaway costs of Kshs 10,000 within 10 days; (ii) the plaintiff was to file and serve a single, bound, paginated and indexed bundle of pleadings, witness statements/affidavits and documentary evidence within 10 days; (iii) in default of either of the two conditions, the reinstatement order was to stand vacated and the suit was to stand dismissed. The plaintiff never bothered to comply with the above terms. She simply fixed the suit for hearing. The plaintiff has similarly not bothered to explain why she failed to comply with the order of 8/10/2018. The defendant's position is that the plaintiff having failed to comply with the order of 8/10/2018, the suit stood dismissed after the lapse of 10 days, hence there was nothing to be heard on 31/10/2018.

6. The defendant adds that on 31/10/2015, he attended court but the plaintiff did not attend. The position of the defendant is that the plaintiff

has not given any plausible explanation for her failure to attend court on 31/10/2018.

7. The principles upon which this court exercises the discretionary jurisdiction to set aside an *ex-parte* order in the nature of a dismissal order or an *ex-parte* judgment are well settled [see **Shah v Mbogo & Another (1967) EA 116**. The court's discretion is unfettered but must be exercised judiciously. Secondly, the discretion is intended to deal with injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. It is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

8. This is not the first time the plaintiff is approaching the court with a motion urging the court to exercise its discretionary jurisdiction to reinstate this suit. She previously made a similar application following a previous dismissal order issued by Gitumbi J under Order 17 of the Civil Procedure Rules. The court listened to her. Guided by the above principles, the court conditionally reinstated the suit. It is now contended by the defendant, without any controverting evidence from the plaintiff, that the plaintiff never bothered to comply with the terms of the ruling which reinstated this suit on 8/10/2018. The plaintiff simply asked the Deputy Registrar to allocate her a hearing date before the service week judge.

9. It is clear from the ruling of 8/10/2018 that non-compliance with the terms of the said ruling was to lead to automatic vacation of the reinstatement order and the suit was to stand dismissed. The defendant asserted in his replying affidavit that the plaintiff did not comply with the order of 8/10/2018 and the suit consequently automatically stood dismissed upon expiry of the 10 days. The plaintiff has elected to keep quiet about that serious contention. There is no evidence on record to suggest that the plaintiff complied with the order of 8/10/2018.

10. In the circumstances, I agree with the defendant that there was no suit to be heard on 31/10/2018. I similarly agree with the defendant that in light of the plaintiff's deliberate refusal to comply with the terms of the ruling of 8/10/2018, she is underserving of the equitable relief which she seeks in the application dated 26/11/2018.

11. Consequently, the plaintiff's notice of motion dated 26/11/2018 is dismissed for lack of merit. The defendant shall have costs of the application and the dismissed suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Wanjohi Gichango for the defendant

June Nafula - Court Clerk