



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 190 OF 2012**

**KARIGE KIHORO.....PLAINTIFF**

**VERSUS**

**BENSON IRUNGU MBARIA.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

This suit came up for hearing on 6th October, 2016 when the plaintiff's evidence was taken. At the close of the evidence of the plaintiff, the plaintiff's advocate informed the court that the plaintiff intended to call one witness before closing his case. The suit was adjourned to 9th February, 2017 for further hearing. On 9th February, 2017, the matter was adjourned once again to 29th June, 2017 on the ground that the plaintiff's advocate was attending to a sick child. When the matter came up on 29th June, 2017 neither the plaintiff nor his advocate attended court. On the application by the advocate for the 1st defendant, the plaintiff's suit was dismissed with costs for non-attendance.

What is now before me is the plaintiff's application brought by way of Notice of Motion dated 3rd July, 2017 seeking an order for the setting aside of the order that was made by the court on 29th June, 2017 and the reinstatement of the suit for further hearing. The application was brought on the ground that when the suit came up for further hearing on 29th June, 2017 the plaintiff's advocate Mr. Noah Kiptoo Byegon was indisposed and that he sent a representative from his firm to appear in court and inform the court of his inability to attend court. The plaintiff contended that he did not attend court because he had been informed by his advocate that since he had already given evidence, it was not necessary for him to attend court since the matter was going to be adjourned. The application was supported by the affidavit of the plaintiff and his advocate, Noah Kiptoo Byegon both sworn on 3rd July, 2017. Mr. Noah Kiptoo Byegon annexed to his affidavit a copy of a medical report dated 28th June, 2017 by Dr. Roger Kayo.

The application was opposed by the 1st defendant through a replying affidavit sworn on 12th October, 2017. The 1st defendant contended that the plaintiff and his advocate had not demonstrated the existence of any mistake, inadvertence, accident or error in their failure to attend court on 29th June, 2017 that would justify the setting aside of the orders made by the court on that date. The 1st defendant contended that the plaintiff and his advocate had consistently failed to attend court and that the present application was an afterthought meant to delay the final judgment in the matter. The 1st defendant contended that the plaintiff had nothing to lose as a result of the delay since he did not own the property in dispute and had not made any investment on the same.

The application was argued by way of written submissions. The plaintiff filed his submissions on 8th March, 2018 while the 1st defendant filed his submissions in reply on 23rd October, 2018. I have considered the plaintiff's application together with the supporting affidavits. I have also considered the 1st defendant's affidavit in reply to the application and the submissions of counsel. This court has power to set aside an order dismissing a suit for non-attendance. The power is however discretionary and ought to be exercised judiciously for the ends of justice to be met. Upon evaluation of the material before me, I am satisfied that good grounds have been put forward by the plaintiff to warrant the grant of the orders sought. First, the court made an error in dismissing the suit for non-attendance. The plaintiff had already given evidence and had been cross-examined and re-examined. The plaintiff's case was not a candidate for dismissal for non-attendance. If the court's attention had been drawn to the fact that the plaintiff had already given evidence, what the court was supposed to do was to close the plaintiff's case and call upon the defendants to proceed with their cases. Since the suit was dismissed in error, the plaintiff is entitled as of right to have the suit reinstated for further hearing.

Even if the plaintiff had not given evidence, I would still have reinstated the suit. There is no evidence on record that the plaintiff had consistently sought the adjournment of this case with a view to frustrate the hearing of the same. All the applications that had been made by the plaintiff for adjournment had been made for good cause and the adjournments had been granted on merit. In this instance, uncontroverted evidence has been placed before the court showing that the plaintiff's advocate was sick when the suit came up for hearing on 29th June, 2017 and was dismissed for non-attendance. I am of the view that in the absence of evidence that the advocate presented a false medical report, sickness is a reasonable excuse for failure by an advocate to attend court.

For the forgoing reasons, I find merit in the plaintiff's Notice of Motion dated 3rd July, 2017. The application is allowed in terms of prayer 3 thereof. The costs of the application shall be in the cause.

**Delivered and Dated at Nairobi this 30<sup>th</sup> Day of April 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. Okoth h/b for Mr. Kiptoo for the Plaintiff

Ms. Gichuhi h/b for Mrs. Warui for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

C. Nyokabi-Court Assistant