

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 308 OF 2017

[Formerly Eldoret Hccc No. 223 of 2000]

CHRISTOPHER KIPROTICH TELENGECH.....PLAINTIFF

VERSUS

LONRHO AGRIBUSINESS (E.A.) LIMITED.....1ST DEFENDANT

HIGHLANDS SURVEYORS.....2ND DEFENDANT

RULING

The application dated 26.7.2018 by plaintiff seeks orders that the suit herein be reinstated and listed down for hearing on merit and the order made on 25.7.2018 be set aside. The plaintiff/applicant states that he was at home on 25.7.2018 and thought that the suit was to be heard on 26.7.2018. The plaintiff/applicant was in court on 25.7.2018 before the suit was dismissed. The plaintiff thought that the suit was scheduled for hearing on 26.7.2018. He states that there was confusion on the hearing date and that is why he did not attend court as scheduled. He states that on the 25.7.2018, he was looking after his sick sister in law who underwent a spinal cord operation.

The 1st defendant opposes the application and states that the suit was rightfully dismissed in accordance with Order 12, Rule 3 of the Civil Procedure Rules, 2010.

The 1st defendant states through the advocate that the reasons advanced are not convincing. That the suit has been pending in court for over 18 years. Moreover, that the plaintiff has no cause of action. He has no intention of depositing security for costs. The matter came up for hearing on 25.7.2018, the plaintiff's counsel could not state the whereabouts of his client. The dates were taken by consent and therefore, confusion does not arise. The applicant is to blame for delay in prosecution of the matter.

Abraham Kiptabut Yego states that the plaintiff is not keen in prosecuting the case 18 years down the line. He was aware that the matter was to come for hearing and there was no evidence that the plaintiff was looking after his sister in law. Stephen Rono Kipkorir states that the hearing date was taken in the presence of all advocates.

I have considered all the facts on record and do find that the hearing date in this matter as scheduled on 25.7.2018 was taken by consent. On the hearing date, the plaintiff's counsel came to court but the plaintiff did not turn up in court. In fact, the plaintiff's counsel walked in court when the matter was about to be dismissed.

The reasons given by the plaintiff for not coming to court on the scheduled date are not substantial. There is no iota of evidence that his sister in law was unwell. In fact, the name of the sister in law is not disclosed.

It is not clear as to whether the plaintiff and his counsel were in constant communication before the scheduled date and it is doubtful that they were in constant communication because if they were, the advocate could not have come to court and left the client behind. The plaintiff states that there was confusion but he does not clearly explain the confusion and whether it was caused by his advocate.

This court is alive to the principles of setting aside judgment and the fact that discretion should not be exercised capriciously or whimsically but it should be exercised judiciously. Moreover, that the mistake of advocate should not be used to punish the counsel.

The plaintiff/applicant is not clearly telling the court why he thought that the case was to be heard on 26.7.2018 and yet it was clear that the same was to be heard on 25.7.2018. He is not saying that the advocate inadvertently informed him that the case would be heard on 26.7.2018.

I am unable to exercise my discretion to allow the application as there is no clear explanation as to what caused the non-attendance by the plaintiff. The application therefore, lacks merit and is dismissed with costs.

Dated and delivered at Eldoret this 12th day of April, 2019.

A. OMBWAYO

JUDGE