



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 309 OF 2014**

**TOROITICH MISOI MERENG.....PLAINTIFF**

**VERSUS**

**SIMEON KIPROTICH KATAM.....DEFENDANT**

**RULING**

1. The plaintiff seeks orders through the application dated 6.12.2017 that the court order given on 4.12.2017 dismissing the suit herein for want of prosecution be set aside and subsequently the suit be reinstated and listed down for hearing.
2. The application is based on grounds that the plaintiff/applicant was unwell at home on 4.12.2017 and thought the suit was in court for mention and not for hearing.
3. The plaintiff's/applicant's counsel on record attended court on 4.12.2017 and found that this suit had been dismissed for want of prosecution after there was no appearance by both parties in this suit.
4. The plaintiff's/applicant's efforts to seek audience of the court and the defence counsel led to this formal application for the interests of justice and all the parties in the suit. The suit was part-heard at the stage of the defence case and can proceed to hearing after this court sets aside the order given on 4.12.2017 and reinstate the suit. In the supporting affidavit, the plaintiff states that he thought that the matter was coming for mention. Moreover, that he was unwell.
5. The defendant on his part states that if the defendant was unwell, he could not have been immediately available to see his advocate. The plaintiff was aware of the hearing date but did not attend. This court dismissed the plaintiffs suit on 4<sup>th</sup> December 2017 for the non-attendance by the plaintiff.
6. Under **Order 12 of Civil Procedure Rules** consequences of non- attendance by a party to a suit are stated. **Rule 13** is specific that when only the defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court. In the case **Shah -vs- Mbogo & Another (1967) EA 1116**, the court stated on the matter of its discretion, that;  
  
*“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”*
7. It is trite law that the court's discretion to set aside its ruling is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court.
8. A court's discretion must be exercised judiciously based on facts and the law. The party seeking to reinstate the suit must also demonstrate good faith the case, what unavoidable circumstances meant. Had the matter been brought up then, may be, the result would have been different, once again, in the court's discretion.
9. I have considered the application and the response and do find the explanation given by the plaintiff for not attending court is not convincing. No medical reports have been annexed to the affidavit as evidence that he was unwell. It appears that the plaintiff “knew” that it was a mention and therefore did not attend because it was a mention. However, the court record shows that it was a hearing. Mr. Cheptarus, learned counsel for the plaintiff does not explain why he did not to attend court.
10. I do find that the explanation given by the plaintiff and his counsel not satisfactory and the same is contradictory as I do not know whether to believe the plaintiff that he was unwell or that he knew that it was a mention. The application has no merit. It is dismissed with costs.

**Dated and delivered at Eldoret this 8<sup>th</sup> day of April, 2019.**

**A. OMBWAYO**

**JUDGE**