



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 152 OF 2015**

**DANIEL TSOZI.....PLAINTIFF**

**VERSUS**

**DANSON MSUKO**

**SYLVESTER MSUKO**

**DUNCAN MSUKO**

**BURTON MSUKO.....DEFENDANTS**

**RULING**

1. This suit was filed on 10<sup>th</sup> September 2015. On 24<sup>th</sup> September 2018 when the suit came up for hearing, the Plaintiff was not present in Court and the suit was thereby dismissed for want of prosecution on the application of the Defendants.

2. Subsequently and by this Notice of Motion application dated 3<sup>rd</sup> October 2018, the Plaintiff prays for an order that the suit be reinstated. The application which is supported by an affidavit sworn by the Plaintiff-Daniel Tsozi is premised on the grounds:-

***a) That the Plaintiff's former Advocate were not in constant communication with the Applicant resulting into numerous adjournments that informed the Court to dismiss the Plaintiff's case;***

***b) That the Applicant has always been desirous to prosecute the case.***

3. In a Replying Affidavit sworn and filed herein on 1<sup>st</sup> November 2018 by their Advocate on record Patrick Shujaa Wara, the four Defendants protest that the application lacks merit as the Plaintiff has all along shown no interest in prosecuting his case.

4. The Defendants aver that ever since pre-trial directions were taken herein on 22<sup>nd</sup> November 2016, the Plaintiff has not testified in his case and that all the adjournments given since were occasioned by the Plaintiff. The Defendants further aver that no satisfactory reasons have been given to account for the Plaintiff's absence and/or his witnesses on the date the suit was dismissed and that the allegation that the Plaintiff was on that day indisposed is nothing but an afterthought.

5. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

6. Order 12 Rule 3(1) of the Civil Procedure Rules provides that:-

***“3(1) If on the day fixed for hearing, after the suit has been called for hearing outside the Court, only the defendants attends and he admits no part of the Claim, the suit shall be dismissed except for good cause to be recorded by the Court.”***

7. On the other hand, Order 12 Rule 7 of the Rules provides that:-

***“Where under this Order Judgment has been entered or the suit has been dismissed, the Court on application, may set aside or vary the Judgment or order upon such terms as may be just.”***

8. The guiding principle in regard to the exercise of a Court's discretion was laid down in *Shah –vs- Mbogo & Another (1967)EA 1116* where the Court stated 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 cause of justice.”***

9. In the matter before me the Plaintiff/Applicant avers that he was always ready and desirous to prosecute his case but was let down by the fact that his former Advocate was not in constant communication with himself and that it was only after being taken through the Court file by his new Advocates that he realised that the case had been adjourned twice before it was dismissed at the behest of his former Advocates.

10. Even though he blames the said former Advocates however, it is telling that at Paragraph 7 of his Affidavit, the Plaintiff admits that he was aware of the date and avers that it is him who called the Advocate to adjourn the case as he was “sickly and was not able to make it to Court.” In this regard he has produced a bundle of documents purporting to show that he was unwell.

11. As it were, none of those documents gives a satisfactory explanation as to the whereabouts of the Plaintiff and/or his witnesses on 24<sup>th</sup> September 2018 when the suit was dismissed. I have perused all the documents and all appear to me to bear dates prior to the date the suit came up for hearing and was dismissed. A perusal of the record on 24<sup>th</sup> September 2018 shows that the failure to produce evidence of the Plaintiff's sickness was one of the reasons the suit was dismissed.

12. One would have therefore expected that the Plaintiff would in the present application produce documents validating his claim that on the material day he was unwell and unable to attend Court.

13. Indeed while he blames his former Advocates for failure to communicate to him about the case, the Plaintiff does not show what steps he took on his own to move the case forward since the year 2016. As was stated in *Utalii Transport Company Ltd & 3 Others -vs- N.I.C Bank & Another (2014)eKLR:-*

***“It is the primary duty of the Plaintiff to take steps to progress their case since they are the ones who dragged the Defendant to Court.”***

14. In the circumstances of this case, I think the Plaintiff was complacent and casual in the manner he handled the suit. I am not persuaded that he has furnished any or any valid or reasonable ground for not attending Court on the date when this suit came up for hearing. In the premises, I find no basis upon which I can exercise my discretion to reinstate the suit.

15. Accordingly and with a lot of trepidation, I dismiss the application dated 3<sup>rd</sup> October 2018. As the Plaintiff has already lost his right to be heard on merit, I will not condemn him to pay the costs of this application.

16. It is so ordered.

**Dated, signed and delivered at Malindi this 26th day of June, 2019.**

**J.O. OLOLA**

**JUDGE**