



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 52 OF 2015

GENERAL H. W. NJOROGE.....PLAINTIFF/APPLICANT

VERSUS

WILLIAM NJOROGE MBOTE.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 17th October 2018 brought under Section 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 rule 15 of the Civil procedure Rules and any other enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) That this honourable court be pleased to set aside the order of 9th October, 2018 dismissing the plaintiff's suit for want of prosecution.

(3) That this honourable court be pleased to reinstate the plaintiff's suit.

(4) That costs be in the cause.

3. The grounds are on the face of the application and are:-

(a) On 9th October, 2018 this honourable court dismissed the plaintiff's suit for want of prosecution.

(b) The plaintiff has been keen in prosecuting this suit.

(c) On 9th October, 2018 the plaintiff's counsel was held up before Hon. Justice Obaga in ELC Case No. 168 of 2018. Osman Tahir Sheikh Said & Amina Tahir Sheikh Said (suing as the executor of the will of Tahir Sheikh Said Ahmed) -v-Normad energy Limited hence was late to arrive in court for mention to take directions on the hearing of the suit.

(d) The inadvertence by counsel is regrettable and the plaintiff should not be punished for the said inadvertence.

(e) This application has been made without delay.

(f) It is in the interest of justice that this honourable court grants the orders as sought.

(g) There shall be no prejudice occasioned upon the defendant herein as the suit shall be determined on merit.

4. The application is supported by the affidavit of Kenneth Wilson, advocate for the plaintiff sworn on the 17th October 2018.

5. The application is opposed. There is a replying affidavit sworn by Mwaniki Njuguna advocate for the defendant, sworn on the 30th January 2019.

6. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the oral submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

7. Order 51 rule 15 provides that:-

"The court may set aside an order made ex parte".

I have gone through the court record, on the 9th October 2018. When the matter came up for directions, neither the plaintiff nor his advocate were present. The suit was then dismissed.

8. I have gone through the supporting affidavit of Kenneth Wilson, Advocate for the plaintiff, he has explained why he was not in court when the matter was called out. I find that the reasons given in the supporting affidavit are reasonable. I find that he has given a plausible explanation for his absence in court on that day.

9. In the case of **Philip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103 at 1040**, it was held by Apoloo JA (as he then was) thus;

"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

I am guided by the above authority in finding that the plaintiff deserves to be heard. I find that it is in the interest of justice that the suit herein be heard on merits.

10. In conclusion, I find merit in this application and all it in the following terms:-

(a) That the orders of 9th October 2018 dismissing the plaintiff's suit for want of prosecution are hereby set aside.

(b) That the plaintiff's suit be and is hereby reinstated.

(c) That costs of this application be borne by the plaintiff.

It is so ordered.

Dated, signed and delivered in Nairobi on this 20th day of June 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant