



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 17 OF 2013

ERIC MAILU *t/a* MAILU & MAILU

CONSULTING PARTNERS.....PLAINTIFF

VERSUS

ILULUWE DEVELOPMENT COMPANY LTD.....1ST DEFENDANT

SERAH MUTUA.....2ND DEFENDANT

JAMES KASYULA MUTUA.....3RD DEFENDANT

RUTH KALEKYE MUTUA.....4TH DEFENDANT

SARAH NZEMBI MUTUA.....5TH DEFENDANT

JOHN KIOKO MUTUA.....6TH DEFENDANT

SIMEON MUTUA.....7TH DEFENDANT

MOSES WAMBUA.....8TH DEFENDANT

PETER MWEU.....9TH DEFENDANT

RULING

1. In the Application dated 24th January, 2019, the Plaintiff is seeking for the setting aside of the order of 14th November, 2018 dismissing the suit for non-attendance.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he had instructed the firm of J.A. Makau & Co. Advocates to represent him in the matter; that on 4th March, 2014, the suit was listed for hearing; that on that day, the matter could not be reached; that on 26th September, 2018, his advocates asked the court for leave to serve the Defendants' advocates with a hearing notice by way of registered post and that since none of the parties attended court on 14th November, 2018, it is not clear if the Defendants' advocate was served with a hearing notice for 14th November, 2018.

3. The Plaintiff deponed that his then advocates on record did not inform him of the hearing date of 14th November, 2018 and that it was not until December, 2018 that he perused the court file and discovered that the matter had been dismissed for non-attendance on his part.

4. The Plaintiff finally deponed that the subject matter is demand for professional fees for services rendered to the Defendants to the tune of Kshs. 340,632,169; that the non-payment of the said fees has made him suffer business and economic losses and that he will suffer serious prejudice, loss and damage if the matter is not reinstated and heard on merit. The Defendants did not oppose the Application.

5. This suit was commenced by way of a Plaint dated 13th May, 2013. The Plaint was then amended on 9th July, 2013. The Plaintiff's claim is for professional fees for the work he rendered to the Defendants to the tune of Kshs. 340,631,169 plus V.A.T.

6. In their Amended Defence and Counter-claim dated 2nd August, 2013, the Defendants disputed the Plaintiff's claim. The pleadings in this matter closed on 12th August, 2013 when the Plaintiff, through his then advocate, filed a Reply to the Amended Defence and Defence to the Counter-claim on 12th August, 2013.

7. The record shows that this matter was mentioned for the first time on 4th March, 2014 when it was taken out of the cause list by the Judge. The matter came up again for pre-trial directions on 8th October, 2014. On the said date, the court directed the parties to file their written statements and agreed issues.

8. When the matter came up for mention on 18th November, 2014, the parties informed the court that they had complied with the directions of 8th October, 2014. The parties then fixed the matter for hearing on 2nd March, 2015. On 2nd March, 2015, the Plaintiff's advocate informed the court that the parties were negotiating the matter out of court. The court directed the matter to be mentioned on 2nd June, 2015 for recording of a consent, if any.

9. On 2nd June, 2015, both parties were absent. The court directed for a date to be fixed in the registry. On 30th August, 2017, the Plaintiff's advocate fixed the matter for directions on 17th October, 2017. On that day, the Plaintiff's advocate applied for adjournment to enable him serve the Defendants' advocate with a mention notice. The matter was then fixed for mention on 26th September, 2018. On that day, the matter was fixed for hearing on 14th November, 2018 by the Plaintiff's advocate, on which day neither the Plaintiff nor his advocate were in court. The court dismissed the suit for want of prosecution and non-attendance on the part of the Plaintiff.

10. The chronology of events shows that the Plaintiff has never been keen in prosecuting the suit. Indeed, considering that the date of 14th November, 2018 was fixed by the Plaintiff's advocate on 26th September, 2018, if the Plaintiff had been following up on the position of his case with his advocate, he would have been updated of the position of the suit.

11. It has been held by the courts that it is the responsibility of parties to a suit to make a follow-up of their cases. If a litigant does not make a follow-up of his matter to acquaint himself with its position in court, he cannot blame his advocate or the court when the matter is dismissed for non-attendance on his part.

12. The mere fact that an advocate did not inform his client about the hearing date cannot be a ground for setting aside an order dismissing a suit. There must be other compelling reasons to warrant the court to exercise its discretion in favour of the Plaintiff.

13. In the circumstances, I decline to exercise my discretion in favour of the Plaintiff. The Application dated 24th January, 2019 is dismissed with no order as to costs. For avoidance of doubt, this suit stands dismissed as ordered by the court on 14th November, 2018.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE