



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 88 OF 2015**

**NESSY KUTHII JUSTUS.....PLAINTIFF**

**VERSUS**

**MARCLUS KIRANGA NIMROD.....DEFENDANT**

**AND**

**ZIPPORAH MUTHONI NIMROD.....INTERESTED PARTY**

**RULING**

The application before me is the Notice of Motion dated 13<sup>th</sup> November 2018 brought under **Order 12 Rule 7, 51 Rule 1, 3, 4 and 10 CPR, Section 1A, 1B and 3A and 63(e) CPA**. The applicant seeks the following orders:

- 1. That the Honourable Court be pleased to set aside its orders issued on 1<sup>st</sup> November 2018 dismissing the plaintiff's suit for non-attendance of the plaintiff.**
- 2. That upon the grant of prayer 1 hereinabove, this Honourable Court be pleased to reinstate the suit for hearing on such terms as the Court may deem necessary for the ends of justice to be met.**
- 3. That the costs of this application be in the cause.**

In support of that application is an affidavit by the plaintiff/applicant sworn on 13<sup>th</sup> November. The application is further supported by nine grounds apparent on the face of the said application. The defendants/respondents each filed a replying affidavit in opposition to the said application sworn on 7<sup>th</sup> February 2019.

**APPLICANT'S CASE**

The applicant stated that when this suit came up for hearing on 1<sup>st</sup> November 2018, she was unable to attend Court as she was indisposed. Due to her health condition, she called her advocate on record who advised her not to attend Court while sick and that her failure to attend Court was not therefore deliberate. She stated that the defendant and the interested party can be remedied by costs

She deponed that land is an emotive issue and that it is in the interest of justice and fairness that the application is allowed and that this suit goes to full trial so that the issues can be decided on merit. She stated that unless the application is allowed, she will suffer great loss. The applicant contends that the application has been brought without undue delay.

**DEFENDANT'S CASE**

The defendant, Marclus Kiranga Nimrod in his affidavit stated that no sufficient grounds have been given by the plaintiff/applicant for the grant of the orders. He deponed that he will suffer substantial prejudice if the application is allowed. He seeks to have the application dismissed with costs.

**THE INTERESTED PARTY'S CASE**

The interested party on the other hand stated that the applicant has not given plausible reasons why she failed to attend Court or his advocate

during the hearing on 1<sup>st</sup> November 2018. She stated that the application is made in bad faith and that should the same be allowed, she will suffer substantial loss.

#### ANALYSIS AND DETERMINATION

I have considered the application and the affidavit evidence both in support and in opposition thereto. I have also considered the materials attached and the submissions by the counsels appearing for the parties. This suit came up for hearing on 1<sup>st</sup> November 2018 when Mr. Asimwe who was holding brief for Mr. Omenya advocate for the plaintiff indicated that Mr. Omenya was not ready to proceed as the plaintiff was said to be indisposed. He therefore sought for an adjournment which was disallowed on grounds that this being a Court of record, there was no evidence of sickness such as a sick sheet or a medical report. The suit was then dismissed for non-attendance and for want of prosecution. The present application is therefore seeking to set aside the said dismissal order and to have the suit reinstated for trial. The applicant has attached a prescription note indicating that on the material day, she was prescribed some drugs at Sagana Sub-county Hospital. The respondents have challenged the authenticity of those documents. The principles for setting aside a dismissal order has been stated in a multitude of decisions. In the case of *Shal Vs Mbogo and another (1967) E.A. 116*, it was held that:

**“The discretion to set aside an Ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, 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”.**

Again in the case of *Haji Ahmed Sheikh t/a Itasa Hauliers Vs Highway Carriers Ltd (1982 - 88) 1 K.A.R 1184*, Gachui J.A. stated as follows:

**“The power of the Court in dealing with application under Order IX Rule 10 is to do justice to the parties. In *Pithon Waweru Maina Vs Thuku Mugira, Civil Appeal No. 27 of 1982 (un-reported) (ibid) (Porter, Kneller J.J.A. and Chesoni (Ag. J.A) Potter, J.A. quoting Dufts P., in Patel Vs E.A. Cargo Handling Services Ltd, (1974) E.A. 75* stated at page 1 of his judgment this:**

**“There are no limited or restrictions on the Judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ..... the main concern”.**

#### DECISION

The application dated 13<sup>th</sup> November 2018 is allowed. Consequently, the order dismissing this suit is set aside and the suit reinstated for hearing. The plaintiff shall pay the defendant and the interested party throw away costs at Ksh. 5,000/= each to be paid before the next hearing.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**4<sup>TH</sup> OCTOBER, 2019**

In the presence of:

1. Mr. Asimwe holding brief for Mr. Omenya for Plaintiff
2. Defendant/Advocate – absent
3. Wachira – Court clerk – absent