



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

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

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

**VERSUS**

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

**RULING**

1. ***Toroitich Miso Mereng***, the Plaintiff, seeks vide Notice of Motion dated 6<sup>th</sup> May, 2019 for review of the Court's ruling of 8<sup>th</sup> May, 2019 and substitute it with an order setting aside the order of 4<sup>th</sup> December, 2017 thereby reinstating the instant suit. The application is based on the nineteen (19) grounds on its face and is supported by the affidavit sworn by the Plaintiff on the 6<sup>th</sup> May, 2019 summarized as follows:

(a) *That the suit was instituted in 2014 and at one time proceeded exparte in the absence of the defendant. That the exparte proceedings were later vacated upon the application of the defendant.*

(b) *That during the hearing of 4<sup>th</sup> December 2017, the parties and their Counsel failed to attend and the suit was dismissed for want of prosecution. That the Plaintiff learnt of the dismissal order on the 5<sup>th</sup> December, 2017 and instructed his Counsel who filed the application on the 6<sup>th</sup> December, 2017 for reinstatement. The application was heard but dismissed through the ruling of 8<sup>th</sup> April, 2019.*

(c) *That the dispute that necessitated the commencement of the suit remains unresolved and the dismissal order serves to impede dispensation of justice. That further, the failure to reinstate the suit will lead the parties to file new suits leading to waste of judicial resources.*

2. The application is opposed by Simeon Kiprotich Kattam, the Defendant, through the replying affidavit sworn on the 21<sup>st</sup> June, 2019 deponing to the following among others;

(a) *That the application has not complied with the requirement for review as nothing new has been tendered that was not dealt with through the previous application.*

(b) *That the application is an abuse of the court process as the court was not privy to the Plaintiff's indisposition and no evidence of his sickness on 4<sup>th</sup> December, 2017 was availed.*

3. The application came up for hearing on the 7<sup>th</sup> October, 2019 when Mr. Kenei and Momanyi, the learned Counsel for the Plaintiff and Defendant respectively, made their oral submissions for and against

the Motion. The learned Counsel for the Plaintiff submitted that the Plaintiff has now availed documentary evidence that he has been unwell since 2015 suffering high blood pressure and a mild stroke. That **Articles 48, 50 and 159 of the Constitution** are relevant as they deal with access to justice, fair hearing and substantive justice respectively. The learned counsel for the Defendant submitted that the Plaintiff has not discharged the duty placed upon him by **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules** to enable the court exercise its discretion in his favour. That the fact of the Plaintiff being ailing has been raised earlier and found wanting. That the application is challenging the merit of the court's ruling which can only be pursued through an appeal. That the document on the Plaintiff indisposition could have been availed to the court earlier through exercise of due diligence. That **Article 159 of the Constitution** does not outlaw the rules of procedure. That the Plaintiff has been heard and had the option to file a fresh suit.

4. The following are the issues for the court's determinations;

***(a) Whether the Plaintiff has made a reasonable case for review of the ruling of 8<sup>th</sup> April, 2019 and reinstatement of his suit dismissed on the 4<sup>th</sup> December, 2017.***

***(b) Who pays the costs?***

5. The court has carefully considered the grounds on the Motion, the affidavit evidence, the oral submissions by learned counsel on the record and come to the following determination;

(a) That the record shows that the hearing of 4<sup>th</sup> December, 2017 when the suit was dismissed for lack of prosecution had been fixed on the 25<sup>th</sup> July, 2017 in the presence of Counsel for both parties. That the Plaintiff then filed the Notice of Motion dated the 6<sup>th</sup> December, 2017 seeking to have the order of 4<sup>th</sup> December, 2017 set aside and the suit reinstated. That paragraph 2 and 3 of the Plaintiff's affidavit in support of the application dated 6<sup>th</sup> December, 2017 raised the issue of his being sick on 4<sup>th</sup> December 2017, and being on medication since 2015, as the reasons for his failure to come to court. That further, the Plaintiff was under the impression that the matter was for mention on 4<sup>th</sup> December, 2017 for counsel to take hearing dates. That the same reasons have been raised again at grounds 6, 10, 11, 12 of the Motion dated 6<sup>th</sup> May, 2019 and paragraphs 7, 11, 12 and 13 of the supporting affidavit. That the reasons of sickness, being on medication and having taken the purpose of the court appearance of 4<sup>th</sup> December, 2017 to be for mention were considered by the court in its ruling of 8<sup>th</sup> April, 2019 and rejected as seen at paragraphs 2, 9 and 10. That those facts are not new or important matters that were not within the knowledge of the Plaintiff at the time of the earlier application.

(b) That in view of the finding in (a) above, the application dated the 6<sup>th</sup> May, 2019 appear to be questioning the merit of the court's finding in its ruling of 8<sup>th</sup> April, 2019. That the proper forum to do so is through the Court of Appeal as this court cannot sit on appeal of its own ruling.

(c) That though the application dated 6<sup>th</sup> May, 2019 has invoked **Articles 22, 23, 28, 40, 43, 45, 48, 50 and 159 of the Constitution** and **Sections 1A, 1B, and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya**, the prayers thereon, especially prayer 3 leaves no doubt that the application is for review. That the Plaintiff therefore, needed to prove that he has satisfied the grounds or principles set out under **Order 45(1) of the Civil Procedure Rules** to enable the court exercise its discretion in his favour. That as shown in (a) above, he has failed to do so.

(d) The Plaintiff having failed in his application should pay the costs of the application as dictated by **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

6. The foregoing shows that the Plaintiff's Motion dated the 6<sup>th</sup> May, 2019 is without merit and is dismissed with costs.

Orders accordingly.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of November, 2019.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

No appearance for Plaintiff.

No appearance for Defendant.

Christine: Court Assistant