



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDCOURT AT CHUKA

CHUKA ELC CASE NO.171 OF 2017

FORMERLY MERU ELC CASE NO. 200 OF 2012

MUGENDI EDWIN.....PLAINTIFF

VERSUS

TIMOTHY MICHENI KANAMPIU.....DEFENDANT

RULING

1. This application is dated 27th December, 2017. It has stated that it has been brought to court under sections 1A, 1B & 3 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and Article 159 (2)(d) of the Constitution of Kenya and all other enabling provisions of the laws of Kenya.

2. The application has the following grounds:

1. That the matter was coming up for N.T.S.C on 18th December, 2017 under order 17 of the Civil Procedure Rules 2010.

2. That the notice was served in our chamber on 8th December 2017 and nevertheless the client was present in court though there was a short notice thereon.

3. That the plaintiff/applicant has been having a psychiatric problem which prevented him from prosecuting his case expeditiously.

4. That there is a medical report dated 8th December, 2017 from the psychiatric (sic) that is positive hence he is now competent to have the after (sic) set down for hearing.

5. That it was the inadvertence of the counsel form (sic) not appearing in court hence the same cannot be revisited on the part of the innocent client.

6. That it is only fair just and equitable that the suit be reinstated back for hearing on merit as the plaintiff/applicant had complied with order 11 of the Civil Procedure Rules 2010.

3. The application is buttressed by the affidavit of MWITI JOSHUA sworn on 27th December, 2017 WHICH STATES:

“I MWITI JOSHUA of P. O. Box 2387-60200 (sic) do hereby make oath and state as follows:

1. That I am an advocate of the High Court of Kenya, in conduct of this matter thus with the

authority of the plaintiff/applicant to make and swear this affidavit.

2. That the matter was coming up for a N.T.S.C under order 17 of the Civil Procedure Rules 2010 and the same was served in our chambers on 8th December, 2017.

3. That we informed our client who appeared in court on the same day though the notice was very short.

4. That the reason why the plaintiff/applicant had not been able to prosecute his case is because he has been having a psychiatric condition thus rendering him incompetent to prosecute the matter (annexed is a copy of doctor's report marked "JM1)

5. That after the plaintiff/applicant developed the psychiatric condition he was even retired on medical grounds (annexed is copy of the letter dated 12 January, 2016 marked "JM2")

6. That the recent report by the doctor shows that the condition is now improving thus he can prosecute the matter on his own, in any event, in case he is rendered incompetent on the capacity of soundness he can move the court under the relevant order of the Civil Procedure Rules 2010.

7. That after the plaintiff/applicant developed that condition he was not at bale (sic) to have the matter set down for expeditious prosecution hence delay.

8. That I was involved in another matter i.e Chuka HCRA 16 OF 2017 SOLOMON MUKIIRA which was coming up for mention thus by the time I finished I was informed by my client the matter had been dismissed for none (sic) attendance by the advocate.

9. That it was purely my inadvertence which cannot be revisited on the part of an innocent client who was present in court to show cause why the suit should not be dismissed.

10. That the court did not consider hearing the plaintiff/applicant notwithstanding the absence of the counsel on record which might be substantial miscarriage of justice.

11. That the misstate of an advocate as a matter of practice should not prejudice an innocent client.

12. That the client was in court though he was not able to inform the court that I was involved in another court and plead with the court to place the matter aside.

13. That it is only fair just and equitable that the matter be reinstated for hearing as the plaintiff/applicant had complied with order 11 of Civil Procedure Rules 2010.

14. That thus we pray that the court to invoke the inherent powers within the jurisdiction of the court and reinstate the suit for hearing and determination on merit for justice to be administered to both parties.

15. That what is deponed herein is true to the best of my knowledge belief and information.

4. The application is opposed vide the replying affidavit sworn by the defendant/respondent WHICH STATES:

"I, TIMOTHY MICHENI KANAMPIU OF P. O. BOX 6029 CHUKA make oath and state as follows:

1. That I am the defendant in respect of the above civil case.

2. That I have read and understood the affidavit of one MWITI JOSHUA sworn on 27.12.2017 an unknown factor in this suit.

3. That apart from explaining the mental capacity of the plaintiff's/applicant, it does not explain how and why the defendant/applicant did not attend court on 8.12.2017.

4. That in any case, the defendant, who is represented by counsel, should have sought orders to appoint a next friend to handle the said by dint of Order 32 of Civil Procedure Rules.

5. That this is an old case which has been pending in court for a long time and in the interests of justice; the 8.12.2017 (sic) should not be disturbed.

6. That the explanation given by MWITI HOSHUA is immaterial, incompetent and should be ignored.

7. That the contents of this affidavit are true to the best of my knowledge, information and belief.

5. The application was heard interpartes on 17.1.2018.

6. Miss Kiome, the plaintiff's advocate, told the court that she was relying on the affidavit by Mwiti Joshua, an advocate in her firm, sworn on 27th December, 2017. She also told the court that she was further placing reliance on the grounds set out in the notice of motion.

7. Miss Kiome told the court that the plaintiff had suffered a psychological disorder which had rendered him unable to prosecute his suit. She urged the court to reinstate the suit.

8. Mr. Gichuki, representing the defendant, told the court that he opposed the application. He asked the court to peruse the replying affidavit sworn by the defendant/respondent on 12th January, 2018.

9. Mr. Gichuki told the court that Order 45 Rule 1 of the Civil Procedure Rules requires that for a review order to be issued, the applicant must demonstrate that new evidence not in the knowledge of the applicant at the time the impugned order was issued had been discovered. He submitted that no such evidence had been shown to have been discovered.

10. In her response, Miss Kiome submitted that a review could be considered by the court if there was any sufficient reason. She opined that she had offered sufficient reason to warrant review of the dismissal order issued by this court on 18th November, 2017.

11. I have considered the oral submissions made by the parties and the pleadings they have filed in support of their respective assertions.

12. I find that the mental state of the plaintiff, if it was an issue, was a matter known to the plaintiff's advocate before the impugned dismissal order was issued. The plaintiff and his advocate have not challenged the issuance of the notice to show cause. The mere submission that the mistake of an advocate should not prejudice his client, does not provide sufficient cause to this court to review its order. The other reasons given by the plaintiff and his advocate do not persuade this court to review its decision.

13. Although Order 45 Rule 1 of the Civil Procedure Rules allows the court to review orders for "any sufficient reason," I find that no such sufficient reason has been demonstrated to warrant review of this court's order which dismissed the suit on 18th December, 2017.

14. I opine that dismissal of a suit under Order 17 of the Civil Procedure Rules, is not a procedural technicality. Such a dismissal is anchored in written law. Dismissal of cases under Order 17 of the Civil Procedure Rules should not be reduced into a ritual where cases are dismissed by courts and parties simply apply for reinstatements which they assume will be granted as a matter of right. Challenge to such dismissals is best done when the parties come to court to show cause why their suits should not be dismissed for want of prosecution. Parties cannot eat their cakes and then have them back. They must show cause when show cause proceedings are fixed. Of course, in suitable circumstances, suits can be

reinstated even when parties did not come to court to show cause. This is not such a suitable cause.

15. In the circumstances, this application is dismissed with costs to the defendant.

16. This suit remains dismissed as ordered by this court on 18th December, 2017.

17. It is so ordered.

Delivered in open court at Chuka this 20th day of February, 2018

in the presence of:

CA: Ndegwa

Gichuki present for Respondent

Mutura h/b M/s Kiome for the Applicant

P.M. NJORGE

JUDGE