

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.383 OF 2017

SOUTHERN EMPIRE TRADERS.....PLAINTIFF

VERSUS

NAKURU PLAYERS THEATRE CLUB.....DEFENDANT

RULING

(Application to reinstate an application dismissed for non-attendance and failure to prosecute; main reason given that counsel for the applicant was indisposed and that he gave another advocate his brief but the said advocate neglected to appear in court; no evidence of any illness displayed; nature and extent of illness not availed; no mention of the particular advocate who was to hold brief; court not persuaded by the reasons given; application to reinstate must be supported by cogent reasons for grant of the same is not automatic; application dismissed).

1. The application before me is that dated 8 November 2017 filed by the plaintiff. The substantive prayer sought in the application is for the reinstatement of an application dated 5th October 2017, which application was dismissed for the non-attendance of the plaintiff. The application is opposed and before I go to the gist of it, I think it is necessary to set down the background leading to this application.

2. The suit itself was commenced by way of a plaint which was filed on 5 October 2016. In the plaint, the plaintiff pleaded that on 28 January 2016, it entered into an agreement with the defendant to occupy the defendant's player's theatre foyer, at an agreed rent of Kshs. 20,000/= per month. It is averred that the plaintiff/applicant has been paying this amount and the defendant/respondent issuing receipts. It is pleaded that on 2 October 2017, the respondent issued to the plaintiff an eviction notice, giving the applicant 14 days to vacate. It is the contention of the applicant that he has never breached any condition of their agreement and thus the notice is malicious. In the suit, the applicant sought orders to have the respondent restrained from evicting the applicant and costs of the suit.

3. Together with the plaint, the applicant filed an application dated 5 October 2017, inter alia seeking orders of interlocutory injunction against the respondent. That application came before me on 16 October 2017 for inter partes hearing, when Mr. Tumuti, learned counsel for the applicant, sought for it to be allowed. I pointed out to Mr. Tumuti that the eviction notice is premised on the allegation that inter alia, rent is owed, and I inquired from him whether his client had any proof that rent had been paid. Mr. Tumuti asked for 2 weeks to supply the documents and I gave leave for a further affidavit to be filed annexing these documents. I then directed that the application be heard inter partes on 7 November 2017. On the said date, only Mr. Towett, learned counsel for the respondent, was present. The applicant and his counsel, Mr. Tumuti, were absent. Mr. Towett, moved that the application be dismissed for failure to prosecute, and I duly obliged. It is upon that dismissal that the present application to reinstate was filed the following day.

4. The application is opposed by the replying affidavit of Mr. Silas Temba. He has averred inter alia that the applicant has failed to pay rent for the months of July, August, September, October, November, December, and January, standing at Kshs. 140,000/= which is said to be causing the respondent economic inconvenience. He has averred that what the applicant has annexed are only payments for utilities.

5. I invited both Mr. Ngamate, learned counsel holding brief for Mr. Tumuti for the applicant, and Mr. Towett, learned counsel for the respondent to make oral submissions which they duly did. I have taken these into account in arriving at my decision.

6. What is before me is nothing more than an application to reinstate one which was dismissed for non-attendance and failure to prosecute. The substantive explanation given in the supporting affidavit, is that Mr. Tumuti was indisposed, and was thus unable to attend at the hearing of the application on 7 November 2017. He has deposed that he sent an advocate to hold his brief and despite the advocate receiving the file, he ignored to hold his brief. He has also averred that if the application is not reinstated, the applicant stands to be evicted.

7. I have considered this explanation but I am afraid that the same is not plausible. Mr. Tumuti has deposed that he was indisposed, but I have no evidence of this. He has not elaborated whether he was ill and recuperating at home, or whether he visited a hospital, and if so, what hospital. Neither has he given the particulars of the advocate that he claims to have sent to hold his brief. I have no affidavit from any advocate who acknowledges to have been instructed to hold brief and who acknowledges to have ignored those instructions. I therefore have no support of the allegation that the applicant's counsel instructed any advocate to hold his brief.

8. The reinstatement of any application or suit that has been dismissed for non-attendance and/or for failure to prosecute ought not to be considered to be automatic. Cogent reasons must be given for the non-attendance, for failure to attend court is a serious issue, and any person failing to attend court must be ready to bear the consequences which may arise therefrom. No applicant should imagine that all he/she needs to do is file an application for reinstatement and that the same will be allowed as a matter of course, and indeed, if courts adopt that stance, it will greatly prejudice the administration of justice for all that a person will need to do is fail to appear, and sit in the comfort zone, that he can always file an application for reinstatement which will be allowed. In this instance, I am afraid that I am not persuaded by the reasons tabled. I was also urged to reinstate the application because the applicant is facing imminent eviction yet he has paid rent. Well, if he is actually evicted despite paying rent, I guess he can be compensated through an award of damages for breach of contract. I am therefore not

moved by this plea.

9. All in all, I see no merit in this application and it is hereby dismissed with costs.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24TH day of April 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-