



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 67 OF 2016**

**CHELONG ARAP CHEROIGIN.....PLAINTIFF**

**VERSUS**

**SAWE CHEROIGIN.....DEFENDANT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 14<sup>th</sup> November 2017, the plaintiff filed a Notice of Motion pursuant to order 12 Rule 3 and 6 of the Civil Procedure Rules as well as sections 3 and 3A of the Civil Procedure Act seeking to reinstate the Plaintiff's suit which was dismissed on 6<sup>th</sup> November 2017 for non-attendance.
2. The application is supported by the grounds stated in the Notice of Motion and the Plaintiff's affidavit sworn on the 14<sup>th</sup> November 2017. In the said affidavit, the plaintiff explains that he arrived in court at 11.00am on the hearing date by which time his case had already been dismissed for non-attendance.
3. He has also explained that his advocate mixed up the hearing date as a result of which he failed to attend court. He has annexed an extract of his advocate's diary to that effect.
4. The application is opposed by the Defendant/Respondent through his Grounds of Opposition filed on 19<sup>th</sup> February 2018. The Defendant states that the plaintiff's counsel was aware of the hearing date since the said date was taken by consent. He is not convinced that there was a mix-up in the plaintiff's counsel's diary.
5. The application was canvassed by way of written submissions and the only the respondent's counsel filed his submissions.

**Respondent's Submissions**

6. In his brief submissions, learned counsel for the respondent submitted that that both the plaintiff and his advocate were aware of the hearing date but they deliberately absconded court as they knew that that the plaintiff has no cause of action against the defendant. He submitted that the defendant's defence shows that he is in occupation of the suit land and that he is the one who paid the loan at he Settlement Fund Trustees.

**Issues for Determination**

7. The main issue for determination is whether the order for dismissal of the plaintiff's suit ought to be set aside and the suit reinstated for hearing.

**Analysis and Determination**

8. In considering the application, I am guided by the case of **Utalii Transport Company Limited & 3 others V NIC Bank Ltd & Another (2014) eKLR** which laid down the principles that the court ought to apply in applications for dismissal of a suit for want of prosecution as follows:

- i. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the matter
- ii. Whether the delay by the plaintiff is intentional, contumelious and therefore inexcusable

- iii. Whether the delay is an abuse of the court process
- iv. Whether the delay will occasion substantial risk to a fair trial to the defendant
- v. Whether the dismissal of the suit would occasion substantial prejudice to the plaintiff
- vi. Who bears the costs of the application?

9. The above issues boil down to the reasons for the non-attendance and whether there has been delay in applying for reinstatement of the suit. The question as to whether or not there has been inordinate delay will normally depend on the circumstances of the case.

10. It must be noted that dismissal of a case without hearing it on the merits is a draconian act which drives the plaintiff from the judgment. It is therefore a matter of the courts discretion which should be exercised judiciously. Looking the plaintiff's conduct in totality and applying the above principles I find that his explanation for his failure to attend court is plausible.

11. It has not been stated that the delay herein has given rise to substantial risk to a fair trial or caused serious prejudice to the defendant. In the above cited case the court observed as follows:

*“For reinstatement of a suit to give rise to substantial risk to a fair trial or result into grave injustice to the defendant, the defendant must show that he suffered some additional prejudice which is substantial and results to i) impeding justice; ii) aggravated costs; iii) specific hardship to the defendant; iv) It must also show that the delay has worsened the defendant's position in the suit.*

*It will not be sufficient to make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out hereinabove. This thought derives legitimacy as a principle of law drawing upon the Constitution of Kenya with regard to promoting access to justice; enforcing the principles of justice especially on substantive justice in Article 159 of the Constitution and achieving the just resolution of disputes field in court through a fair and public hearing in accordance with Article 50”*

12. I have carefully considered the Notice of Motion, the supporting affidavit, replying affidavit, the pleadings herein as well as the rival submissions. The applicant has not placed any material before the court to suggest that he will be prejudiced if the case is allowed to proceed. Both the Plaintiff and defence raise triable issues which ought to be adjudicated by the court. This being a land matter, it is just and fair that the case be determined on the merits.

13. Accordingly, I find merit in the plaintiff's application. I therefore set aside the order for dismissal and reinstate the suit for hearing on the merits on condition that the plaintiff pays thrown away costs of Kshs. 15,000 to the defendant within 21 days from the date hereof, time being of essence. If the said amount is not paid within the stipulated period the order for dismissal shall take effect.

The costs of the application shall be borne by plaintiff.

**Dated, signed and delivered at Kericho this 25<sup>th</sup> day of May 2018**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koech for the Plaintiff/Applicant
2. Mr. Koske for the Defendant/Respondent
3. Court assistant - Rotich