



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.23 OF 2016

WENDANO MATUU COMPANY LIMITED PLAINTIFF

VERSUS

STEPHEN NDAMBUKI MULI 1ST DEFENDANT

ONESMAS MUISYO KIMATU 2ND DEFENDANT

JOHN NZAU KAWINZI3RD DEFENDANT

RULING

1. In the Application dated 13th March, 2018, the Plaintiff is seeking for the following reliefs:

a. That the Honourable Court be pleased to set aside the orders made on 12th March, 2018 dismissing the suit for non-attendance and reinstate the same for hearing on its merit.

b. That the costs of and incidental to this Application be in the cause.

2. The Application is premised on the grounds that the suit was dismissed by the court for non-attendance on the part of the Plaintiff; that the failure by the Plaintiff's counsel to register his presence in court was accidental and that the Plaintiff is keen to pursue the claim herein.

3. In his Affidavit, the Plaintiff's advocate deponed that he had a telephone conversation with the Defendants' advocate in which they agreed to adjourn the matter; that in light of the Agreement, he sent his pupil to attend court and get an advocate to hold his brief and that his pupil called him at 9.45 am on the day of the hearing and informed him that the suit had been dismissed for non-attendance.

4. The Plaintiff's counsel finally deponed that the reasons for the dismissal of the suit is not of his client's making and that it would be unjust if the Plaintiff was to suffer for his advocate's mistakes.

5. The Plaintiff's advocates pupil swore a Further Affidavit in which he deponed that he had instructions from his pupil master to attend court on 12th March, 2018 and have an advocate to hold his brief; that just as he entered the court, the matter was called out and that while instructing counsel to hold his brief, the court dismissed the matter for want of prosecution.

6. The 1st and 2nd Defendants filed Grounds of Opposition in which they averred that the Plaintiff's advocate has not offered any plausible explanation for the dismissal of the suit for non-attendance and that the Respondents will be prejudiced if the Application is allowed

7. The 3rd Defendant filed Grounds of Opposition in which he opposed the Application. According to the 3rd Defendant, the Affidavit of the Plaintiff's advocate does not disclose any material and plausible excuse for the Advocate's failure to attend court on the hearing date and that a pupil's inadvertences are inconsequential as he had no authority *ab initio* to address court or represent the Plaintiff in court.

8. The Plaintiff's advocate submitted that the suit was dismissed following accidental circumstances; that no rebutting evidence has been adduced by any of the Respondents to challenge those circumstances and that incidentally, the suit was dismissed for non-attendance due to the well intentioned attempt by counsel for the Plaintiff to accommodate a fellow counsel who intended to apply for adjournment.

9. The Plaintiff's advocate submitted that the Applicant was timeously filed within 48 hours immediately after the dismissal of the case. Counsel relied on several authorities which I have considered.

10. The 1st and 2nd Defendants' counsel submitted that when the matter came up for hearing on 12th March, 2018, the Defendants were in

attendance but the Plaintiff was not present in court; that reinstatement of the suit is at the discretion of the court and that the Plaintiff has failed to give a plausible and/or excusable reason for non-attendance in court on the day the matter was set for hearing.

11. Counsel submitted that the court's decision to dismiss the matter for non-attendance was well within the law and that the suit should not be reinstated. The Defendants' counsel relied on several authorities which I have considered.

12. The 3rd Defendant advocate submitted that for a suit to be reinstated following its dismissal for non-attendance, the Plaintiff has to establish that his non-attendance, or that of his advocate constituted an inadvertent excusable mistake and was not meant to deliberately delay the cause of justice. Counsel submitted that there is no sufficient reason that has been advanced to persuade the court to exercise its discretion in favour of the Plaintiff. I have carefully considered the authorities that the 3rd Defendant's advocate has relied on.

13. The record shows that when this matter came up for hearing on 12th March, 2015, Mr. Oyugi advocate held brief for Mr. Otieno, the Plaintiff's advocate, while Mr. Langalanga advocate held brief for Mr. Omwenga, the 2nd Defendant's advocate. The two advocates informed the court that they had agreed to take out the matter. The court proceeded to dismiss the matter, not because the Plaintiff's advocate was not in court, but because no good reason had been given as to why the parties could not proceed with the hearing of the matter on that day.

14. In a nutshell, the court was not informed the reasons that had made the Plaintiff's and the 2nd Defendant's advocate to agree to take out the matter. It is trite that once a matter has been fixed for hearing, parties can only adjourn the matter if and when good and plausible reasons are given. It cannot be said that the parties to a suit can agree, and expect the court to allow an Application adjourning a matter without giving a convincing explanation as to why the matter can proceed.

15. Indeed, the Plaintiff's advocate has not even attempted to explain in his Affidavit as to why he agreed with the Defendants' advocate to adjourn the matter. Instead, he wants this court to reinstate the suit as a matter of course. That is unacceptable, because doing so will mean that the business of the court is subservient to the whims of litigants and their advocates.

16. Considering that the suit was dismissed, not because of non-attendance of the Plaintiff's advocates, but because no explanation was given as to why the suit could not proceed for hearing on 12th March, 2018, and in the absence of such an explanation, I find that the discretion of the court cannot be exercised in favour of the Plaintiff.

17. For those reasons, I dismiss the Application dated 13th March, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE