



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 438 OF 2010

1. ALI RAMADHAN MWATSAHU

2. ABDUB GALGALO BORU.....PLAINTIFFS

-VS-

1. HALIMA BINTI UMAR

2. INVESTE CO KENYA PROPERTY & INVESTMENT CO. LTD

3. COMMISSIONER OF INCOME TAX.....DEFENDANTS

RULING

1. The application coming up for determination is the Notice of Motion dated 18th December, 2017. It is brought under Order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Application seeks to set aside the order made by the court on 27th November, 2017 dismissing the plaintiffs' suit and have the same to proceed for hearing inter-partes.

2. The application is based on the grounds set out in the motion and is supported by the two affidavits, the first sworn by Abdub Galgalo Boru the 2nd Plaintiff sworn on 18th December 2017 and second by Tadayo Muyala Advocate sworn on 19th December 2017. The 2nd Plaintiff depones inter alia that he was aware that the suit was coming up for hearing on 27th November 2017 and that he arrived at the court at 8.45 am and went through the cause list where he found that the matter was listed for hearing before Hon. Justice C. Yano's Court. That he entered the courtroom but the court was fully packed with people and he stood behind the door of the main public entrance and waited for his case to be called out, having met with his advocate, Mr. Muyala outside the court who told him to wait for him inside the court. He depones that the court went on with the hearing of other cases but that he did not hear this matter being called out. That at about 11.00 a.m. the court went for a break and in a short while Mr. Muyala came in and asked him whether the matter had been called out to which he answered that it has not. That Mr. Muyala went to see the court clerk who was seated in front of the court and after talking with him for a few minutes, came back to where the 2nd Plaintiff was seated and told him that his case had been called out in his absence and was dismissed by the court. The 2nd Plaintiff depones that he was in court but never heard his name called out. He stated that he has a good case against the defendants which has overwhelming chances of succeeding if given an opportunity to present it.

3. In his affidavit, Mr. Muyala depones that on 27th November 2017 he was in conduct of the plaintiff's case having received instructions to hold brief for Mr. Asige Advocate. He states that on the material date, he arrived at the court at 8.45 am and went through the cause list and found that the matter was listed for hearing before Yano, J. That he went to Honourable Omollo's Court where he had another matter coming up for hearing and returned at about 11.00 a.m. and found the court had adjourned and he approached the court clerk who was still in court who informed him that the matter had been called out and dismissed as the plaintiffs and their advocate were absent. He states that his absence at the time the matter was called out was not deliberate but purely inadvertent.

4. The application is opposed by the 3rd Defendant through an affidavit sworn by Diana A. Almadi on 14th March, 2018. She depones that she is the legal counsel in the respondent's legal services and Board coordination department and is well versed with the issues that led to the disputes herein. She depones inter alia that the matter has been listed severally but the same has never taken off due to non-attendance by the Plaintiffs and their advocates. That on 27th November 2017 the plaintiffs' advocate was not present in court despite having been served with a hearing notice. That the court rightly dismissed the suit as it was clear that the applicants and their advocate were aware of the hearing but never attended court. She states that no sufficient or valid reason has been given by the applicants for the failure to attend court on 27th November 2017. It is the deponent's contention that the applicants are guilty of inordinate delay having filed the application on 19th December 2017, but only served on 23rd February 2018. That the Applicants' actions clearly show litigants who are not interested in the prosecution of their suit and their actions amount to an abuse of the court process and a waste of precious judicial time. That the 3rd Defendant has suffered and shall continue to suffer prejudice by incurring costs should the suit be reinstated. She further averred that in the

event the case is reinstated, the Applicants should pay the 3rd Respondents costs incurred on 12th July 2017 and on 27th November 2017. The 3rd Respondent otherwise urged the court to dismiss the application with costs.

5. The Application was canvassed by way of written submissions which were duly filed by the applicants and the 3rd Respondent. The applicants reiterated the facts and grounds as contained in the affidavits in support of the application and relied on the case of **Michael Kiberenge Chumo –v- Peter Mungai Muthami, Eldoret ELC No. 1 of 2012**. The 3rd Respondent in their submissions also reiterated the facts as contained in the Replying Affidavit and relied on the cases of **Josephat Muthui Muli – v Ezeotec Ltd (2014) eKLR** and **Gideon Sitelu Konchella –v- Daima Bank Ltd (2013)eKLR**.

6. I have considered the Application and the submissions filed. The main issue is whether they met the threshold for setting aside an order for dismissal for non-attendance. Order 17 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. The application herein was filed on 19th December, 2017 while the order for dismissal was made on 27th November, 2017. This was about 21 days later. Although the 3rd Respondent argued that there was inordinate delay, I find that the application was filed without undue delay. It may, however have been served on the 3rd Respondent after considerable time had elapsed.

7. The applicants have urged the court to set aside the order on the grounds that the non-attendance by the advocate was an inadvertent mistake while the 2nd plaintiff stated that though he was in court he did not hear the matter called out. The advocate stated that on the material day, he was in court at 8.45 a.m. and after checking and confirming that the case was listed for hearing he went before Lady Justice Omollo where he had another matter and only returned at about 11.00 am. When he found the matter had been dismissed. I have considered the advocates explanation for failing to attend court at the time the matter was called out. In my view, the counsel's explanation is not plausible as the alleged matter which was before Omollo J has not been given. Furthermore, if the learned counsel had confirmed that the matter was listed, and if he was to attend to another matter before another Court, he had the option of asking a colleague to hold brief and request that the matter be placed aside. No explanation had been given to the court why counsel did not ask someone else to hold his brief. Furthermore, no particulars of the case that was allegedly before Omollo J, has been given. Counsel only states that he went to Honourable Lady Justice Omollo's Court where he had another matter coming up for hearing and only left that court at about 11.00 a.m. It is not stated whether the hearing in that court proceeded or not from the time the time the court begun sitting up to about 11.00 am.

8. I have also considered the 2nd Plaintiff's explanation. He stated that he arrived at the court at about 8.45 am and found that the matter was listed for hearing, that he entered the courtroom and found it fully packed stood behind the entrance and waited for his case to be called out. He states that he met the advocate who told him to wait for him inside the court. He further states that the court was going on with the hearing of other cases but he did not hear this matter called out. I find this explanation not credible. If indeed the 2nd Plaintiff was present in court and even heard other cases, how then could he fail to hear his own matter when it was called out? In their affidavits, the applicants and their advocate refer to the court clerk the advocate allegedly met as a male. It is common knowledge that the court assistant on the material day was a female and not a male.

9. The court is vested with discretion to reinstate a suit that has been dismissed for non-attendance. Just as in all other discretions, the same must be applied judiciously. As was stated in the case of **Shah – v – Mbogo (1967) EA 116**, the Court has discretion to reinstate a matter dismissed ex-parte and such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The essence of justice is to allow each party to ventilate his/her case in full and courts ought to be slow to shut out a party from presenting his/her case. Where there is good reason provided, the court generally ought to allow an application to reinstate a suit.

10. In the circumstances of this case, I think no adequate reason has been provided as to the absence in court on 27th November 2017 of the plaintiffs and their advocate. The reasons given are not convincing and I am unable to believe them. The case had been fixed for hearing on 12th July 2017 in the presence of both parties. However, the Plaintiffs and their advocate did not attend court and the matter was fixed for hearing on 27th November 2017 when the same was dismissed for non-attendance on the part of the Plaintiffs and their advocate. The inference one can draw is that there is a pattern to deliberately or otherwise delay the expeditious disposal of the suit.

11. For the above reasons, I am of the view that the Plaintiffs Notice of Motion application dated 18th December, 2017 lacks merit. I am not convinced that good reason has been provided as to the absence of the Plaintiff and of Counsel on the day that this suit was dismissed for non-attendance. I dismiss the application with costs to the 3rd Respondent.

Delivered, signed and dated at Mombasa this 25th September, 2018.

C. YANO

JUDGE