



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 188 OF 2012

HARDEV SINGH KALSI.....PLAINTIFF

VERSUS

MOHAMED AZHAR.....DEFENDANT

RULING

On 31st January, 2017, this suit was fixed for hearing on 27th September, 2017. When the matter came up for hearing on 27th September, 2017, neither the plaintiff nor the defendant was ready to proceed with the hearing. The plaintiff and his advocate were absent while the advocate who appeared for the defendant sought adjournment on the ground that the advocate who was seized of the matter, Mr. Achach Advocate was attending to an election petition in the High Court at Kisii. The court considered the application for adjournment and refused the same. In the absence of the plaintiff to prosecute his case, the suit was dismissed for non-attendance.

What is now before me is the plaintiff's Notice of Motion application dated 29th September, 2017 seeking to set aside orders that were made on 27th September, 2017 dismissing the suit for non-attendance. The application is supported by an affidavit of the plaintiff's advocate, Jared Omari Mituga sworn on 29th September, 2017. The grounds upon which the application is premised are that failure to attend court on 27th September, 2017 was caused by inadvertent mistake on the part of the plaintiff's advocate who diarized the hearing date as 28th September, 2017 instead of 27th September, 2017. The plaintiff's advocate has averred that he learnt of the said mistake and the dismissal of the suit when he made enquiry at the registry on 28th September, 2017 after failing to trace the matter on that day's cause list. The plaintiff's advocate has annexed to his affidavit excerpts of his diary for 27th and 28th September, 2017 as well as a letter to the plaintiff dated 31st January, 2017 advising the plaintiff that the suit had been fixed for hearing on 28th September, 2017.

The application is opposed by the defendant through a replying affidavit sworn on 1st December, 2017 in which he has stated that the plaintiff has not been keen on prosecuting this suit as he was not present in court when the matter came up for hearing. He has stated further that, no reasonable explanation has been given by the plaintiff and his advocate for their failure to attend court on 27th September, 2017. The defendant has contended that the plaintiff's absence on the hearing date was intended to delay the prosecution of the suit.

The application was argued on 22nd February, 2018. Mr. Mituga advocate who appeared for the plaintiff submitted that his failure and that of the plaintiff to attend court on 27th September, 2017 was not intentional as he thought that the matter was fixed for hearing on 28th September, 2017. He stated that he realised the mistake when he attended court on 28th September, 2017 and found that the matter not listed. He submitted that upon realising the mistake, he promptly made the present application. He submitted that the plaintiff has been keen on prosecuting this suit and that the suit has on other occasions been adjourned at the instance of the defendant. He submitted that in this suit, the plaintiff is seeking a permanent injunction against the defendant while in the earlier suit which has been concluded, the plaintiff was pursuing the title for the suit property.

In response, Ms. Sinana advocate who appeared for the defendant submitted that the reinstatement of this suit would be an academic exercise as judgement had been entered in favour of the plaintiff in another suit which the plaintiff had brought against the defendant for adverse possession. Ms. Sanana submitted that no appeal has been preferred against that decision and that the plaintiff who is in possession of the suit property has no reason for pursuing this suit.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the submissions of counsel. The issue that I have been called upon to determine is whether the plaintiff has put forward sufficient reasons to warrant the reinstatement of this suit. Order 12 Rule 7 of the Civil Procedure Rules gives this court discretionary power to set aside an order of dismissal of a suit for non-attendance.

It is settled that the court's discretionary powers must always be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in the case of Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018)eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

The principles to be considered by the court in setting aside an ex parte order were set out in the case of Shah v Mbogo (1967) E.A 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

Applying the said principles to this case, I am inclined to exercise my discretion in favour of plaintiff. I have noted from the record that the plaintiff has always been ready to proceed with the hearing of this case but for one reason or the other, the case has never taken off. I am of the view that the plaintiff’s advocate has given reasonable explanation why the plaintiff and he did not attend court on 27th September, 2017 when the suit was scheduled for hearing. The explanation that was not contested by the defendant’s advocate who was also not ready to proceed with the hearing on 27th September, 2017 was that he had mistakenly diarised the hearing date as 28th September, 2017 instead of the correct date which was 27th September, 2017. Extracts of his diary for the two dates were exhibited and supports his contention. The fact that he honestly believed that the hearing date was 28th September, 2017 is also supported by the letter that he wrote to the plaintiff on 31st January, 2017 the same date the said hearing date was given in which he indicated that the matter was coming up for hearing on 28th September, 2017. The prompt filing of the present application on 29th September, 2017 upon discovering the said mistake is to me an expression of the plaintiff’s desire and eagerness to prosecute this suit.

I am of the view that in the circumstances of this case, the plaintiff’s advocates’ mistake has been well explained and is excusable. In Phillip Chemwolo & Another v Augustine Kubede [1982-88] KAR 103 at 1040, Apaloo J (as he then was) stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

I am not satisfied that the reasons advanced by the defendant warrants the refusal of the plaintiff’s application. It is up to the plaintiff to decide whether to pursue this suit or not in light of the decision that was made in the adverse possession suit. For the foregoing reasons, I find merit in the plaintiff’s Notice of Motion application dated 29th September, 2017 which I hereby allow in terms of prayers 2 and 3 thereof. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 15th day of November, 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Kimani h/b for Singh Gitau for the Plaintiff

Mr. Sekwe h/b for Mr. Achach for the Defendant

Catherine - Court Assistant