



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 511 OF 2008**

**DHAMINI LIMITED.....PLAINTIFF**

**=VERSUS=**

**TANAD TRANSPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MUSA HASSAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This suit came up for hearing on 27/3/2017 before Justice Mwangi Njoroge. None of the parties was in court when the matter was called out. Consequently, the court dismissed the suit for non-attendance under Order 12 rule 1 of the Civil Procedure Rules. Arising from the dismissal, the plaintiff brought a notice of motion dated 5/7/2017 seeking the following orders:-

***(a) This honourable court be pleased to grant leave to the firm of Simiyu Opondo Kiranga to come on record for the plaintiff/applicant herein.***

***(b) That the honourable court be pleased to reinstate this suit filed on the 21st of October 2008.***

***(c) Costs of this application be in the cause.***

2. The application was supported by an affidavit sworn on 5/7/2017 by Mr Baraza Tabulo, a director of the plaintiff company. He contended that the dismissal was occasioned by the failure of his previous advocates to update the plaintiff and to attend court on the appointed day. He urged the court to excuse the plaintiff for counsel's negligence.

3. The defendants opposed the application through an undated replying affidavit sworn by Musa Said Hassan. The defendants contended that the application should be rejected because, first, it was drawn by a firm of advocates who were not on record in this suit. Secondly, the defendants contended that all along the plaintiff had not been keen to prosecute the suit. Thirdly, they contended that the plaintiff took inordinately long to bring the present application, hence reinstatement should not be allowed.

4. At the hearing, Mr Alakonya, counsel for the applicant, submitted that failure to prosecute the suit and to attend court on the appointed day was a mistake of the previous advocates. He added that the suit raises triable issues relating to the plaintiff's right to the suit property. He urged the court to be guided by the decision in **Gold Lida Limited vs NIC Bank Ltd (2018) eKLR**.

5. Mr A B Shah, counsel for the respondents submitted that from the court record it was evident that the plaintiff had not been keen to prosecute this suit. He added that the same conduct was still evident because the plaintiff brought the present application four months after the dismissal order was made. He argued that there is a difference between mistake and negligence and contended that the plaintiff had been negligent. He urged the court to dismiss the application.

6. I have considered the application together with the supporting affidavit. I have also considered the parties' rival submissions. Two issues fall for determination. The first issue is whether the application is fatally defective on the ground that the firm of Simiyu, Opondo, Kivanga & Company Advocates was not on record when they brought the application. The second issue is whether the applicant has satisfied the criteria upon which the court would exercise discretionary to set aside the dismissal order of 27/3/2017. I will deal with the two issues in the order in which they are itemized.

7. The first issue relates to the legality of the application in the absence of a prior notice of change of advocates. It is not in dispute that the application was brought before the filing of a notice of change of advocates. It is noted from the face of the material application that the first limb of the application seeks leave allowing the firm of Simiyu Opondo, Kivanga and Company Advocates to come on record for the plaintiff. The requirement for leave is provided for under Order 9 rules 9 and 10 of the Civil Procedure Rules and relates to a scenario where change of advocates is contemplated after judgment has been passed. Both the Civil Procedure Act and the Interpretation and General

Provisions Act do not define what constitutes a judgment. The Concise Oxford English Dictionary define judgment in the present context as **“an opinion or conclusion”**. Black’s Law Dictionary (Tenth Edition) defines judgment as **“a court’s final determination of the rights and obligations of the parties in a case”**.

8. The issue as to whether a dismissal order made under Order 12 rule 1 of the Civil Procedure Rules constitutes a judgment is still grey. The plaintiff in the present suit proceeded from the premise that a dismissal order under Order 12 rule 1 of the Civil Procedure Rules constitutes a judgment hence the need to seek leave of the court to effect a change of advocate. Order 9 permits combination of a plea for of leave together with any other relief in the same application. It is noted from the court record that a notice of change of advocates was eventually filed on 2/8/2018.

9. In my view, a dismissal order is considered to be a final order in the suit, subject to the court’s jurisdiction to set aside the order. To this extent the application for leave has a basis. It therefore follows that the application is not fatally defective. Secondly, it would be inappropriate to dismiss the notice of motion on this technical ground when on the face of it, the first prayer sought is leave to come on record. This view is buttressed by the constitutional framework under Article 159 of the Constitution which requires that courts administer substantive justice without undue regard to technicalities. I will therefore grant leave as sought in the first limb of the application. I will further validate the notice of change of advocates filed on 2/8/2018.

10. I now turn to the issue as to whether the applicant has satisfied the criteria for setting aside a dismissal order. The applicant wholly blames its previous advocate for the non-attendance and for the preceding acts of indolence.

11. The guiding principle in our courts’ exercise of this jurisdiction was laid down in **Mbogo & Another Vs Shah EALR 1908**. The court’s discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

12. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, **Madan J** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake of counsel.

**“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”**

13. Apaloo JA outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**;

**“Blunder 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 the purpose of imposing discipline”.**

14. In the present suit, there is no explanation as to why the applicant’s advocates failed to attend court. The said advocates are no longer on record. Secondly, it does emerge that the applicant learnt about the dismissal order in March 2018. It brought the present application four months later. In my view, that delay was inordinate.

15. I am nonetheless alive to the fact that this court deals with land disputes which require final determination on merit. Secondly, Order 12 rule 1 under which the suit was dismissed leaves room for a fresh suit in respect of the same cause of action. Bearing the foregoing in mind, I will reluctantly exercise discretion and set aside the dismissal order upon the following terms:-

**(a) The plaintiff shall pay the defendant throw away costs of Kshs 20,000 within 30 days.**

**(b) The plaintiff shall file and serve a single, bound, paginated and indexed bundle of pleadings, witness statements, and evidentiary documents within 10 days.**

**(c) In default of (a) and (b), the suit herein shall stand dismissed.**

**(d) Mention before the Deputy Registrar on 5/11/2018 to fix a hearing date before one of the judges serving under the service week programme.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF NOVEMBER 2018.

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Wanjohi holding brief for Mr A B Shah for the 1st Respondent

June Nafula - Court clerk