



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**PETITION NO. 13 OF 2012**

**SALIM IDD ZAKUMERA.....PETITIONER/APPLICANT**

**-VERSUS-**

**WILSON BURUGU GITAU & 2 OTHERS.....RESPONDENTS**

**RULING**

1. The application before the Court is dated 27<sup>th</sup> January 2017 by way of notice of motion. It is premised on the provisions of Order 12 rule 7, Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and articles 50 & 159 (2) (b) of the Constitution. The petitioner/applicant seek orders that:

**(i) The Court be pleased to set aside, review and or vary the ruling/order made on 30<sup>th</sup> November 2016 dismissing the petition for non-attendance and direct that the petition be fixed for full hearing.**

**(ii) Costs of the application be provided.**

2. The applicant states that his absence at the time of the hearing was not deliberate or evasive but was due to illness. The applicant annexed treatment notes from Diani Health Center showing that he went for treatment on 30<sup>th</sup> November and later went for review on 2.12.2016. The applicant also avers that this Court has unfettered discretion to set aside its orders to avoid injustice be occasioned.

3. The application is opposed by the 1<sup>st</sup> Respondent vide a replying affidavit filed on 15<sup>th</sup> May 2017. The Respondent deposed that the reason given for seeking an adjournment was because the petitioner's counsel had travelled upcountry and or was ill. That the Court declined to grant the adjournment noting the myriad excuses made on behalf of the Petitioner which portrayed reluctance in prosecuting the suit. The Respondent contends that the explanation of illness by the Petitioner is an afterthought and that the Petitioner was neither admitted nor given bed rest. He urged the Court to dismiss the application with costs.

4. The Petitioner in his written submissions cited the case of **John Nahason Mwangi vs Kenya Finance Limited (in liquidation) (2015) eKLR** and in particular page 7 paragraph 16 that espoused on the right to be heard as given under article 50 coupled with 159 of the Constitution and the defined principles which should guide the Court while making a decision on reinstatement of a suit which has been dismissed by the Court. The principles enunciated include inter alia that Courts should sparingly dismiss suits for want of prosecution as it drives the plaintiff away from the seat of judgement.

5. The 1<sup>st</sup> Respondent on his part submitted that the Court's discretion to set aside orders should not be exercised to assist litigants who deliberately seek to obstruct or delay the cause of justice. That under article 159 (2) (b) of the Constitution, justice must be dispensed with without undue delay. The Respondent also submitted that the application is defective because of lack of a prayer to reinstate the petition. He cited the case of **of Aftab Ahmed & Another vs Salim Dhanji & 2 others (2007) eKLR** in support of their submissions.

6. I have considered all the issues raised in the application and the submissions. I have looked at the record which does show the petitioner's advocate has always been in Court whenever the matter comes up for hearing. On 30.11.2017 when the matter was called out, Mr Gichana advocate holding brief for Mogaka advocate for the Petitioner said Mr Mogaka had travelled upcountry and therefore sought seven (7) days to file his response. The Court noted that Mr Gichana seemed not properly briefed of what was coming for hearing on that day and I directed the matter to proceed at 11.30 am.

7. At 12.00 pm, Mr Jengo advocate now holding brief for Mr Mogaka informed the Court that the Petitioner was unwell and was currently undergoing treatment at Ukunda – Diani. He sought adjournment on this account. This application was also strongly opposed by Miss Ngige for the 1<sup>st</sup> Respondent while the A. G left it to the Court to determine it as it deemed just. It is on account of these conflicting instructions presented on behalf of the petitioner that the Court proceeded to dismiss the petition for want of prosecution.

8. The Petitioner has annexed a copy of treatment book to this application which confirms that he indeed went to seek treatment from Diani – Ukunda as explained by Mr Jengo. It appears the mistake was on his advocate who did not give his representative proper instructions to pass on to the counsels holding their brief. In most cases, the advocates' clerks sit with the instructions until the file is called out by the Court before passing a request to an advocate to stand in the shoes of their boss and by then it sometimes becomes too late for the advocate holding brief to verify the information as given. This is not to say such acts should be tolerated.

9. However I am satisfied with the explanation given by the petitioner necessitating his absence from the Court on 30.11.2016. The issue of illness and mistake of his counsel should not cost him an opportunity to be heard. In this instance, the 1<sup>st</sup> Respondent can be compensated for the prejudice by an award of attendance costs for that day being given. In reference to the defect of the application for failure to include a prayer for re – instatement that is not a defect in my view. Because once the order of dismissal is set aside, the petition automatically regains its life/is automatically re – instated.

10. In conclusion, I hereby find merit in the application and allow it in terms of prayer (i). The petitioner shall pay to the 1<sup>st</sup> Respondent attendance costs for 30.11.16 assessed at Kshs 5000/= payable within 30 days of this ruling. Each party to bear their respective costs of this application.

**Dated, signed & delivered at Mombasa this 22<sup>nd</sup> November 2017.**

**A. OMOLLO**

**JUDGE**