



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

NAIROBI ELC NO. 190 OF 2010

PETER XAVIER INDINDI OJIAMBO

CONCILIA AKUKU ODUNDO

REGINA OCHAMI ODUORI

(Trustees of Regiechristies Church Ministry)....PLAINTIFFS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

ATHI WATER SERVICES BOARD.....2ND DEFENDANT

KENYA POWER AND LIGHTING COMPANY...3RD DEFENDANT

RULING

1. On 25th May, 2017 the plaintiff brought a Notice of Motion application dated 25th May 2017 seeking to set aside this court's order made on 25th May 2017 dismissing this suit for non-attendance. The application is supported by an affidavit sworn by the 1st plaintiff on 25th May 2015 in which the 1st plaintiff states that he was present in court on 25th May 2017 when the suit was listed for hearing. He contends that although he had been instructed by his advocate to request for time allocation at 10.00 am, he did not hear when the case was called out. The 1st plaintiff further contends that the court has powers to allow the application. Lastly, the 1st plaintiff states that the plaintiffs would be greatly prejudiced if the order sought was not granted.

2. The application is opposed through a replying affidavit sworn on 6th July 2017 by Mercy Mwizi, the 3rd defendant's advocate on record. She states that the date of 25th May 2017 was given in court on 30th March 2017 in the presence of all parties representatives. Counsel states that she sent a legal intern by the name Felix Mulekyo to find an advocate to hold her brief and take time allocation while she attended to a different matter within the same court building. She further states that Felix Mulekyo informed her that the matter was called out three times with no response from the plaintiff and that the court on its own motion proceeded to place the file aside to be called out again at the end of the causelist. There was no response by both the plaintiffs and their counsel when the matter was called out at the end of the causelist and the court proceeded to dismiss the suit for non-attendance.

3. The 3rd defendant states that the plaintiff was not keen to prosecute this suit, adding that on 9th February 2017 the court served parties with a notice to show cause why the suit should not be dismissed for want of prosecution. She adds that on 30th March 2017, the court directed that the suit be heard

without further delay and set it down for hearing on 25th May 2017. Counsel contends that on 30/3/2017 the court directed parties to file a paginated bundle of their pleadings, statements and evidential documents within 30 days, which directive the plaintiffs failed to comply with. The 3rd defendant contends that the plaintiff has been indolent to the prejudice of the 3rd defendant.

4. The application was orally canvassed in court on 18th September 2017. Learned Counsel for the plaintiff, Mr Onyango, submitted that the plaintiff was present in court on the material day and that the plaintiff's failure to respond when the matter was called out was occasioned by the plaintiff's lack of understanding of the court process. In response, Ms Mwizi for the 3rd defendant submitted that reinstatement of the suit would be prejudicial to the 3rd defendant. She argued that no proper reason had been given why the advocate was not in court and urged the court to disallow the application.

Determination

5. The single issue for determination in this application is whether the plaintiff has satisfied the criteria for exercise of the discretion to set aside a dismissal order. Doubtless, the court has power under **Order 12 Rule 7 of the Civil Procedure Rules** to reinstate a suit which has been dismissed for non-attendance. The approach to be applied in the exercise of this discretionary power was spelt out in the case of **PHILIP CHEMWOLO & ANOTHER V AUGUSTINE KUBEDE, (1982-88) KAR 103**, where Apaloo JA stated as follows:

“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.”

6. The 1st plaintiff contends that he was present in court when the suit was dismissed on 25th May 2017. He however did not hear when the suit was called out. The application for reinstatement was filed on the same day the suit was dismissed. Save for stating that allowing the application will cause it prejudice, the 3rd defendant who has opposed the application has not tendered evidence on the nature of prejudice it will suffer if the application is allowed. He has not demonstrated that the attendant prejudice cannot be compensated by an award of costs.

7. Guided by the above jurisprudence and legal framework, I am of the view that justice will be served best if the court exercises its discretion to reinstate the suit. I accordingly reinstate the suit. The defendant will be indemnified through an award of costs assessed at KShs.10,000/= to be paid within 60 days from the date of this Ruling. In default, the order reinstating this suit shall stand vacated and the suit shall stand dismissed. A hearing date shall be fixed at the time of reading this Ruling.

Dated, signed and delivered at Nairobi on this 17th day of November, 2017.

B M EBOSO

JUDGE

In the presence of:

Chebet h/b for Onyango Advocate for the Plaintiff

Kiiru h/b for Mwinzi Advocate for the 3rd Defendant

Halima Abdi: Court Assistant