

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 218 OF 2012

JAMIN KIOMBE LIDODO.....PLAINTIFF

VERSUS

EMILY JERONO.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

Jamin Kiombe Lidodo (hereinafter referred to as the applicant) has come to court against Emily Jerono and Attorney General applying for orders that the Honourable court be pleased to set aside and or vacate its order of 1.9.2016 dismissing the plaintiff's suit for want of prosecution and that the suit by the plaintiff be reinstated and heard on merit. Costs of this application be in the cause.

Which application is based on the affidavit of Jamin Kiombe Lidodo and the grounds that the plaintiff/applicant was unwell on the date set for hearing and that the plaintiff's counsel was attending to a matters before the National Land Commission in Nairobi on the material day. The applicant believes that an order of dismissal of the plaintiff's suit before hearing is prejudicial to the plaintiff and that non of the parties to this action will be prejudiced by the orders sought. The application has been timeously presented. The requirements of justice demand that suits or disputes be heard on merit as opposed to technicalities.

The application is supported by the affidavit of Jamin Kiombe Lidodo who states that he was in court on 25.7.2016 whereby he was stood down from the witness box because he was unwell suffering from diabetes mellitus, which is a debilitating condition. That the hearing was rescheduled to 1.9.2016 when again he was unwell as evidenced by the annexed documents marked JKL.1(a-c). That on the same day, the matter was coming up for hearing, his Advocate on record was away in Nairobi on official duties. That his advocate sent his legal clerk, one Bernard Keya but there were no advocates in court to hold his brief. That failure to attend court was not deliberate nor presumptuous but was occasioned by a health condition beyond his control. That he is honestly sorry and he unreservedly apologize to the Honourable court for all the inconvenience cause to it. That he is still interested in prosecuting his claim as evidenced by the timeous and prompt filing of this application. That no prejudice will be occasioned to the other parties to this proceedings if the application is allowed.

The application is opposed vide affidavit of Gustine Othuro who states that they were in court on 25th July, 2016 with the plaintiff's advocates and by consent fixed a hearing date for this suit on 1st September, 2016. That on 1st September, 2016, the defendant herein was in court together with her two witnesses and he was ready to proceed with the matter. However, there was no attendance by the plaintiff or his Advocate on the same date. There is no proof/documentation that the plaintiff's advocate was in Nairobi on official duties on the date of the hearing that had been fixed by consent as claimed in paragraph 4 of the application. The nature of official duties claimed in paragraph 4 have not been expounded. That on 1st September, 2016, he placed the matter aside shortly and tried to call the plaintiff's advocates but his phone was off. That paragraph 5 of the supporting affidavit is not true and the fact is that there were many advocates in court on the same day as four matters were handled on the same date. There was no representation from the plaintiff's advocate.

That the annexed document shows the plaintiff being unwell is dated 2nd September, 2016 yet the suit was on the 1st of September, 2016. That the annexed medical documents are normal check up for blood

pressure and is not proof that the plaintiff was actually sick. That he prays that this application be dismissed with costs.

I have considered the evidence on record and do find that it is not controverted that the plaintiff was unwell when the matter came for hearing. The documents on record are proof that the plaintiff was unwell. Moreover, I believe Mr. Mbugua when he states that he had asked an advocate to hold brief in the matter but the said advocate did not attend and therefore, the matter went unattended. I have perused the court record and do find that on the 1/9/2016 at 10.00am after dismissal of the suit for want of prosecution *M/s Kipsei* holding brief for *Mr Mbugua* came to court and explained the predicament of Mr Mbugua thus that his client was unwell but this was too late. I agree with the previous holdings by judges that blunders will continue to be made from time to time and it does not follow that because a mistake has been made then a party should suffer the penalty of not having his case determined on merit. I am inclined to exercise my discretion and do order that the suit herein be reinstated and be heard on merit.

DATED AND DELIVERED AT ELDORET ON 16TH DAY OF DECEMBER, 2016.

ANTONY OMBWAYO

JUDGE