



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 1101 OF 2012

Formerly HCC No. 28 of 2009

CLEMENT KORAT.....PLAINTIFF

VS

KIPLAGAT CHERUTICH.....DEFENDANT

(Application to re-instate a suit dismissed for non-attendance; explanation offered that plaintiff failed to attend court because the date was mis-diarized by his counsel; reasons satisfactory; application allowed but subject to payment of thrown away costs)

RULING

The application before me is one dated 25 February 2014 filed by the plaintiff. It is an application inter alia brought under the provisions of Order 12 Rule 7. It seeks orders that the plaintiff's suit, which was dismissed for non-attendance, be re-instated. The grounds upon which the application is based include the reasons that there was non-attendance because the hearing date was mis-diarised. The application is supported by the affidavit of Stanley Kagunza, an associate advocate in the law firm of M/s Kigen & Company Advocates who are on record for the plaintiff. The defendant has opposed the application by filing a replying affidavit of his own.

This matter was fixed for hearing on 19 February 2014. That date was taken by Ms. Kipseei advocate, counsel on record for the defendant. In the supporting affidavit of Mr. Kagunza, it is averred that the firm of M/s Kigen & Company Advocates, were served with a hearing notice, but that Mr. Kagunza, inadvertently mis-diarised the date for 19 March 2014 instead of 19 February 2014. He then wrote a letter advising the plaintiff that the matter is listed for hearing on 19 March 2014. For that reason, counsel and the plaintiff did not attend court on 19 February 2014. On 20 February 2014, Mr. Kagunza was called by Mrs. Kigen, the proprietor of the law firm, who inquired as to what happened in court on 19 February 2014, as she had been advised by another counsel that the suit was dismissed for non-attendance. It is then that Mr. Kagunza rushed to peruse the file and found out that the matter had been dismissed the previous day for non-attendance. It is stated that the claim herein touches on land and the plaintiff ought to be granted an opportunity to ventilate his case.

In the replying affidavit, the defendant has averred that this is an old case, having been filed in the year 2009, and has never been heard mainly due to the plaintiff's inaction. It is averred that indeed the hearing date was taken by the defendant's counsel and not the plaintiff and has asked that I disallow the application.

I have considered the application. On the 19 February 2014 when this suit was scheduled to be heard, only the defendant and his counsel were present. The plaintiff and his counsel were absent. The defendant

admitted no part of the plaintiff's claim and therefore the plaintiff's suit was properly dismissed vide the provisions of Order 12 Rule 3 (1). The same provides as follows :-

When only defendant attends [Order 12, rule 3.]

This application is brought inter alia vide the provisions of Order 12 Rule 7 which is drawn as follows :-

Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

It follows from the foregoing, that the court is empowered to set aside an order of dismissal of a suit for non-attendance. That falls upon the discretion of the court, and like all other discretions, the same must be exercised fairly and in a way that is not going to cause injustice or unnecessary hardship to the parties. In the case of ***Chemwolo v Kubede (1982-88) KAR 103***, at 1040, the Court of Appeal 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."

I am in full agreement with the above dictum. It is important that parties be given their day in court and be heard on merits. I am satisfied by the explanation of Mr. Kagunza, that the date was mis-diarised and that is the reason why the plaintiff and his counsel failed to attend court. I am willing to excuse the plaintiff and re-instate his case. The plaintiff will however have to compensate the defendant with costs. The defendant attended the registry, took a date, duly served it and attended court. They deserve thrown away costs for this application, which in my discretion, I hereby assess at Kshs. 15,000/=. I direct that these costs be paid within the next 14 days or else the order dismissing the plaintiff's suit will stand.

That said, I am of the opinion that the plaintiff needs to be more pro-active in moving his case to be heard. The plaintiff went to sleep and that is the reason that the defendant had to take a hearing date. Thus, although I am willing to excuse the plaintiff, I am also hereby warning him to be more keen on his case.

For the reasons above, the application is allowed subject to payment of thrown-away costs as directed.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. E.M. Makuto holding brief for Mr. Kagunza of M/s Kigen & Co for plaintiff/applicant.

Ms. L.J. Kipsei for defendant/respondent.