



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Case 311 of 2003

LEISURE LODGE LIMITED.....PLAINTIFF
VERSUS
SOLOMON AMIANI.....DEFENDANT

RULING

The plaintiff's suit herein was dismissed on 21st November 2007 for none attendance. The suit had been fixed for hearing at the behest of the plaintiff but when it was called out for hearing on the said date none of the parties or their advocates attended. The plaintiff now seeks, by its Chamber Summons dated 26th May 2008, an order setting aside the order of dismissal upon the main grounds that the plaintiff had not been informed of the hearing date; that the plaintiff's counsel was indisposed and counsel instructed to hold her brief failed to attend the court to so inform the court; that the failure to prosecute the suit on the said date was not intentional or due to indolence and that the plaintiff is interested in the suit which involves land. The application is supported by an affidavit sworn by one John K. Mutua, the plaintiff's Chief Executive Officer which affidavit is an elaboration of the above grounds.

The application is opposed primarily upon the grounds that the plaintiff has not satisfactorily explained why it has not prosecuted the suit expeditiously while enjoying an order of injunction; that the plaintiff is guilty of delay in lodging this application and that counsel for the plaintiff has not demonstrated by documents or affidavit that she was infact unwell when the suit came up for hearing on 21st November 2007.

When the application came up for hearing before me on 24th February 2010, counsel agreed to file written submissions. The same were in place by 23rd April 2010 when a date for ruling was given.

I have perused the application, the affidavits on record and the submissions of counsel. Having done so, I take the following view of the matter. In exercising its discretion under Order IX B Rule 8 of the Civil Procedure Rules, the main concern of the court is to do justice to the parties. The discretion should not be exercised where a party is deliberately obstructing or delaying the course of justice. It should however not punish honest inadvertence, accident or excusable mistake or error. It should also be noted that in exercising its discretion, the court should consider *inter alia*, the facts and circumstances both prior and subsequent and all the respective merits of the parties. The question as to whether the other side can reasonably be compensated by costs for any delay that may be occasioned by the setting aside of the judgment or order of dismissal should be considered and it should be remembered that to deny a litigant a hearing should be the last resort of the court. All those are settled principles applied when considering a default judgment or order.

In this case, the plaintiff's advocate duly fixed this suit for hearing on 21st November 2007, but neither attended the court nor did her client, the plaintiff. The plaintiff now says that its advocate was unwell and instructed her colleague to inform the court accordingly but the colleague neither attended the court nor informed her of the order made on 21st November 2007. On its part the plaintiff swears through its Chief Executive Officer that it was not informed of the hearing date and could not attend the court when the suit came up for hearing.

I am surprised that counsel for the plaintiff did not file an affidavit to buttress the averments of the plaintiff's Chief Executive. Notwithstanding that failure, however the record shows that on the said hearing date neither the defendant nor his counsel attended the court. The record further shows that both Advocates conducted themselves after the dismissal of 21st November 2007 as if the suit had not been dismissed until 17th April 2008 when both counsel were informed of the dismissal. This application was then lodged on 26th May 2008. In

those premises, I accept the explanation proffered by the plaintiff for the delay in moving the court to set aside the order of dismissal made on 21st November 2007.

The plaintiff has deponed that it did not know that its suit had been fixed for hearing on the said date and that is why it did not send a representative to attend the court on the said date. I have no reasons to doubt the plaintiff. In my view the plaintiff did not deliberately fail to attend the court when its case came up for hearing. The allegation that it is bent on delaying the hearing and determination of this suit is without basis.

The defendant has also not demonstrated that the delay to be occasioned by the setting aside of the order of dismissal cannot be compensated in costs. The upshot of my consideration of the plaintiff's application dated 26th May 2007 and filed on the same date is that the same is allowed in terms of prayer 1 of the application. The plaintiff shall however pay the defendant's thrown away costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Oguk holding brief for Ngugi for the Defendant/Respondent.

F. AZANGALALA

JUDGE

17TH MAY 2010