



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 157 OF 2011**

**PETER MUMO MASAVE.....PLAINTIFF**

**VERSUS**

**MUTUA KIOKO.....1<sup>ST</sup> DEFENDANT**

**KIOKO MUTUA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Application dated 4<sup>th</sup> June, 2018, the Plaintiff is seeking for the following orders:

- a. That the Plaintiff's case which was dismissed on 9<sup>th</sup> April, 2018 be reinstated for hearing.**
- b. That the Defendants' case be reopened and the Plaintiff allowed to defend the Counter-claim.**
- c. The costs of the Application be in cause.**

2. The Application is premised on the grounds that the suit came up for hearing on 9<sup>th</sup> April, 2018 when the Plaintiff did not attend court because he was unwell; that the Plaintiff's case was dismissed for want of prosecution and non-attendance and that the Plaintiff stands to suffer irreparably if the orders sought are not granted.

3. The 1<sup>st</sup> Defendant filed Grounds of Opposition in response to the Application in which he averred that the documents exhibited by the Plaintiff in support of the Application are contradictory; that the Plaintiff has not in any way explained his failure to attend court on 9<sup>th</sup> April, 2018 and that the Plaintiff's advocate Application for adjournment was declined.

4. In his submissions, the Plaintiff's advocate submitted that the Plaintiff was prevented from attending court by an act of God, that is sickness and that the failure to attend court was not deliberate but was occasioned by sickness.

5. Counsel submitted that the law allows the court to exercise its discretion judiciously even in matters where Judgment has been entered ex-parte and that Article 50 of the Constitution requires that every person should be afforded an opportunity to be heard and his case to be decided on merit.

6. The Plaintiff's counsel finally submitted that there is no challenge on the medical documents exhibited by the Plaintiff; that the Plaintiff was genuinely sick and that the Application should be allowed. Counsel relied on numerous authorities which I have

considered.

7. The Defendants' counsel submitted that the exercise of the court's discretion to set aside a Judgment or order is to be guided by the existence of a good cause as to why the Plaintiff did not attend court; that when the matter was called out on 9<sup>th</sup> April, 2018, no good cause was shown as to why the Plaintiff was not in court and that having not shown any good cause why he did not attend court on 9<sup>th</sup> April, 2018, the Application should be dismissed.

8. The Defendants' counsel submitted that the handwritten medical note produced by the Plaintiff does not state that the Plaintiff was sick to the point that he could not attend court; that the Plaintiff was not on bed rest on 9<sup>th</sup> April, 2018 and that there are no treatment notes for 9<sup>th</sup> April, 2018 to support the Plaintiff's allegation that he was sick on the day the matter came up for hearing.

9. The record shows that when this matter came up for hearing on 29<sup>th</sup> January, 2018, neither the Plaintiff nor the Defendants were ready to prosecute their Plaintiff and Counter-claim respectively. The court granted both parties the last adjournment. The matter was then fixed for hearing on 9<sup>th</sup> April, 2018.

10. When the matter came up for hearing on 9<sup>th</sup> April, 2018, the Plaintiff's advocate informed the court that the Plaintiff was unwell. On that ground, the Plaintiff's advocate applied for the matter to be adjourned to a different date. The Application for adjournment by the Plaintiff was opposed by the Defendants' advocate primarily because the Plaintiff's advocate did not have copies of medical reports to show that the Plaintiff was ill. Indeed, the Plaintiff's advocate admitted that he did not have medical notes to show that the Plaintiff was sick. In a short Ruling, this court stated as follows:

**“No evidence has been furnished to show that the Plaintiff is unwell. The Application for adjournment is disallowed. The suit and the Counter-claim to proceed for hearing at 11.00a.m.”**

11. The record shows that when the matter was called out for hearing at 11.00 a.m, the Plaintiff was not in court. The court proceeded to dismiss the Plaintiff's suit with costs for want of prosecution and non-attendance. The court proceeded to hear the Defendant in respect to his Counter-claim. The Plaintiff's advocate cross-examined the Defendant at length.

12. The Plaintiff is seeking to set aside the orders and proceedings of 9<sup>th</sup> April, 2018 on the ground that the Plaintiff was sick on that day. According to the Plaintiff, he was unable to attend court on 9<sup>th</sup> April, 2018 because he was unwell.

13. Order 12 Rule 7 of the Civil Procedure Rules provides that where Judgment has been entered or the suit has been dismissed (*for non-attendance*) on Application, the court may set aside or vary the Judgment or Order upon such terms as may be just.

14. The law relating to setting aside of an Order or Judgment has been settled. In the case of *Patel vs. EA Cargo Handling Services Limited (1974) E.A 75*, the court held that there are no limits or restrictions on a Judge's discretion except that if he does vary the Judgment, he does so on terms as may be just. The court further held as follows:

**“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules...”**

15. As I have stated above, the court declined to adjourn the matter when it came up for hearing on 9<sup>th</sup> April, 2018 on the ground that there was no evidence to show that the Plaintiff was unwell. The Plaintiff has now annexed on his Affidavit a treatment note dated 29<sup>th</sup> May, 2018 from Digital Medical Clinic. In the said note, it is shown that the Plaintiff, aged 72 years, was treated for a septic wound on 7<sup>th</sup> April, 2018 and was reviewed and dressed on 8<sup>th</sup> April and 9<sup>th</sup> April 2018.

16. In addition to the medical treatment notes of 29<sup>th</sup> May, 2018, the Plaintiff has also exhibited on his Affidavit the medical card for Digital Medical Clinic showing that he was to be examined on 12<sup>th</sup> July, 2017, 8<sup>th</sup> April, 2018 and 9<sup>th</sup> April, 2018.

17. Considering that the Plaintiff has shown that indeed he was attended to by a doctor on 9<sup>th</sup> April, 2018, and in the absence of evidence to the contrary, I shall exercise my discretion and set aside the order dismissing the suit for non-attendance. The Plaintiff shall however pay for the costs of the Application and for the Defendants' advocates getting up fees of 9<sup>th</sup> April, 2019.

18. For those reasons, I allow the Application dated 4<sup>th</sup> June, 2018 in the following terms:

- a. **The Plaintiff's case that was dismissed on 9<sup>th</sup> April, 2018 be and is hereby reinstated.**
- b. **The proceedings and orders of 9<sup>th</sup> April, 2018 be and are hereby set aside.**
- c. **The Plaintiff to pay the Defendants' advocate getting up fees for 9<sup>th</sup> April, 2018 to be assessed by the Deputy Registrar of this court.**
- d. **The Plaintiff to pay for the costs of the Application.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**



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