Ombachi v Karanja & another (Environment & Land Case 65 of 2018) [2023] KEELC 16330 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16330 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 65 OF 2018

FM NJOROGE, J

MARCH 16, 2023

BETWEEN

AGNES MORAA OMBACHI ..... PLAINTIFF

AND

NICHOLAS GITAU KARANJA ..... 1ST DEFENDANT

BEATRICE MUTHONI KARANJA ..... 2ND DEFENDANT

RULING

1. This is a ruling in respect of the plaintiff/applicant's notice of motion application dated December 14, 2022 seeking the following orders:

    1. Spent.

    2. Spent.

    3. That this honorable court be pleased to set aside/stay the orders issued on the November 16, 2022 dismissing this suit for want of prosecution and also set aside all the consequential orders emanating therefrom.

    4. That this honourable court be pleased to reinstate the plaintiff's suit and the same be heard on merit.

    5. Costs of this application be provided for.

2. The application is supported by the affidavit of Richard M Machage the plaintiff's advocate, sworn on December 14, 2022. He deposed that the matter was listed for hearing on November 16, 2022; that they had closed their offices on November 10, 2022 as usual; that when they reported to work the following day at 7.00am they found their offices locked with 3 padlocks; that upon enquiry they established that one Mr Robert Kirui was the one who had locked the said office; that upon requesting him to open

the office he refused despite not being their landlord; that he rushed to the Business Premises Rent Tribunal seeking a mandatory order against Mr Kirui to open the office which was issued; that despite the order being served upon Mr Kirui and his Advocates, they still refused to open until November 21, 2022 when the police intervened which was when he managed to gain access; that all the while he had been unable to attend to his matters since he did not have his diary nor his clients' files; that he later learnt that his client had attended court but was unable to follow the proceedings when the suit was dismissed; that it would be fair and just that the application be allowed.

Response

3. The defendants/respondents did not file any response to the application.

Submissions

4. There are no submissions on record filed by any of the parties.

Analysis And Determination

5. This court has considered the application and supporting affidavit and the only issue for determination is whether the plaintiff/applicant's case ought to be reinstated.

6. Order 17 rule 2 of the *Civil Procedure Rules*, provides that:

    1. "In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

    2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

    3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

    4. The court may dismiss the suit for non-compliance with any direction given under this order."

7. Besides the situations provided for in order 17, it is normal for the court to also dismiss a suit for want of prosecution when the claimant fails to turn up at the hearing. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D Popat and others & another* [2016] eKLR, the court stated as follows:

> "Nonetheless, article 159 of the Constitution and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:
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> "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the

action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

8. According to the court records, this matter came up for hearing on November 16, 2022. The defendant/respondent's advocate was present but the plaintiff was absent. The defendant/respondent's advocate requested the court to have the matter dismissed for want of prosecution for the reason that the said date had been fixed by consent.

9. The court noted the same and proceeded to dismiss the suit for want of prosecution with costs. The plaintiff/applicant has filed the instant application and alluded to the fact that he was unable to attend court on the said date of hearing as his office had been closed. He explained that he did not have access to his clients' file and therefore urged this court to set aside the orders made on November 16, 2022 and reinstate the suit.

10. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR considered the duty that advocates owe to the court:

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch App 497 in which Lord Hatherley communicated the court's expectations this way:
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> '... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned..."

11. In the present case the unfortunate circumstances that befall Mr Machage fall beyond the category of "mistake" as defined in the case law cited herein above. In this court's view they are more readily excusable than a mistake and require less scrutiny of this court. Having carefully considered the application, the facts before me and relying on the legal provisions cited above, I find that the plaintiff/applicant's application has merit.

12. In view of the foregoing, I find the instant notice of motion dated December 14, 2022 is merited and I allow it. I further proceed to make the following final orders:

    a. That the orders of this court made on November 16, 2022 dismissing the plaintiff/applicant's case are hereby set aside;

    b. That the plaintiff/applicant's suit be and is hereby reinstated for hearing on its merits;

    c. The plaintiff/applicant shall set down this suit for hearing on its merits within 30 days from the date hereof;

    d. The costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU