Laboso v Chepkwony (Environment & Land Case 81 of 2013)
[2023] KEELC 17128 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17128 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 81 OF 2013

MC OUNDO, J

APRIL 27, 2023

BETWEEN

JAMES CHERUIYOT LABOSO ..... PLAINTIFF

AND

REUBEN CHEPKWONY ..... DEFENDANT

RULING

1. Before me for determination is an Application dated the 23rd March 2022 brought pursuant to the provisions of Section 1A, 1B, 3, 3A, & 63 (e) of the *Civil Procedure Act*, Order 45 Rule 2, and Order 51 Rule 1 the *Civil Procedure Rules* and all enabling provisions of the law where the Applicant seeks orders to set aside the court's order dated 23rd May 2018 which had dismissed his suit, and that thereafter his suit be reinstated and set down for hearing. The Plaintiff/Applicant further seeks for stay of execution of the said order and all consequential orders as well as an order to amend his Plaint dated the 20th November 2013.

2. The Application is supported by the grounds thereof and the Applicant's supporting affidavit sworn on 23rd March 2022 in which the Applicant has deponed that he had been keen in prosecuting the matter and that the failure to do so was not by his own making but that it had been his previous advocate's fault because he had failed to notify him and/or guide him appropriately through the process.

3. That his Application to have the suit re-instated had previously been struck out for non-compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* which had now been cured with the filing of a consent between his previous Counsel and the current Counsel, and which consent had been adopted by the court on the 9th March 2022.

4. That the suit land had since been sub-divided and hence the reason for which he sought to amend the Plaint so that there could be a just and conclusive determination of the matter. That further, there

needed to be a stay of execution of the order given on the 23rd May 2018 as well as all consequential orders so that the matter could be set down for hearing on merit.

5. The Application was opposed by the Respondent in his Replying affidavit and Grounds of opposition both dated 10th November 2022 to the effect that the said Application was made in bad faith judgment having been delivered, a Decree issued and certificate of costs granted. That the Applicant had come to court with unclean hands and the Application for stay of execution of the judgment and Decree were an afterthought colored with bad faith, was misconceived and amounted to an abuse of the court process and therefore should be dismissed.

6. The court gave directions on 3rd November 2022 that the Application be disposed of by way of written submissions wherein parties complied.

Applicant's submissions.

7. In support of this Application, the Applicant framed his issues for determination as follows;

    i. Whether the Plaintiff is deserving of an order to set aside the order of this Honorable Court that had dismissed his suit, so that the suit be set down for hearing.

    ii. Whether the Plaintiff/Applicant is deserving of leave to amend the Plaint dated 20th November, 2013.

8. On the first issue for determination, the Applicant submitted that pursuant to the filing of a suit against the Defendant/Respondent on 21st November, 2013, his previous advocate had failed to inform him of the progress of the same and when he went to his office, he realized that Counsel had closed shop. That he had later discovered, upon perusal of the file in the registry, that the suit had been dismissed with costs on 23rd May 2018 despite there having been no notice served upon him. Reliance was placed on the decision in the case of *Associated Warehouse Co. Ltd & Others vs. Trust Bank Ltd* HCCC NO. 1266 of 1999 (unreported) quoted with approval in *Ibrahim Athman Said (suing in his capacity as Administrator Ad Litem) vs. Ibrahim Abdille Abdullah & Another* (2014) eKLR and in the case in *Eunice Soko Mlagui v Suresh Parmar & 3 others* [2018] eKLR.

9. That the Applicant's Counsel had disappeared without notice, and he had only came to learn about this after he had been served with the Party and Party Bill of Costs and Taxation Notice. That the mistake of his previous Advocate on record should not visited upon him (Applicant). That the delay in prosecuting the matter was excusable and reinstatement of the suit would be in the best interest of justice and would not occasion any prejudice upon the Defendant since he would be accorded an opportunity to be heard as was held in *Ivita vs. Kyumbu* 1984 KLR 441, cited with approval in *Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others* [2018] eKLR amongst others. He sought that the court do exercise its discretion and set aside the order dismissing the suit and thereafter order that the same be set down for hearing.

10. On the second issue for determination as to whether the Plaintiff/Applicant was deserving of leave to amend the Plaint dated 20th November, 2013, he relied on the provisions of Order 8 Rule 3 of the *Civil Procedure Rules* to submit that the same provided for court, at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

11. That firstly, the suit land known as L.R. No. Kericho/Litein/ 1573 had since been subdivided into several parcels with different titles wherein the suit portion was now comprised in L.R. No. Kericho/ Litein 2295 and therefore the need to amend the Plaint to capture the correct registration number of

the land in dispute. That secondly, the Plaint dated 20th November 2013 had inadvertent omissions and errors and therefore the need to amend it so as to ensure that all the matters in dispute had been brought to the attention of the Court so as to enable it reach a just and conclusive determination of the matter. That the Application had merit and the same ought to be allowed.

Respondent's submissions.

12. In opposition to the Application, the Respondent framed their issues for determination as follows;

    i. Whether the Applicant's Application is competent?

    ii. Whether the Applicant's Application is res judicata.

    iii. Who bears the costs?

13. On the first issue for determination, the Respondent submitted that from the provisions of the law by which the Application was brought, being Section 1A, 1B, Section 3, 3A and 63(e) of the *Civil procedure Act*, Order 45 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, the combined orders sought by the Applicant to wit; that there be stay of execution of the order of 23rd May 2018 and all consequential orders as well as leave to amend the Plaint dated 20th November 2013 could not be issued because there was no provision of law cited for the orders sought in prayers. That the Plaintiff/Applicant's Application dated 23rd March, 2022 was therefore fatally defective and was not curable.

14. On the second issue for determination as to whether the Applicant's Application was res judicata, the Respondent submitted while placing reliance on the provisions of Section 7 of the *Civil Procedure Act* and in a holding in the case in *Bernard Mugo Ndegwa vs. James Nderitu Githae & 2 Others* [2010] eKLR, as referred to in the case of *Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 others* (2014) eKLR, that this Application was similar to an Application dated 2nd March, 2021 in which a Ruling had been delivered on 4th November 2021 and therefore the current Application is *res judicata*.

15. The Respondent further submitted that the Plaintiff/Applicant's allegations that he was not served with notice of dismissal of this suit was false as at the time, he had an Advocate on record who had been duly served as evidenced by an annexure marked as "JCL 2" in their Replying Affidavit.

16. As to the issue as to who would pay the costs, the Respondent's submission, while relying on the decision in the case of *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR was that costs were normally awarded to compensate the successful party for the trouble taken in prosecuting or defending the suit. That litigation had to come to an end and parties should not waste the court's time in an attempt to forum shop. That the Application was fatally defective, was res judicata and the same ought to be dismissed with costs.

Determination.

17. I have carefully perused and considered the pleadings, the written submissions the authorities cited and the relevant provisions of the law. The Plaintiff/Applicant has sought for a myriad of orders in his Application to which I find the issues for determination herein as being;

    i. Whether there should be stay of execution of the court's order dated 23rd May 2018 dismissing the Plaintiff's suit.

    ii. Whether the Plaintiff/Applicant's dismissed suit should be reinstated.

18. On the first issue for determination, the proper provisions of the law that seeks for stay of execution is founded under the provisions of Order 42 Rule 6 and not Order 45 Rule 2 as captioned by the Applicant. This notwithstanding, it is not in dispute that this matter was instituted vide a Plaint dated the 20th November 2013 and filed on the 21st November 2013 pursuant to which no steps were taken to prosecute the matter until the 23rd May 2018 about 4 years and six months later when the same had been dismissed, for want of prosecution, on application by the Defendant/Respondent herein. I note that the orders issued therein had been to this effect;

> " The suit is dismissed with costs to the Defendant."

19. These orders, in my humble opinion were negative orders which were not capable of being executed. Indeed in the case of *Milcah Jeruto vs Fina Bank Ltd* [2013] eKLR the Court had held that an order for stay cannot be granted where a negative order had been issued.

20. Under Section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

> ''any person in whose favour a decree has been passed or an order capable of execution has been made..."

21. It therefore obtains that there are orders that are capable of execution while others are not. In the present case, the Court did not order the Applicant to do anything or to abstain from doing anything or to pay any sum of money.

22. In the case of *Western college of Arts and Applied Sciences vs. Oronga* (1976) KLR 63 at p. 66 Law V P said:-

> " But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an Application for stay, to enforce or to restrain by injunction."

23. Further, in *Sonalux Limited & Another vs. Barclays Bank of Kenya Limited & 2 Others* [2008] eKLR the Court of Appeal had held:

> 'As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.'

24. That said and done the Applicant's Application to stay execution of the orders issued on 23rd May 2018 is herein rejected.

25. The second issue for determination is whether Plaintiff/Applicant's dismissed suit should be reinstated.

26. Indeed the provisions of Order 17 Rule 2(5) of the *Civil Procedure Rules* are clear to the effect that:

> ''A suit stands dismissed after two years where no step has been undertaken.''

27. The import of the said provision of the law is very clear to the effect that where no step has been taken for more than two years to prosecute a matter, then the same stands dismissed without notice.

28. The court in *Kihara v Thumbi* (Environment & Land Case 18 of 2018) [2022] KEELC 3333 (KLR) (27 July 2022) (Ruling) had held as follows:

> " Clearly therefore, where no action has been undertaken in a suit for 2 years, such suit "stands dismissed" by operation of the law and the Court is not even obliged to issue any notice for such dismissal. The dismissal is automatic. The mischief intended under that provision which was introduced through L.N No 22 of 2020 must have been to ensure that suits which have been in the registries for 2 years and above with the parties taking no action are removed to pave way for other cases and not to take up valuable space in our already congested registries indefinitely."

29. Indeed the Court of Appeal in the case of *Peter Ngome vs. Plantex Company Limited* [1983] eKLR held that the dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution amounted to a judgment in that suit.

30. A court's discretion to set aside an ex-parte judgment or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

31. I have considered the reasons presented before me by the Applicant to wit that pursuant to the filing of the suit against the Defendant/Respondent on 21st November, 2013, his previous advocate had failed to inform him of the progress of the same and it had been after he had gone to his Advocates' office that he had realized that the office had been closed. That later he discovered, upon perusal of the file in the registry, that the suit had been dismissed with costs on 23rd May, 2018 despite there having been no notice served upon him.

32. I have considered whether the failure to prosecute the matter by both the Plaintiff and his Counsel constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the present Application to set aside orders made on the 23rd May 2018, two years and four months after the said order was made so that the matter, which had been filed eight years and four months earlier can be reinstated for hearing, constituted inordinate delay.

33. The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself, it is well settled. In the case of *Utalii Transport Company Limited & 3 Others vs NIC Bank & Another* [2014] eKLR the Court held that.

> 'It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to Court. Then exhorts that over one year has lapsed without the Plaintiffs taking any step to progress their case and makes a strong conclusion that the Plaintiffs' inertia runs contra to the overriding objective of the Court stipulated in section 1A, 1B and 3A of the CPA. The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a Court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the Plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the Court. See the opinions of

Danckwerts, LJ in Nagle v Fielden [1966] 2 QBD 633 at p 648, and Lord Diplock in Birket v James [1978] A.C. 297. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by Court in an Application for dismissal of suit for want of prosecution. These principles are:

1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

2) Whether the delay is intentional, contumelious and, therefore, inexcusable;

3) Whether the delay is an abuse of the Court process;

4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

5) What prejudice will the dismissal occasion to the Plaintiff"

6) Whether the Plaintiff has offered a reasonable explanation for the delay;

7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court"

34. Although it is not in dispute that Article 50 coupled with Article 159 of the *Constitution* constitutes the defined principles which should guide the court in making a decision on matters of reinstatement of a suit which has been dismissed by the court, however the Court is also under an obligation to consider whether there are reasonable grounds to reinstate such suit after considering the prejudice that the Respondent would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.

35. As was stated in The *Chairman Board of Trustees Ndalu Mosque & another .v. Martin Mabele & Others* 2018 eKLR: -

> " Parties must be warned that Courts have now taken charge of the proceedings and will no longer take a laid back approach to litigation but will ensure that the overriding objective of the *Civil Procedure Act* and Rules are strictly adhered to so that matters are heard and determined expeditiously."

36. The Applicant has not explained why the suit was not prosecuted for more than 4 years and six months (from 21st November 2013 – 23rd May 2018 2022.) but has now shifted blame to his previous Advocate whom he claims did not inform him of the progress of his matter. The Applicant ought to be reminded that suits do not belong to the Advocates but to the parties who must remain vigilant at all times to ensure that they are kept abreast of the happenings in their cases. They need to be on top of their casesandif the Applicant finds that the said Counsel was negligent, then his remedy lies elsewhere and not in setting aside of the dismissal order herein.

37. In the case of *Shah vs Mbogo & Another* (1967) EA 116 it had been held that;

> " The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

38. I find that there was inordinate delay on the part of the Plaintiff in prosecuting the case, which delay was intentional and inexcusable. Further, the Plaintiff has not offered any plausible explanation for the delay and therefore this said and done, I find no merit in the Application dated the 23rd March 2022 and I proceed to dismiss it with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF APRIL 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE