Redeemed Gospel Church & another v Egielan & 2 others (Environment & Land Case 52 of 2020) [2023] KEELC 16820 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16820 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 52 OF 2020

FO NYAGAKA, J

APRIL 17, 2023

BETWEEN

REDEEMED GOSPEL CHURCH ..... 1ST PLAINTIFF

WILLIAM ABOK ..... 2ND PLAINTIFF

AND

JOHN EGIELAN ..... 1ST DEFENDANT

EPUNGURE JOSEPH ..... 2ND DEFENDANT

NABUIN EKAMIAS ..... 3RD DEFENDANT

RULING

The Application

1. The instant Notice of Motion Application dated November 8, 2022 and filed on November 17, 2022 has invoked the provisions set out in Article 159 (2) (d) of the *Constitution*, Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 12, Rule 7 of the Civil Procedure Rules praying for orders:

    1. Thatthe orders of the Honorable Dr Fred Nyagaka J made on July 4, 2022 dismissing the Plaintiffs' suit for want of prosecution together with all other consequential orders be set aside.

    2. Thatthe Plaintiff's suit be reinstated for hearing and determination on merit.

    3. That costs of this Application be in the cause.

2. The gravamen of the Application is to be found in the grounds on its face as read with the supporting Affidavit of one Apollo Ambutsi but however sworn by the Judgment-Debtor or the 2nd Plaintiff. The proceedings herein were terminated by an order of dismissal of the suit with costs to the Defendants, which was made on July 4, 2022. He explained that the Judgment-Debtors or Plaintiffs could not proceed to prosecute their case on that day as Counsel for the 2nd Plaintiff informed his counterpart

acting for the 1st Plaintiff, that he had two (2) other lengthy hearings before the High Court at Kitale namely HC MISC E002 of 2021; Anna Nanyama Wanjala v Maurice Anthony Wanjala Muse and HC P&A 78 of 2014; In the matter of the estate of Ann Njeri Kinyanjui. Consequently, the Applicant did not attend court.

3. It was argued that the Application was deserving as the mistake of Counsel should not be visited upon an innocent client. Additionally, the Applicant had a good case with high chances of success. It was therefore in the interest of justice that the suit be reinstated for determination on its merits, otherwise the Applicant stood driven out of the seat of justice. Finally, the Applicant urged this court to allow the Application since he was desirous of prosecuting the suit to its logical conclusion noting that the Application had been filed in good time.

The Response

4. The 1st Decree-holder/Defendant filed a Replying Affidavit on December 19, 2022 and sworn on December 14, 2022. He opposed the Application on the following grounds. That it was res judicata. He observed that a similar Application had been filed in 2021 when on May 4, 2021, this suit was dismissed for want of prosecution. As such the present Application was an abuse of the process of the court that ought to be frowned upon; secondly, the orders of July 4, 2022 were self-executing and did not need clarification; thirdly, the Applicant by default forfeited his right to defend; fourthly, the Applicant's recourse lay in an appeal and not in the present Application. In the circumstances, this court was functus officio. Finally, he deposed that the Applicant was aware of the hearing date since it was fixed by consent in the presence of all parties. In light of the above reasons, the Respondent urged this court to dismiss the Application with costs.

Rejoinder

5. In response to the Respondent's Affidavit, the Applicant filed a Further Affidavit sworn on January 23, 2023 on February 22, 2023. He deposed that the Application was filed in ordinate time and in the interests of justice; it was not res judicata; it was Kitale ELC No 52 of 2020 consolidated with Kitale ELC No 43 of 2021 that was dismissed and later reinstated; he defended that he never participated in the dismissed suit; that the Application was based on the principles of natural justice that would occasion no prejudice on the Respondents if allowed; finally, he rehashed the contents of his Application urging this court to grant the orders sought.

Submissions

6. At the close of pleadings, parties elected to file written submissions in disposing of the Application. The Applicant filed his undated submissions on 22/02/2023. He relied on Section 3A of the *Civil Procedure Act* and the authorities of *Ivita v Kyumbu [1984] KLR 441*, *Bilha Ngonyo Isaac v Kembu Farm Limited & Another [2018] eKLR*, *Belinda Murai & Others v Amoi Wainaina [1978]* (sic) and *Philip Chemwolo & Another v Augustine Kubede [1982 - 88] KAR 103* to submit that this court was within its discretion to grant the reliefs sought. He reiterated his Application urging this court to allow it as prayed.

7. The Respondent's submissions dated December 20, 2022 and filed on January 11, 2023 submitted that the onus was on applicants to efficiently and effectively fast track their case in its disposal. He continued that the present suit was filed on August 21, 2020. It was then dismissed for want of prosecution on May 4, 2021 and reinstated to be ultimately dismissed for want of prosecution on July 4, 2022 once more. He relied on *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR*, *State of Maharashta and Another vs National Construction Company Bombay Supreme Court Civil*

Appeal No 1497 of 1996 and *Njue Ngai v Ephantus Njiru & another [2016] eKLR* to urge this Court to dismiss the present Application for being res judicata. Finally, the Respondent submitted that this Court was under the functus officio dogma estopped from reopening the litigation herein. Since the Application was bad in law, he prayed that the same be dismissed with costs.

Analysis And Disposition

8. I have considered the Application, the grounds and the Affidavits. I have also considered the Replying Affidavit and analyzed the rival submissions. The Applicant seeks to reinstate the suit. The principles governing reinstatement of suits were properly enunciated in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR* which this Court wholly adopts as follows:

> ' The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution*. Article 50 coupled with article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial ''Sword of the Damocles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.'

9. Taking the above cue, is the Applicant deserving of the orders sought? I have examined the court's analysis of July 4, 2022 dismissing the suit for want of prosecution. This court took into account the submissions made by both parties. In arriving at its conclusion, the court observed that no evidence was furnished before the court to demonstrate that the Applicant's wife was indisposed. It noted that although Counsel intimated that he was engaged before the High court, that was a court of equal status as the present one, no sufficient reason was furnished to rank those matters in the High Court in priority. That irrespective, the court opined that the Plaintiffs ought to have attended court.

10. Secondly, when this matter was listed for hearing on May 4, 2021, the Applicant sought an adjournment that was denied. The suit was ultimately dismissed. The Applicant filed an Application dated May 11, 2021 seeking to reinstate the suit that was allowed on August 6, 2021. The matter was subsequently listed for hearing on November 9, 2021 but did not proceed. The Court compelled the Applicant to proceed with his case but, however, his Counsel intimated to the court that he could not proceed in the absence of his client. As such, it was dismissed for want of prosecution.

11. From that brief precis, it is observed that the Applicant seeks to re-litigate upon those issues considered extensively when the suit was dismissed for want of prosecution. In other words, the Applicant invited this Court to sit on appeal of its own decision because the same issues proffered on July 4, 2022 hinged the present motion. That is not only frowned upon but against the dictates of our Constitution and statute. This court, as rightly pointed out by the Respondent, was functus officio.

12. Additionally, it is observed that the Applicant has time again developed a propensity to not only fail to proceed with prosecuting his case but also seek reinstatement of the it when adverse orders have

been made but as a result of her making. While I observe that the present motion is not res judicata since the orders challenged were made on two (2) distinct days, the nature of the Application cannot be wished away. The Question is: is this Application merited? I think not. The reasons advanced by the Applicant are not only short of being convincing but were not even given to the Court at the time the adjournment of the suit was sought the second time and when denied the suit was dismissed. In any event, what guarantee does this court have, if the Application being allowed, that the Applicant will prosecute his case? I think also, none. The Applicant has been given chances to ventilate his case but has chosen not to.

13. It is also instructive to point out that the Application offended the mandatory provisions of Order 9, Rule 9 of the *Civil Procedure Rules*. Under it, a change of advocate, after judgment has been passed, shall only be effected (emphasis mine) is effected by an order of the Court or by the consent of the incoming and the advocate formerly on record. Put differently, leave must be granted to a party to change his Advocate on a post-judgment scenario. The order can only emanate from an application duly filed and prosecuted successfully or by consent of learned counsel.

14. The drafters of the provision of law under reference, and to facilitate efficacious disposal of applications after judgment, elaborately allowed parties, under Order 9 Rule 10, to combine this prayer with others sought in the post judgment application(s). However, that prayer would take priority and be determined first.

15. Turning to the instant case, the nature of the orders of July 4, 2022 conclusively determined the matter. There was a regular judgment on record. Before a party could invoke any audience before this Court where they chose to be represented by a new firm of Advocates, it was incumbent on them to first regularize the record by obtaining proper leave for the firm of Advocates to act on its behalf. Without that mandatory leave, the present Application is incompetent and incurably defective.

16. Furthermore, although the suit was dismissed on July 4, 2022, no explanation was brought before this court to explain why it was filed four (4) months later. I find that inordinate delay since the Applicant's grounds in the present Application emanated from the proceedings of July 4, 2022 when it sought an adjournment. If he elected to rely on the reasons previously advanced seeking an adjournment as he has done to substantiate the present Application, then nothing prevented him from lodging the Application much sooner since those reasons were well within his purview.

17. The upshot of the analysis above is that the Applicant has failed to demonstrate why this Court should exercise its discretion to reinstate the suit. For these reasons that I conclude that the Application dated November 8, 2022 and filed on November 17, 2022 is not only incompetent but lacks merit. It is hereby dismissed with costs to the Respondent herein.

18. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 17TH DAY OF APRIL, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE