



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 14 (B) OF 2019

MICHIRA MESSAH & CO. ADVOCATES.....PLAINTIFF

VERSUS

KALUME NDURYA KATANA.....1ST DEFENDANT

PATRICK KAMA NJERU.....2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

Mr. Mogaka for the applicant

Mr. Onchangu for respondent

RULING

On 18th March, 2019 the applicants' objection was dismissed for want of prosecution. The application through the Firm of Onchangu Kemunto & Co. Advocates has moved this court under Section 1A, 1B of the Civil Procedure Rules and Order 12 rule 7 to have the dismissal order lifted and set aside and the objection be set down for hearing.

In that motion of the applicant avers on the affidavit and body of the motion that the absence and or non-attendance on the scheduled date was not deliberate or an act of negligence. That it was an inadvertent mistake and omission. That when the file was called out, learned counsel holding brief was before the High Court whereas the file was being dealt by the Deputy Registrar.

The applicant moves the court to grant the relief on grounds that the objection raises weight and substantial issues requiring the determination by this court.

The respondents, also legal counsel in a rejoinder to the application filed a replying affidavit opposing any attempts by this court to reinstate which he referred to as a defective application.

Analysis

The law on dismissal of suits and may their reinstatement is governed by very clear settled principles in the case of **Ivita v Kyumbu 1984 KLR 441**:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay.”

I further derive assistance from the threshold issues in the case of **Mwangi S. K. Menyi v Attorney General and another Civil Suit Misc. No. 720 of 2009** where it was held that:

“When the delay is prolonged and inexcusable such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straightaway and the judicious exercise of discretion should be guided by the following conditions:

a) Whether the delay has been intentional and contravenes.

b) Whether the delay or conduct of the plaintiff amounts to an abuse of the court.

c) Whether the delay is inordinate and inexcusable.

d) Whether the delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant.”

From the record there is every indication that the applicant has taken long to prosecute his objection proceedings. It is possible for the court to consider it a normal omission or inexcusable mistake but the effect of it would likely occasion prejudice to the respondent.

In principle the court in **Shah v Mbogo & another 1967 EA 1116** on account of exercise of unfettered discretion it was held that:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but it not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

For purposes of this application the exercise of the court’s discretion is to deal with the dismissal order issued for non-attendance of the applicant. Prima facie the objection proceedings whatever its merit or demerits remains unresolved.

Remedy on this ground must be justified by special consideration that denial of it would impose exceptional hardship upon the applicant, I conceive it to be a mistake according to the particular circumstances of this application not to heed the call by the applicant to let a judgement pass in which there has been no proper adjudication on the merits.

For these reasons, I would hold that the notice of motion dated 11th November, 2019 be allowed on condition that the applicant be condemned to pay throw away costs of Shs.10,000 before admission of the objection proceedings for interpartes hearing. Further the aforesaid objection proceedings be set down for hearing within 21 days from today’s date. The costs of the application to abide the outcome of the pending motion.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE