



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2458 OF 1998

MOROP DISTRIBUTORS (K) LIMITED.....PLAINTIFF

VERSUS

JOB KIPNANDI CHEBON.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. In its Notice of Motion application dated 21st February 2019 and filed on 1st March 2019, the Plaintiff sought that leave be granted for it to substitute Mariko Cheboiwo with Gedion Kiprop Chepsergon as its duly appointed representative and that the firm of M/S Chesaro & Co Advocates to prosecute the matter in place of M/S Cheronon & Co Advocates. The second limb of the Plaintiff's application was allowed on 3rd October 2019 and the present advocates were instructed to file their Notice of Change of Advocates forthwith.
2. Its application was supported by the Affidavit of Gideon Kiprop Chepsergon, which was sworn on 21st February 2019 and the Supplementary Affidavit of Linda C. Bii, its advocate, that was sworn and filed on 19th November 2019.
3. The Plaintiff pointed out that Mariko Cheboiwo who was its representative in the suit herein passed away during the pendency of the suit and was emphatic that it was never served with the Notice to Show Cause (NTSC) why the suit should not be dismissed for want of prosecution. It contended that the court official omitted and /or was negligent in not having served it with the said NTSC.
4. It averred that it tried to follow up the matter with the firm of M/S Cheronon & Co Advocates but to no avail and that it appointed the new representative after it held its general meeting on 11th July 2015 who subsequently established that the suit herein was dismissed by Justice Sawe (**sic**) on 30th June 2015.
5. It was its contention that the subject matter of the suit was its sole property and was dependent on its entire (**sic**) shareholders as their prime investment to benefit them and It was its contention that the subject matter of the suit was its sole property and its entire (**sic**) shareholders had invested millions of money in it as their prime investment to benefit them and their children and consequently, if its said application was not allowed, then it's said shareholders would suffer irreparable loss.
6. It averred that the matter had been active during its pendency until the demise of its representative, Mariko Cheboiwo, and that at some point, the file could not be traced. It asserted that it was only four (4) years since the suit was dismissed and that the 1st Defendant would not suffer any prejudice if its present application was allowed as it was not the one that made the application for dismissal. It thus urged this court to allow the same.
7. In opposition to the said application, on 16th May 2019, the 1st Defendant swore a Replying Affidavit. The same was filed on 26th June 2019. He pointed out that the suit traced its origin to a sale and purchase of the subject suit land in 1995 and that it had been twenty (20) years since the suit was filed. He added that the suit was dismissed in 2008 and that the Plaintiff was coming to court for reinstatement eleven (11) years later which was very late in the day. He stated that it had not advanced any good reasons why it had not taken action to follow up on and/or prosecute the matter.
8. He was emphatic that reinstatement of the suit would offend the provisions of Article 50 of the Constitution of Kenya, 2010 that guarantees a fair and speedy determination of disputes as well as the maxim of equity that delay defeats equity. He averred that the suit was not merited and thus asked this court to dismiss the present application with costs to him.

9. On 4th April 2019, the Plaintiff's counsel had informed the court that suit against the 2nd and 3rd Defendants had been withdrawn leaving it and the 1st Defendant herein as parties to the suit herein.

10. In support of the pending prayer, the Plaintiff relied on the case of **Kenya Power & Lighting Ltd vs Cold Storage Ltd** (citation not given) and which it did not annex to its Written Submissions. It attached two (2) other cases which were not referred to in its Written Submissions.

11. Similarly, the 1st Defendant also alluded to authorities which were not attached to his Written Submissions. What he attached was a copy of the case of **Mohamed Shally Sese (Shah Sese) vs Fulson Company Ltd & Another [2006] eKLR** where the court found that the delay therein had been inordinate and not satisfactorily explained.

12. This court agreed with the 1st Defendant that the Plaintiff had taken such a long time to prosecute its case. It did not attach any evidence to show when its first representative, Mariko Cheboiwo, passed away. It did not also adduce any evidence to show when its proposed new representative, Gideon Kiprop Chepsergon, was appointed and/or explain why he did not file the present application immediately he established that the suit herein had been dismissed. Further, it did not adduce evidence to show that the file was missing and/or that it was unable to trace its advocate, who they averred was subsequently appointed as a judge.

13. After perusing the court file, it appeared to this court that the Plaintiff had not been keen in prosecuting its case since it filed suit in 1998 because the last time its advocates took a hearing date at the Registry was on 11th March 2008. The last time the matter was before a judge was on 14th March 2005. The delay that offended both the Constitution of Kenya, 2010 and the maxim of equity that **“justice delayed is justice denied”**.

14. Notably, Article 159 (2) (b) of the Constitution of Kenya stipulates that:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles

b. justice shall not be delayed;

15. Whereas there is a duty on a litigant to pursue his case in court, it is not uncommon for an advocate to be in the driver's seat with the litigant being at the mercy of the hands of the advocate who navigates seamlessly within the corridors of justice. Indeed, the reason why a party appoints an advocate is so that he can follow up the matter on his behalf. The advocate renders services for which he is paid. Many a time, advocates fail to keep their clients abreast of developments of their cases due to several reasons such as non-payment of legal fees and their clients who are good pay masters chase advocates just to be kept abreast of those developments. It was for that reason that this court was hesitant to heap all the blame on the Plaintiff herein.

16. It is not clear why its advocate did not take any further action since 11th March 2008. What was evident, however, was that the advocates appeared to have taken a back seat in prosecuting the matter herein. This was prejudicial to the Plaintiff's case. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

17. Having said so, it was also clear to this court that the Plaintiff was not served with any NTSC. If it had been served, then the same ought to have been in the court file. What was in the file was an order of 30th June 2015 by Sewe J dismissing the suit herein. It was not correct as the 1st Defendant had stated that suit was dismissed in 2008.

18. While this court found and held that a period of four (4) years was long and inordinate and that the explanation for the delay was not good, it nonetheless noted that rules of natural justice demand that a party must be given an opportunity to be heard. The fact that there had been inaction by the Plaintiff did not negate the fact that it had to be notified of the dismissal of its suit so that it could defend itself appropriately.

19. Indeed, Article 50(1) of the Constitution of Kenya that provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

20. Accordingly, weighing the 1st Defendant's fundamental right not to have justice delayed in line with Article 159(2)(b) of the Constitution of Kenya and the equally important fundamental right to fair trial as enshrined in Article 50(1) of the Constitution of Kenya, this court determined that there would be more injustice in the Plaintiff being denied an opportunity to ventilate its case on merit as it was not given an opportunity to respond to the NTSC. Indeed, dismissal of a suit in the absence of a party is a serious step and must be done sparingly and only where it is clear that such party had been notified of the dismissal of its suit and failed to attend court to defend itself.

21. Going further, it was evident that the subject matter of the suit herein related to the question of ownership of land. Notably, suit was filed prior to the promulgation of the Constitution of Kenya in 2010 when the High Court had jurisdiction to hear and determine land matters. Post-Constitution of Kenya, 2010, the matter is now not within the jurisdiction of the High Court as can be seen in Article 165(5)(b) of the Constitution of Kenya which stipulates that:-

“The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in

Article 162 (2).”

22. Further, Article 162(2)(b) of the Constitution of Kenya states that:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.”

DISPOSITION

23. For the reasons foregoing, the upshot of this court’s Ruling was that the Plaintiff’s Notice of Motion application dated 21st February 2019 and filed on 1st March 2019 was merited and the same is hereby allowed in terms of Prayer Nos (1) and (2) herein. As the suit herein was dismissed without notice to the Plaintiff herein, the court will not order that it pays the 1st Defendant throw away costs. Instead, it is hereby directed that costs of the application will be in the cause.

24. Further, it is hereby directed that this matter be and is hereby transferred to the Environment and Land Court for hearing and determination. The same to be placed for mention before the Presiding Judge of that court on 17th September 2020 for his further orders and /or directions.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July 2020

J. KAMAU

JUDGE