



**Bongoi v Barno & another (Environment & Land Case 71 of 2016)
[2023] KEELC 20233 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 71 OF 2016
JM ONYANGO, J
SEPTEMBER 27, 2023**

BETWEEN

KIMARU KIPLAGAT BONGOI PLAINTIFF

AND

CHRISTOPHER KIBET BARNO 1ST DEFENDANT

JACKSON KIPROTICH KEMBOI 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff/Applicant's application dated February 9, 2023 seeking orders that the court be pleased to set aside the order issued on October 13, 2018 dismissing the suit so that the suit can be heard and determined on merit. The Plaintiff also seeks leave that the firm of M/S Kimaru Kimutai & Company Advocates do come on record on behalf of the Plaintiff/Applicant.
2. The grounds upon which the application is premised are that the court file herein could not be traced at the Registry and that the Plaintiff was not aware of the dismissal order until January 2023. The Applicant further asserts that the mistake of his counsel should not be visited upon him. The applicant also relies on his supporting affidavit sworn on the 9th day of February 2023.
3. The 1st Defendant/Respondent opposed the application through his Grounds of Opposition dated March 20, 2023 in which he asserts inter alia that the Plaintiff is guilty of inordinate and unexplained delay in seeking to reinstate the suit after it was dismissed. He further states that the plaintiff's allegation that the court file was missing from the Registry is not supported by any evidence that the plaintiff made any efforts to trace the file. The Respondent also states that the Plaintiff's assertion that the mistake of his advocate should not be visited upon him has not been explained and that the Plaintiff has not met the threshold for grant of the orders sought.
4. The 2nd Defendant/Respondent filed a Replying Affidavit sworn on February 20, 2023 in which he strenuously opposed the application. In the said affidavit he faulted the Plaintiff for failing to follow up



on his case and instead blamed his advocate for failing to communicate with him. He further blamed the plaintiff for inordinate delay in filing the application.

5. The court directed that the application be canvassed through written submissions and both parties complied by filing their submissions which I have carefully considered.

Analysis and Determination

6. The only issue for determination is whether the order of dismissal of the suit made on October 13, 2018 should be set aside.

Order 12 Rule 7 of the *Civil Procedure Rules* provides that;

“Where under this order judgment has been entered or a suit has been dismissed, the court on application may set aside or vary the judgment or order upon such terms as may be just’

7. The court has a wide discretion to set aside a judgment or order of dismissal although such discretion must be exercised judiciously taking into account the circumstances of each case. As was held in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (In liquidation)* (2015) eKLR;

“In considering an application to set aside an order of dismissal, the court must 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 would suffer if the suit is not reinstated”.

8. In the instant suit the Applicant has deponed that when the matter came up for mention to fix a hearing date, his former advocate instructed another advocate to hold his brief and take a hearing date. The said advocate took the hearing date but failed to inform the Applicant’s advocate and as a result both the Applicant and his advocate failed to attend court on the hearing date. The Applicant claims that he was based in Tanzania at the time.

9. It is worth noting that Applicant’s former counsel has not sworn an affidavit to confirm the allegations in the applicant’s affidavit nor has the Applicant furnished any proof that he was working in Tanzania in 2018. Be that as it may, the Applicant has not explained why it took him five years to find out about the progress of his case. His allegation that the court file was missing from the registry is equally unsupported. It must always be borne in mind that a case belongs to the litigant and not his advocate and a litigant cannot get away by blaming his advocate for failing to update him on the progress of his case. In the case of *Utalii Transport Co Ltd and 3 others v NIC Bank and Another* (2014) eKLR, the court observed 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”

10. Similarly, in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairoobn Najbi* (Milimani) HCCC No 397 of 2002 Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the



progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

11. In the absence of a plausible explanation as to why he took five years to file this application I am not inclined to exercise my discretion in the applicant's favour.
12. It must be noted that in exercising its authority this court is guided inter alia by Article 159 2(b) of the Constitution of Kenya which provides that justice shall not be delayed. Additionally, the court is enjoined to give effect to the overriding objective of the Civil Procedure rules and the Environment and Land Court Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed by these Acts. In order to enable it carry out its mandate, both parties and advocates are under a duty to assist the court to further the overriding objective. This cannot be achieved if parties fail to diligently prosecute their cases in court.
13. The Plaintiff herein appears to have taken a back seat after filing his case and he has only himself to blame. In the case of Abigael Barma v Mwangi Theuri ELC Case No 393 of 2013 the Court referred to Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden LC in Smith v Clay (1767) 3 Bro CC 639n at 640 n) where it was asserted that

“a court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing”

14. In view of the foregoing the plaintiff's application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER 2023.

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J.M ONYANGO

JUDGE

In the presence of;

Miss Rop for the 2nd Defendant/Respondent

No appearance for the Plaintiff/Applicant

Court Assistant: A. Oniala

