



Dhamini Limited v Tanad Transporters & another (Environment & Land Case 45 of 2019) [2023] KEELC 20085 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 45 OF 2019
JA MOGENI, J
SEPTEMBER 26, 2023**

BETWEEN

DHAMINI LIMITED PLAINTIFF

AND

TANAD TRANSPORTERS 1ST DEFENDANT

MUSA HASSAN 2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff/Applicant's Notice of Motion Application dated 7/03/2023 brought pursuant to Order 45 Rule 1 and order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 1B & 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The Plaintiff/Applicant is seeking for the following orders: -
 - a. That the order issued by this Honourable Court on 23/02/2023 dismissing the suit herein for want of prosecution be reviewed and/or set/aside.
 - b. That the suit herein be reinstated.
 - c. That the costs of this application be provided for.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Sospeter Opondo Aming'a, counsel for the Plaintiff/Applicant herein sworn on 7/03/2023. I do not need to reproduce the same.
3. The application is opposed. There is a Replying Affidavit by Musa Hassan, the 2nd Defendant/ Respondent herein and a director of the 1st Defendant, sworn on 15/04/2023.
4. On 12/06/2023, counsels agreed to file written submissions to the application and the Court gave directions on the same. The Plaintiff/Applicant duly submitted, and I have considered them. The



Plaintiff/Applicant filed its written submissions dated 16/06/2023 but the Respondents had not duly submitted by the time of writing this Ruling.

Analysis And Determination

5. I have considered the Applicant's Application, the affidavits on record and the submissions made. The only issue for determination is whether or not the court should set aside the order issued on 23/02/2023 dismissing the Plaintiff's suit and have the same reinstated.
6. The Plaintiff's advocate essentially says that it was never served with the court dates. They were unable to log into the first Pre-Trial Conference date before the Deputy Registrar due to technical difficulties. The advocate alleges that he was later informed that the matter had been listed before the Judge on 18/09/2022. He annexed a screenshot of a WhatsApp conversation with one Ken Kiranga in support of this allegation. The said person is unknown to the Court. A perusal of the court record shows that the matter was listed for Pre-trial Conference on 8/09/2022 and not 18/09/2022 as alleged. I believe parties to a suit receive notifications once a date is updated on the Case Tracking System portal. However, the plaintiff's counsel feigns that he was never served with any dates by the court including the NTSC.
7. Counsel for the plaintiff submits that the lack of court attendance on 7/07/2022 was excusable as he had technical difficulties. Which is fine and understandable. He then submits that he diligently followed up with the court via telephone call and were informed that the next date was 18/09/2022 which set off a domino of missed attendances and losing track of the case despite unsuccessfully sending the clerk to the registry to follow up with no success. The communication they allege to have annexed to their application is a screenshot of a WhatsApp conversation with an unknown person. This is not sufficient evidence to demonstrate diligence in following up on one's court case. Counsel's allegations are not substantiated. 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.
8. The 2nd Defendant avers that in response to paragraphs 3-8 of the plaintiff's affidavit, the depositions therein show that the lack of seriousness in the way the Plaintiff and its advocates have been dealing with the matter, and they betray the fact that the Plaintiff is not keen on prosecuting the matter, but is merely hell bent on vexing the Defendants/Applicants, since the suit property subject of this suit, was the subject of an already concluded matter being ELC 68/2009 between Laser Communications and the 1st Defendant/Respondent herein, which suit the Plaintiff was never a party to, despite claiming to own the suit property. That if at all the Plaintiff and its legal advisers were keen on prosecuting the suit, and not merely using it to extort, harass and vex the Defendant/Applicant's they would have been checking the status of the case on the Case Tracking System as well as on the cause list published on Kenya Law Reports, and would have been aware that the suit was scheduled for Notice to Show Cause why the suit should not be dismissed, and therefore the Plaintiff/Applicants can only blame their Advocates on record, and their application ought to be dismissed.
9. The Respondent avers that the court was correct and justified in dismissing the suit for want of prosecution on that day, since from the record of proceedings it was quite evident that the Plaintiff/Applicant has completely abandoned the suit, as there had been no appearance for the Plaintiff/Applicant in the proceedings court attendances before the Deputy Registrar, hence the court properly exercised its jurisdiction in dismissing the suit, and the Plaintiff/Applicant's application lacks merit and ought to be dismissed with costs.
10. Further, that the delay by the Plaintiff/Applicant's advocates to follow up on the status of the matter for the period between 23/02/2023, and 7/03/2023 when they filed the instant application, further



goes to show that the Plaintiff/Applicant is not a diligent litigant who is desirous of having the suit prosecuted, which is buttressed by the fact that this is the 3rd time that the Plaintiff/Applicant's suit is being dismissed in a similar manner, hence by its conduct the Plaintiff/Applicant is totally undeserving of the exercise of this honourable court's discretion to set aside the order dismissing the suit, and he urged the court to dismiss the application with costs.

11. In response to paragraph 14, the Respondent contends that the depositions therein are not true, since as he has earlier deponed, the suit land which the Plaintiff claims in this matter, was the subject of an already concluded matter, between Laser Communications and Defendants herein, where a judgment was delivered by both the Environment & Land Court, the Court of Appeal in Civil Appeal No... of 2018 and was settled by consent in Supreme Court Petition No. E009/2022, and the Plaintiff/Applicant was not a party to the said case, hence the Plaintiff/Applicant has no proprietary interests in the suit property, and is merely a busybody who is abusing the court process to vex the Defendant/Respondent's and harass them, knowing very well it has no valid claim over the suit property. In further response to paragraph 14 of the Affidavit, he added that the fact that the Plaintiff/Applicant has never been in possession of the suit property since it began the litigation over the same in 2008, and when it filed the instant suit it did not make any application for an injunction, it goes to show that the Plaintiff/Applicant lacks a genuine and justiciable claim over the suit property, and hence will suffer no prejudice if the application dated 7/03/2023, is disallowed and dismissed with costs.
12. That in response to paragraphs 15 and 16 of the Affidavit, in light of the history of the Plaintiff's conduct in the course of the litigation history between the parties herein over the subject matter of this suit, and the fact that the Plaintiff/Applicant is yet to settle the costs awarded to the Defendants/Respondents for the initial suit which was dismissed in December 2018, after being in court for 10 years, he avers that allowing the Plaintiff/Applicant's application will not only cause extreme prejudice to the Respondents, but shall be against the interest of justice and the principle that litigation must come to an end. He pleads with the court to dismiss the application dated 7/03/2023, with costs to the Defendants/Respondents.
13. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate that suit. The instant Application was filed on 8/03/2023. The suit was dismissed on 23/02/2023. The same in my view was therefore not filed without inordinate delay.
14. In the case of *Shah -v- Mbogo* (1967) EA 116, it was stated that the exercise of discretion of the court to set aside ex-parte Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.
15. In this case, the suit was dismissed for want of prosecution. There was a series of non-attendance by both parties. The Court notes that this case has been listed for Pre-Trial Conference before the Deputy Registrar for five (5) times since 28/04/2022 up to 7/02/2023 when the matter was given a date for Notice to Show Cause. There was no appearance on 23/02/2023 when the matter was listed for Notice to Show Cause. The Plaintiff's counsel has explained that he was unable to log into Court due to technical difficulties on 7/07/2022. Regarding the other dates, counsel avers that he was never served especially with the NTSC and that he had been following up with the registry with no success. It is trite that justice is justice for both the plaintiff and the defendant and the plaintiff having dragged the defendant to court, he ought to have expedited the prosecution of the matter. These allegations by the Plaintiff's counsel are only supported by one annexure of a WhatsApp conversation with an unknown person allegedly informing the Plaintiff that the matter was coming up on 18/09/2022 before the Judge. The Case Tracking System indicates that this matter was listed before the Deputy Registrar on



8/09/2022. It is my humble view that the Plaintiff's Counsel has failed to demonstrate diligence in following up on his matter. One screenshot of a WhatsApp conversation with an unknown person is not sufficient evidence. A mere perusal of the court file by the Clerk would have updated the Plaintiff/Plaintiff's counsel on the progress of the Case.

16. The least one could do when they institute a case is that a Plaintiff and/or his counsel would do more to follow up with the court registry on the status of their case and not call and write WhatsApp messages and wait for a response. Simply stating that the next date which was on a Sunday (18/09/2022) set off a domino of missed attendances and losing track of the case despite unsuccessfully sending the clerk to the registry to follow up with no success is not acceptable. It is not inadvertence or an excusable mistake or error.
17. The Court cannot assist the Plaintiff in these circumstances. It cannot be said that the Plaintiff's failure to attend Court was intentional or deliberate. The Defendant contended that the court was correct and justified in dismissing the suit for want of prosecution on that day, since from the record of proceedings it was quite evident that the Plaintiff/Applicant has completely abandoned the suit, as there had been no appearance for the Plaintiff/Applicant in the proceedings court attendances before the Deputy Registrar. Further, the Defendant avers that in light of the history of the Plaintiff's conduct in the course of the litigation history between the parties herein over the subject matter of this suit, and the fact that the Plaintiff/Applicant is yet to settle the costs awarded to the Defendants/Respondents for the initial suit which was dismissed in December 2018, after being in court for 10 years, he avers that allowing the Plaintiff/Applicant's application will not only cause extreme prejudice to the Respondents, but shall be against the interest of justice and the principle that litigation must come to an end.
18. In view of the foregoing, the factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR, which echoed the decision of the court in *Shah vs. Mbogo & Another* (*supra*). One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. See *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR. I am not entirely convinced by the arguments put forward by the plaintiff's counsel to explain his non-attendance in court as and when required. I am persuaded that the circumstances of this case do not justify giving the Plaintiff another chance. In any event, even on substance, the Plaintiff has not convinced the court that there are good reasons for setting aside the dismissal orders made on 23/02/2023.
19. In the result, the Court finds that the Applicant's Application lacks merit and is therefore dismissed with costs to the Defendants/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2023.

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MOGENI J

JUDGE

In the virtual presence/Absence of:

No appearance by the parties 10.50 am



Mr Wanjohi for the Defendants

No appearance for the Plaintiff/Applicants

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

