



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL MISC. APPLICATION NO. 20 OF 2016

JAMES MWANGI GATHARA.....1ST APPLICANT

GERALD THEURI KARUME.....2ND APPLICANT

VERSUS

THE OFFICER COMMANDING STATION LOITOKTOT...1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

MANDEEP SINGH CONSTRUCTION (KENYA) LTD....INTERESTED PARTY

RULING

On the 22/01/2018 the applicant filed a notice of motion pursuant to section 1, 1A, 3A 63E of the Civil Procedure Act and order 12 Rule 7 of the Civil Procedure Rules for court orders to reinstate the application for hearing dated 23/1/2017 for non-attendance on 17/1/2018. The application was supported by an affidavit sworn in support by Olga Ochola.

Background

This case has had a chequered history which is not very pleasant. In 2016 the plaintiff under an application filed a notice of motion dated 30/4/2016 seeking leave of the court to transfer CMCC No. 49 of 2015 filed at the Chief Magistrate's Court be transferred to the High Court. The reason for the transfer was that the relief being sought exceeded the monetary jurisdiction of the court. The application together with the annexures in support of the claim persuaded this court to order for a transfer of the dispute to itself for hearing and determination.

The matter was later followed with yet another application by way of a notice of motion dated 8/9/2016 signed by interested party seeking leave of the of the court to be enjoined as a party to the claim as provided for on section 1A, 1B, 3A, order 51 rule (1) of the Civil Procedure Rules. In October 4/10/2016 an order of this court granting the order for the interested party to be enjoined as a party was allowed.

After the order was issued on 30/5/2017 another notice of motion was filed by the 2nd Respondent/defendant seeking orders to dismiss the suit for want of prosecution. On consideration of the notice of motion the court agreed with the 2nd Respondent/defendant to have the suit dismissed for want of prosecution. Further, on 22/1/2018 there was yet another notice motion by the plaintiff/applicant praying for an order of the court that an order dismissing the application dated 23/1/2017 for non-attendance on 17/1/2018 be reinstated.

The applicant is supported by an affidavit sworn by Olga Ogola who deposed as follows:

That the plaintiff has been diligent in prosecuting the suit. That the non-attendance of learned counsel on the scheduled date of 16/1/2018 was due to reasons beyond her control

That the plaintiff/applicant stand to suffer irreparable harm if the suit is not heard on the merit.

In the application of this nature I see the following issues as the ones to be addressed to determine the notice of motion.

- **Is there a reasonable excuse why the plaintiff/applicant counsel did not attend court?**

- **If the orders are not issued would there be prejudice on the part of the applicant?**
- **In any event what are the appropriate orders to be granted by this Court?**

Analysis

I find it relevant to invoke the provisions of the statute in this kind of application. Section 1A (1) of the Civil Procedure act provides for an overriding objective that the objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the court disputes governed by the Act.1(3) **“A party in Civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act to effect, to participate in the processes of the court and to comply with the directions and orders of the court.”**

1(B) (D) provides that:

“the duty of the court is for the timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties”.

Under order 45 of the Civil Procedure Rules a party has a right to review of an order of the court where no appeal is preferred.

Section 3A **“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

The general principles of law in applications of this nature are anchored in the realm of judicial discretion. The manner in which courts apply the law has been spelt one in a plethora of cases. However, in doing so one should not lose sight that the statute referenced the Civil Procedure Act and rules governs all orders within the letter or spirit of any of its mandates. The device of judicial discretion is used therefore in circumstances within the applicable law but where the precise conjunction of the various competing considerations may be so variable that no one precise rule for such an application is practicable.

The constitution of Kenya has deposited judicial power with judicial officers for the purpose of being used to adjudicate disputes and administer justice substantively and fairly within due regard to technicalities. (**See Article 159 of the Constitution**).

I now turn to the question whether the action is excusable. On this, courts have come up with applicable principles and standards to consider in exercising judicial discretion.

I find the following cases relevant. The decision whether to reinstate a suit and the legal test to be met has been discussed in the case of: **Wanjiku Kamau Versus Tabitha Kamau & 3 others 2014 EKR:**

“The court has the discretion to set aside judgement or order and there are no limitations and restrictions on the discretion of the judge except of the judgement or order is raised. It must be done on terms that are just”

Further, in the case of **Lochab Bros Ltd Versus Peter Karuma T/A as Lumumba, Lumumba Advocates 203 EKLR** the court observed that:

“the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to filter the wide discretion given to it by rules”.

Esther Wamaitha Versus Safaricom, the court fortified the legal threshold to determine the rights of the parties on issues like the ones at hand. The court held as follows:

“The discretion is free and the main concern of the courts is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah Versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration Versus Gasyali). It also goes without saying that the reason for failure to attend should be considered”.

It also true parties to a litigation are bound to make mistakes including failure to keep time lines set by the statute to ventilate the dispute on the merits. Sometimes it is a mistake or omission on the part of legal counsel retained by a party to a suit who is guilty of laches without the knowledge of his client. In all these scenarios the duty of the court to determine the proceedings efficiently and effectively is impaired. The law however did not leave them without a remedy for courts to exercise discretion in the interest of justice. This is shown by the following passage from the decision of the court in the case of **Philip & another Versus Augustine Kibede 1982-88 KLR 103** where the court held:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline”.

The position of counsel provided for in the constitution and statute and what his or her role in judicial proceedings is to represent and appear on behalf of a litigant or defendant in a suit. The link between right to counsel and procedural due process has already been recognized under Article 50 G (H) of the Constitution. Though emphasis is often laid on matters of a criminal nature the rationale is also applicable to a Civil case. In discharge of their legal duty, legal counsels may find themselves in the mix of balancing the competing interest of the parties and legal standard set to comply with time lines in Procedural Law. That is why in the holding of Majune J. in the case **Muwanga Estates and another Versus N. PART CA 49/2001** is stated as follows:

“It is how an established principle of the law that original litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in court because of the negligence of his counsel”.

In the present case, the main ground on which review is being sought is for the dismissal order to be set aside to enable parties be heard on the merits.

According to the affidavit evidence learned counsel failed to make it to court on the material day on the ground that he was not able to easily access public transport to Kajiado in time. Unfortunately, the application seeking reinstatement orders is not opposed by the respondent.

As this application stands I am satisfied that the applicant has shown sufficient cause for non-attendance in court on 17/2/2018.

Applying the provisions of section 1A, 1B, 3A of the Civil Procedure act and the decisions in the case **of Philip Versus Augustine Kubede Muwanga, Estate Esther Wamaita (Supra)**. The notice of motion dated 22/11/2017 requesting this court to set aside the dismissal order is allowed. In view of the peculiarity of this case the following orders are further issued. That the application be set down for hearing inter-partes on a priority basis. The cost of this application to await the outcome of the pending interlocutory application.

Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance.

It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes.

In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point.

All in all, for the reasons stated above the notice of motion is allowed as prayed.

Dated, Signed and Delivered in open court this 17th April, 2018 at Kajiado

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R. NYAKUNDI

JUDGE

In the presence of:

- Mr. Chege for the Applicant
- Applicant – Absent
- Mr. Mateli – Court Clerk