REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 295 OF 2009

JOSEPHINE LUNDE MATHEKA....PLAINTIFF/APPLICANT

VERSUS

GLADYS MULI.....DEFENDANT/RESPONDENT

RULING

1. On 27th June, 2012, this suit was by consent of parties fixed for hearing on 16th October, 2012. On the said day the matter was cause listed before **Makhandia, J** (as he then was) the parties were represented by **Mr Mungata** and **Mr Mutinda** respectively.

2. When the matter was called out **Mr Mutinda** informed the Court that the Plaintiff was residing in the USA and had not gotten in touch with him. Further, pre-trial requirements had not been complied with. On those grounds he sought an adjournment.

3. That application was opposed by **Mr Mungatia** who informed the Court that since the suit was filed under certificate of urgency, there was no reason given for the adjournment as the hearing date was fixed by consent.

4. The Court declined to grant the adjournment sought as a result of which **Mr Mutinda** left the matter to the Court. On an application by **Mr Mungata** the Court proceeded to dismiss the suit with costs.

5. The applicant has not moved this Court by way of a Motion on Notice dated 24th August, 2018 in which he seeks in substance that the orders made on 16th October, 2012 dismissing this suit and all consequential orders be set aside and that the suit be reinstated for hearing on merit. She further seeks that he be granted leave to file witness statements and all necessary documents in support of her case and that an early hearing date be set.

6. The application was based on the following grounds:

1) THAT the suit was filed on 2nd October 2009 and served upon the Defendant/Respondent.

2) THAT Plaintiff/Applicant filed a Chamber Summons Application together with the Plaint seeking among others orders of an injunction to restrain the Defendant/Respondent from dealing with the suit property.

3) THAT the Defendant/Respondent entered appearance 0n 14th October 2009 and filed the statement of defence on 23rd October 2009 and served the same upon the Plaintiff.

4) THAT on the 9th February 2010 when the said application was set down for hearing the court was not sitting.

5) THAT in view of the sensitivity of the matter the Plaintiffs then Advocates prepared and filed a Notice of Motion application dated 10th March 2010 seeking a hearing date for the Plaintiffs application dated 2nd October 2009.

6) THAT vide a letter dated 26th March 2012 the Plaintiff/Applicant's advocates invited the Defendant/Respondent's advocates to the court registry to fix a hearing date for the application dated 2nd October 2009.

7) THAT the said application was set down for hearing on 16th October 2012.

8) THAT on the said date the honourable court dismissed the Plaintiff/Applicant's suit for want of prosecution/evidence despite the Plaintiff/Applicant's advocate on record then being present in court and informing the court that the Plaintiff/Applicant was resident in the USA and sought an adjournment.

9) THAT the applicant's advocates on record then did not inform her of the dismissal, and when Plaintiff/Applicant figured that it had taken too long to get any communication from the said advocates Plaintiff/Applicant sought advice from the current advocates on record who upon perusal of the court file found that the suit had been dismissed for want of prosecution and/or evidence.

10) THAT the dismissal was highly unfortunate and greatly prejudicial to the Plaintiff/Applicant and the Plaintiff/Applicant prays for the setting aside of such dismissal and reinstating the said suit for hearing.

11) THAT the Defendant/Respondent will not suffer any prejudice if the matter is reinstated, heard and determined on its merits as each party will have its day in court.

12) THAT the Plaintiff is ready and willing to comply with any conditions that may be imposed by the Honourable court.

13) THAT it is in the interest of justice and the parties herein that this suit be reinstated for hearing on merit since it has a high probability of success.

14) THAT this Application herein has been brought in good faith.

15) THAT it is in the interest of justice that this Application be allowed.

7. The application was supported by an affidavit sworn by the plaintiff in which it was deposed that the plaintiff instituted this suit against the Defendant/Respondent vide a Plaint dated 2nd October 2009 seeking a mandatory injunction restraining the Defendant/Respondent her agents servants and/or whomsoever claiming or acting on her behalf from trespassing, constructing, alienating, selling and/or dealing in the Plot No. CB/CP-54 Kyumbi Trading Centre in any manner prejudicial to the applicant's rights. According to the applicant, the said suit was filed by her then Advocates on record Messrs. Malonza & Company Advocates, whom formally she had formally instructed to act on her behalf since she resides outside the country, in the USA, to represent her interests in the matter until the logical conclusion of the same.

8. The applicant asserted that she was and has always been desirous of having the suit heard and determined. She deposed that her advocates on record then, Messrs. Malonza & Company Advocates, on her instructions and with their advice filed a Chamber Summons Application together with the Plaint seeking among others orders of an injunction to restrain the Defendant/Respondent from dealing with the suit property. To the suit, the Defendant/Respondent entered appearance and filed the statement of defence and served the same upon her advocates on record.

9. It was averred that on the 9th February 2010 when the said application was set down for hearing the court was not sitting and in view of the sensitivity of the matter her Advocates prepared and filed a Notice of Motion application dated 10th March 2010 seeking a hearing date for the Plaintiffs application dated 2nd October 2009 and vide a letter dated 26th March 2012 the said advocates invited the Defendant/Respondent's advocates to the court registry to fix a hearing date for the application dated 2nd October 2009 which application was set down for hearing on 16th October 2012. However, on the said date the Court dismissed her suit for want of prosecution/evidence despite her advocates on record being present in court and informing the court that she was resident in the USA and sought an adjournment.

10. The plaintiff however averred that her said advocates on record did not inform him of the dismissal, and when she figured that it had taken too long to get any communication from the said advocates she sought advice from her current advocates on record, Messrs. Wanjala Linda Company Advocates, who upon perusal of the court file found that the suit had been dismissed for want of prosecution and/or evidence.

11. To the applicant, the dismissal was highly unfortunate and she therefore prays for the setting aside of such dismissal and reinstating the said suit for hearing. In her view, the Defendant/Respondent will not suffer any prejudice if the matter is reinstated, heard and determined on its merits as each party will have its day in court. She disclosed that she was ready and willing to comply with any conditions that may be imposed by the court and that it is in the interest of justice and the parties herein that this suit be reinstated for hearing on merit since it has a high probability of success and this application herein has been brought in good faith.

12. The application was however opposed by the Respondent. According to the Respondent, the plaintiff is guilty of unreasonable delay in bringing this application and is thus meant to re-litigate issues which were settled by the court long time ago. It was deposed that on the day the suit was dismissed, the plaintiffs former advocate **Malonza & Company Advocates** were present in court hence the plaintiff cannot claim that she was not aware of the proceedings of the court. In any case, the case belongs to the plaintiff and not her advocates.

13. The Defendant disclosed that after the case was dismissed she filed a bill of costs and the same was taxed at Kshs 60,000/=by consent of the parties and after taxation she proceeded to close her file. It was deposed that since 16/10/2012 she has never heard from the plaintiff and was surprised the plaintiff was bringing this application after close to 8 years later. It was her case that the plaintiff should be reminded that litigation must come to an end and parties cannot litigate forever. In this case the suit the plaintiff wants to revive was filed in the year 2009 and thus has been pending for the last about 10 years.

14. According to the Defendant, after the suit was dismissed the plaintiff had filed a similar suit being **Machakos High Court Civil No 435/2012 - Josephine Lunde Matheka =Vesrsus= Gladys Muli & Another** and the same was subsequently dismissed by this Court with costs on 24/3/2017 for being an abuse of the court process upon her application. The Defendant then filed her bill of costs, which she served the plaintiff's former advocates and which was accordingly taxed at Kshs 148,887.00.

15. According to the Defendant, it is therefore not a mere coincidence that the suit was dismissed for want of prosecution due to indolence of the plaintiff but again the suits were not prosecuted because they were frivolous an filed in bad faith. It was the Defendant's case that she

stands to suffer irreparably if the application is allowed because due to passage of time evidence has been lost including the concerned society, Katelembo Athiani Muputi Ranching Society which is also being wound up.

16. The Defendant wondered why the Plaintiff filed **Machakos High Court Civil No 435/2012** if she did not know orders of the court made on 16/10/2012 dismissing her suit. To her since the plaintiff did not appeal the orders of 16/10/2012 she cannot therefore move the court in the manner she has done.

17. The Defendant asserted that the plaintiff has all along been aware the suit was dismissed and therefore the grounds as well as the affidavit in support are full of lies. She accordingly prayed that the application be dismissed with costs.

Determination

18. It is clear that the dismissal of the Plaintiff's suit was pursuant to the current Order 12 Rule 3 of the ***Civil Procedure Rules, 2010*** which provides as follows:

> ***(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.***
>
> ***(2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.***
>
> ***(3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.***

19. That provision was formerly Order XVI rule 6 of the ***Civil Procedure Rules***. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed under the said provision. Whereas the general rule in those circumstances is provided in Order 12 Rule 6(1) that the plaintiff in a suit dismissed under the Order, may, subject to the law of limitation, bring a fresh suit, where however the suit is dismissed under rule 3 thereof, it is expressly provided that no fresh suit may be brought in respect of the same cause of action.

20. In this case it is clear that the plaintiff attempted to file a fresh suit but the same was quite properly in my view dismissed. It would seem that it was only after that that she decided to make this application. This application can therefore rightly be described as an afterthought. By conducting herself in the manner the plaintiff is doing amounts to playing lottery with the Court process. It is a gross abuse of the court process. It seems that the applicant has completely failed to get her act right. Having considered the issues raised herein, I find that the Plaintiff's actions constitute a comedy of errors and omissions which without any explanation being offered cannot be excused. The decision whether or not to excuse an error is an exercise of discretion and like any other discretion must be exercised upon reason and must not be capriciously done or done on the whims. See **Masefield Trading (K) Ltd. vs. Francis M Kibui Nairobi (Milimani) HCCC No. 1796 of 2000 [2001] 2 EA 431.**

21. The Plaintiff seems to be placing the blame on her erstwhile advocate's doorsteps. However, in **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS 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."**

22. In this case the suit was dismissed in the presence of both counsel after the Plaintiff's advocate informed the Court that he had lost touch with his client. This suit was filed on 2nd October, 2009. The dismissal was however on 16th October, 2012 three years later. Though the plaintiff now contends that what was coming up on that day was the hearing of his application, the record is clear that on 6th June, 2012, the plaintiff's advocate informed the court that he was proceeding to fix the case for hearing. A decision whether or not to reinstate a dismissed suit is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

23. In my view a default that is sought to be explained away by contrived grounds is not made *bona fide.* In my view favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. See **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

24. In this case the Plaintiff's application is based on quicksand. It is partly based on a patently false premise.

25. Apart from that it is now 9 years since the suit was filed. The Defendant contends that she has lost evidence. In my view to resurrect this long dead suit is likely to prejudice the Defendant's case.

26. It is not enough for a party to simply blame the advocates but must show tangible steps taken by him/her in following up his/her matter.

27. Taking into account the delay in making the present application as well as the unconvincing reasons advanced by the applicant I am not satisfied that sufficient reasons have been advanced to enable me exercise my discretion favourably and reinstate this suit which was dismissed nearly a decade ago.

28. In the result, the application dated 24th August, 2018 lacks merit and is dismissed but with no order as to costs.

29. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Loki for Mr Opondo for the Plaintiff/Applicant

Miss Jerobon for Mr Muasya for the Defendant/Respondent

CA Geoffrey