REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

E.L.C NO.37 OF 2013

ROSELINE ADHIAMBO OKUMU ……...……PLAINTIFF/APPLICANT

VERSUS

FESTO ONYANGO OPATA …….DEFENDANT/RESPONDENT

R U L I N G

1. The application under consideration is a Notice of Motion dated 5/5/2015, filed here on 8/5/2015. It is stated to be brought under Order 12 Rule 7, Order 17 Rule 3, Order 45 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant – **ROSELINE ADHIAMBO OKUMU** – was the Plaintiff in the suit herein filed against the Respondent – **FESTO ONYANGO OPATA** – who was the defendant on 30/11/2013. That suit was dismissed by the Court on 24/2/2015, first for non-compliance with Orders given before that date and, second, for want of prosecution. This application is essentially contesting that dismissal.

2. According to the applicant, failure to proceed was beyond her control. She had Counsel whose mistake should not be visited on her; and it is Counsel who failed to comply with the conditions given.

3. The respondent opposed the application vide a replying affidavit filed on 15/4/2016. According to him, the applicant had sought several adjournments in the past. Specifically, such adjournment had been sought on 29/7/2013, 19/9/2013, 13/3/2014, 3/6/2014, 29/9/2014 and finally on 24/2/2015. The adjournment of 24/2/2015 however was not granted. The Court rejected the request to adjourn and ordered that the matter proceed. At the time allocated for hearing, the plaintiff's Counsel did not appear and the plaintiff herself intimated that she could not proceed. The Court dismissed the matter.

4. The respondent urged the Court to note that it is the applicant who always sought for adjournment. After dismissal, cost were thereafter taxed by consent. The applicant was accused of inordinate delay.

5. The application was canvassed by way of written submissions. The applicants submissions were filed on 24/2/2017. The applicant blamed her then advocate on record for failure to proceed. It would therefore be tantamount to injustice and breach of the applicant's fundamental rights if the mistake, professional negligence or improper discharge of duties on the part of her Counsel are visited on her.

6. She further submitted that once an advocate is seized of a matter, the matter moves from the ambit of the litigant to the instructed advocate. Such advocate takes control of file movement and becomes the litigants spokesperson and the litigant should not be blamed for what the advocate does. The applicant said she has a hearing problem; was always in Court and acted with diligence. She asked to be given another chance to have her matter proceed.

7. The respondent's submissions were filed on 23/1/2017. It was reiterated that the plaintiff had caused

several adjournments before the final one was refused. Costs have already been taxed and the plaintiff has partly settled some of them. The firm, now acting for the applicant was faulted for coming on record irregularly. That firm, it was submitted, ought to have sought leave of Court before coming on record. And the firm initially on record has not ceased to be on record. It is still technically acting for the applicant.

8. I have considered the application, the response made, and the rival submissions. It appears to me true that Onsongo for applicant came on record when the matter had already been dismissed and costs had been taxed. In other words, the matter had reached conclusion. At that stage, we need leave of Court to come on record or at least consent of the Counsel then on record. Onsongo did not seek any such leave or consent. Counsel for respondent was therefore right in making this observation.

9. It is also true that the applicant had sought several adjournments. From the records, it appears that the Court was extremely lenient to her. On the last instance however, the Court refused to adjourn further and reckoned that, the interests of justice were better served by dismissing the matter. The fact of the matter is that a case can be dismissed for want of prosecution due to absence of Counsel and this fact may not be used as an excuse by the litigant to stop such dismissal.

10. All what the Court considers is whether there is likely injustice or prejudice to be caused to the other side. If the Court finds this to be the case, it exercises its discretion to dismiss the matter leaving the litigant to his remedy against his own Counsel who has brought him to this plight (see EATON VS STOPER [1881] 22 ch DIV at page 91).

11. When a case is filed, it is owned by a litigant and, not his advocate. It behoves the litigant to always follow up his case and check its progress. He can not come to Court and start blaming his advocate when a decision adverse to him is made. It has been held by the Court of Appeal in **MUMBI NGANGA VS DANSON CHEGE & ANOTHER [20026] e KLR** that where an advocate fails to prosecute a case to the satisfaction of his client, then such a litigant has the option of suing such advocate for professional negligence. The mistake of Counsel will not, perse, make the Court exercise its discretion in favour of an aggrieved litigant.

12. Sometimes, the Court also considers the conduct of the parties. In this matter, it is clear that the applicant had been granted several adjournments. The adjournments would be granted on the understanding that something that needed to be done would be done. But records show that several such adjournments were granted without the applicant playing her part to do what needed to be done. On the day that the adjournment was refused for instance, some cost required to have been paid. They had not been aid. The matter was supposed to proceed that day. Yet another adjournment was sought so that it could not proceed. When the Court insisted that the matter had to proceed, it became clear that the Applicants side was not prepared to proceed at all.

13. All this behavior seems to me to amount to what would be considered willfully intentional and contumelious. There was an order of the Court that the matter proceed. The applicant's side, disobeyed it. Now the plaintiff comes to Court to say that her fundamental rights were breached. She engaged in blame worthy conduct only to turn up and cry loud that her rights were breached. Fundamental rights apply to both sides. Continued adjournments of the matter would ultimately cause gave injustice to the respondent. When the Court dismissed the case, it must have reckoned that the justice of the case in the circumstances precisely required such action.

14. It is also doubtful whether the applicant was entitled to come to Court vide this application. When a matter is dismissed for want of prosecution, two options are normally available to the litigant viz: Appeal and/or filing a fresh suit. The option of appeal is there as of right. The option of filing a fresh suit is also there as of right subject only to the Statute of Limitation. It is not clear why the applicant decided to file this application instead of exercising these options. And it has to be appreciated that the applicant consented to taxation of costs and is said to have even paid some of them. The application herein therefore seems to be very much a belated afterthought.

15. In light of all the foregoing, I am not persuaded that the application herein is one I should grant. I therefore dismiss it with costs.

A.K. KANIARU

J U D G E

DATED AND DELIVERED ON 23RD MAY 2017 AT BUSIA

IN THE PRESENCE OF:

NO PARTY PRESENT

FWAYA FOR RESPONDENT

M/S ONALO FOR APPLICANT

COURT CLERK - ICHULOI

J U D G E