REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 63 OF 2010 (O.S.)

JULIET WANGUI NDEGWA.....PLAINTIFF/APPLICANT

VERSUS

FRANCIS JAMES NDEGWA.....DEFENDANT/RESPONDENT

RULING

Before me for determination is a notice of motion dated 26th February 2016, filed by the plaintiff (hereinafter referred to as the applicant) seeking orders that:-"*That this court be pleased to set aside the orders dismissing this suit on 23rd June 2015 for want of prosecution."*

The application is expressed under the provisions of Sections **1, 1B,** of the Civil Procedure Act[1]and Order **51** Rules **1** & **4** of the Civil Procedure Rules and is premised on the grounds stated on the said application and the supporting affidavits of the Applicant **Juliet Wangui Ndegwa** and **Peter Mwangi Muthoni**, Advocate annexed thereto. Briefly, the grounds are as follows:-

i. Neither the plaintiff nor her advocate were served with the notice to show cause. Had they been served, they would have shown sufficient cause as to why this ought not have been dismissed.

ii. The last step in this suit was in January 2015 when the court file was unavailable, only for it to resurface for dismissal.

iii. That this is an ELC matter and the case should be referred there.

iv. That the defendant will not be prejudiced by the reinstatement

The applicant reiterated in her affidavit that she was not aware of the notice to dismiss the case, that she has been unwell, that counsel could not get a date due to unavailability of the court file, that he received a letter from the defendant demanding some money and notifying her that her case had been dismissed and that the defendant is now scouting for a buyer for the property.

Mr. Muthoni advocate states in his affidavit that he learned from his client in July 2015 that this case had been dismissed for want of prosecution, that he never received notice from the court and had he received it, he would have shown cause why this matter ought not to have been dismissed and reiterated that this is a matter for the ELC court.

The defendant/Respondent filed what he describes as a statement of defence but which I will treat as his

grounds of objection and an affidavit sworn by a one **Bernard Kariuki Theuri** who avers that he is privy to the fact that the parties herein had agreed to withdraw these proceedings and also had agreed to share past and future income from the premises while in the said grounds the Respondent states that he vehemently opposes the application, that the parties were served with the notice, that both parties had agreed to withdraw these proceedings, that the applicants counsel was not properly on record and that the applicant has not revoked her notice of intention to act in person dated 22nd March 2013.

At the hearing of the application, the applicant adopted his written submissions filed on 9th September 2015 and reiterated essentially the contents of his affidavit and made a passionate plea to the court for the case to be heard on merits.

On his part the respondent vehemently opposed the application and urged the court to dismiss it. I have carefully considered his grounds and the aforesaid Replying affidavit.

At this point I propose to address three issues pertaining to this application. **First,** Mr. Muthoni states in his grounds that this is a land matter and ought to be referred to the ELC court. **I do not agree**. This is a suit relating to matrimonial property and falls under Family Law and therefore within the purview of the jurisdiction of this court.

Secondly, the Respondent insisted that counsel for the applicant is not properly on record, his client having filed a notice of intentions to act in person on 15th April 2013. A close look at the record shows that the defendant raised the same issue on 16th May 2013 and the applicant disowned the alleged notice and after hearing the parties the court expunged the same from the court record, thus bringing the matter to a close. I propose to say nothing more about it.

Thirdly, counsel for the applicant states that he learnt of the dismissal from his client in July last year, yet this application was filed in February this year, after an unexplained delay of about **seven months**. This, to me is an unreasonable delay, and to make matters worse it has not been explained. However, considering the nature of this dispute and the open hostility evidently exhibited by the parties towards each other when they appeared before me, I take the view that it would be in the interests of justice if I determine the application on merits guided by the overriding objective of civil procedure rules and the provisions of article 159 **(2) (d)** of the constitution of Kenya, 2010.

The law concerning dismissal of suits for want of prosecution is contained in Order **17** which provides as follows:-

> *1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

The applicant and her advocate maintain that she never received the notice, hence the reason why there was no attendance. The copy in the court file only bears the postal address but there is no certificate of posting to show it was dispatched to the applicant. Secondly, and more important, it is not clear why the court chose to address the notice to the applicant yet she had an advocate on record. There was no attendance by either side on the material day. I find that there is nothing to demonstrate that the applicant or her advocate received the notice as required, hence both cannot be blamed for non-attendance to show cause.

This court has jurisdiction to reinstate a suit dismissed under the above provision. Section **3A** of the Civil Procedure Act[2] provides that *'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.'*

I find that the reason given by the applicant and her advocate for failing to attend court is excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I

find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[3] where the court expressed itself as follows:-

> *"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"*

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting is case. The court in the above cited case of *Richard Nchapai Leiyangu vs IEBC & 2 others* proceeded to state as follows:-

> *"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"**[4]***

The above case was cited with approval by the Court of Appeal in *Harrison Wanjohi Wambugu vs Felista Wairimu Chege***[5]**where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri***[6]** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in *CMC Holdings Ltd vs James MumoNzioka**[7]*** where it was held *inter alia*:-

> *"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"*

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi***[8]** where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. In *Katsuri Ltd vs Nyeri Wholesalers Ltd*,[9] a dismissed appeal was restored the mistake involved having been the omission of counsel to enter a date of the hearing in his diary.

In *Utalii Transporters C Ltd & Others vs NIC Bank & Another*[10]the court held *inter alia* that:-

> *"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat. It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution. These principles are:-*
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> *a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
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> *b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
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> *c. whether the delay is an abuse of the court process;*
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> *d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*

e. what prejudice will the dismissal occasion the plaintiff?;

f. whether the plaintiff has offered a reasonable explanation for the delay;

g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

With regard to the last test, I am persuaded that the nature of this case which deals with a protracted dispute relating matrimonial property requires a lenient exercise of the discretion so that the parties can ventilate their respective positions in court and have the dispute conclusively determined. I am totally persuaded that there has been inordinate delay in prosecuting this case and also filing the present application. But as herein above stated, the interests of justice in my view weigh in favour of having this dispute heard so that the respective rights of the parties in the matrimonial property can be determined by the court.

The Respondent states that the parties had settled or agreed to settle this dispute. Reinstating the suit will also afford the parties an opportunity to amicably resolve the dispute and if they do, a suitable consent can be filed in court. Affording parties an opportunity to settle is in my view in line with the provisions of article **159 (c)** of the constitution. Refusing to allow the application before me may deem the prospects of such settlement.

I also note that the order dismissing the case was issued on 23rd July 2015, but the same is dated 22nd July 2015, one day before it was issued.

In conclusion, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I make the following orders:-

*a. **That** the orders of this court made on 23rd day of July 2015 dismissing this suit for want of prosecution be and are hereby set aside and this suit is hereby reinstated and I direct that the same proceeds for hearing and be determined on its merits.*

*b. **That** the plaintiff is further ordered to fix a hearing date for this suit **in the next 45** days from today in default of which this suit shall stand dismissed.*

c. No orders as to costs.

Orders accordingly. Right of appeal 30 days

Dated at Nyeri this **23rd** day of **March** 2016

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] Cap 21, Laws of Kenya

[3] Civil Appeal No. 18 of 2013

[4] Supra

[5] Civil Appeal No. 295 of 2009, Visram, Koome, Otieno-Odek , JJA, Nyeri Court of appeal

[6] Civil Appeal no. 49n of 2013, Nyeri Court of appeal,

[7] {2004}KLR 173

[8] {2002}2EA 662

[9] CA App No. 248 of 2012, Nyeri

[10] {2014}eKLR