



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 750 OF 2016

LEE MWATHI KIMANI.....PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES OF NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

RULING

The plaintiff filed this suit on 4th July 2016. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 1st July 2016 seeking a temporary injunction restraining the defendant from interfering with the plaintiff's quiet possession and enjoyment of all that property known as Nairobi/Block 97/490-Tassia Estate (hereinafter referred to as "the suit property"). The plaintiff's application came up for hearing on 19th July 2016 when the same was adjourned and stood over generally because the plaintiff had not served the defendant. The plaintiff was directed to fix the application for hearing at the registry. The plaintiff never took any further action in the matter for a period of 2 years. On 8th March 2018, the court on its own initiative fixed the matter for mention on 25th July 2018 for directions. The advocates for both parties were served with mention notices.

On 25th July 2018 when the matter came up for directions before the Deputy Registrar, only the advocate for the defendant appeared. The plaintiff's advocates did not show up despite service. On that day, the Deputy Registrar ordered that the plaintiff's advocates be served with a notice to appear in court on 20th November 2018 and show cause why the suit should not be dismissed for want of prosecution. Once again, notices to show cause were taken out and served personally upon the advocates for the plaintiff and the defendant. When the matter came up for Notice to Show Cause on 20th November 2018, the plaintiff's advocate once again failed to appear in court. The defendant's advocate who was present urged the court to dismiss the suit for want of prosecution on the ground that the plaintiff had lost interest in the suit. The court noted that the plaintiff had not taken any action in the matter since 2016 and dismissed the suit for want of prosecution.

For almost one and half years after the dismissal of the suit, the plaintiff took no action. It was until 16th June 2020 that the plaintiff brought the present Notice of Motion application dated 2nd June 2020 seeking an order for the setting aside of the order dismissing this suit for want of prosecution that was made on 20th November 2018. The plaintiff's application is supported by the affidavit of the plaintiff's advocate, Tito Munyalo of Munyalo Muli & Company advocates who have been on record for the plaintiff since the suit was filed. From the affidavit, the present application was filed when the plaintiff noted the presence of some strangers on the suit property who were allegedly sent by the defendant. The only reason given by the plaintiff's advocates for the plaintiff's failure to take action with a view to prosecuting the suit is that the firm of Munyalo Muli & Company advocates had assigned the plaintiff's file to a freelance advocate by the name James Wachira deceased whom they believed was attending to the matter as and when he was required to do so. The said James Wachira died in 2019. The plaintiff's advocate has contended that no prejudice would be suffered by the defendant if the application is allowed.

The application is opposed by the defendant through a replying affidavit sworn by Don Otury on 25th November 2020. The defendant has contended that the application is an abuse of the process of the court and that the plaintiff is guilty of laches. The defendant has contended that the allegation by the plaintiff's advocates on record that the plaintiff's file was handed over to a freelance advocate by the name James Waitheka to handle is not true and is a ploy to mislead the court since the said firm was at all material times on record as acting for the plaintiff. The defendant has contended that equity aids the vigilant and as such the plaintiff who has been indolent cannot benefit from the same. The defendant has contended that no reasonable explanation has been given by the plaintiff and his advocate for their failure to prosecute the suit or attend court on several occasions when the matter came up including on 20th November 2018 when it came up for Notice to Show Cause. The defendant has contended that it will suffer prejudice if the orders sought are granted.

The application was argued by way of written submissions. The plaintiff filed his submissions on 2nd February 2021 while the defendant filed its submissions on 31st May 2021. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the submissions of counsels. The issue that I have been called upon to determine is whether the plaintiff has put forward sufficient reason to warrant the reinstatement of this suit. The plaintiff's suit was dismissed for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules. There is no provision

under Order 17 of the Civil Procedure Rules empowering the court to set aside an order made under Rule 2(1) of thereof. I am of the view however that where a suit is dismissed for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules in the absence of a plaintiff, the court has inherent power on application by such plaintiff to set aside the order of dismissal for good reason. The court's inherent power to set aside an order made ex parte is discretionary.

In Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018)eKLR the court stated as follows on the exercise of discretion:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

The principles to be considered by the court in setting aside an ex parte order were set out in the case of Shah v Mbogo (1967) E.A 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

Applying the said principles to this case, I am not inclined to exercise my discretion in favour of plaintiff. I have noted from the record that the plaintiff lost interest in this suit as soon as it was filed. The plaintiff brought this suit under certificate of urgency. The plaintiff took no steps to pursue the application for injunction that was filed together with the plaint. Notices that were served upon the plaintiff's advocates by the court although received were not responded to. By the time the suit was dismissed, the plaintiff had not taken any action to prosecute the same for a period of over two years from the last time the matter was in court. The present application for reinstatement of the suit was filed almost four years from the last time the matter was in court. The plaintiff has not given any reasonable explanation why it took no steps to prosecute the suit. The plaintiff has also not made any attempt to explain why he did not attend court for directions when called upon to do so by the Deputy Registrar. There was also no explanation why the Notice to Show Cause by the court was ignored. In my view, an advocate is an advocate. There is nothing like a freelance advocate. I have heard of that term only with reference to journalists. The plaintiff's advocate's claim that they had handed over the plaintiff's file to a freelance advocate to handle does not therefore make sense. In any event, even if there was such an advocate, the firm still retained the responsibility of monitoring the kind of service that was being rendered by the advocate. The plaintiff also had a duty to follow up on his case. A plaintiff who never bothered to find out the position of his case that was brought to court under certificate of urgency for 4 years is an uninterested litigant and an indolent one for that matter. Contrary to the plaintiff's submissions, inaction for 4 years is inexcusable. The plaintiff has come to court for equity. Equity does not aid the indolent. Justice looks at both sides. I am not convinced that the interest of justice would be served by granting the orders sought by the plaintiff.

On the plaintiff's contention that no prejudice will be suffered by the defendant if the application is allowed, I am in agreement with the defendant that litigation must come to an end. The plaintiff has not contested the defendant's claim that the plaintiff had filed an earlier suit against the defendant over the same subject matter which suit was also dismissed for want of prosecution. In ET Monks & Co. Ltd. v Evans [1985]KLR 584, it was held that public policy demands that the business of the court be conducted with expedition. It follows therefore that the plaintiff cannot be allowed to prosecute his case at his own pace. Due to the foregoing, I am not persuaded that this is a suitable case in which I should exercise my discretion in setting aside the order for the dismissal of the suit made herein on 20th November 2018.

In conclusion, I find no merit in the plaintiff's Notice of Motion application dated 2nd June 2020. The same is dismissed with costs to the defendant.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Mr. Kerori h/b for Mr. Kinyanjui for the Defendant

Ms. C.Nyokabi-Court Assistant