REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 209 OF 2014

HARUN KAMAU WAMBURA ALIAS HARUN KAMAU NGARUIYA.......PLAINTIFF/ APPLICANT

VERSUS

NAIROBI CITY COUNTY..1ST DEFENDANT/RESPONDENT

MICHAEL WAGAKO MBUGUA...2ND DEFENDANT/ RESPONDENT

JULIUS KANGARA NDEGWA...3RD DEFENDANT/ RESPONDENT

RULING

1. As per the court records, the application coming up for determination is a Notice of Motion application dated 13th August 2021 filed by the Plaintiff/ Applicant. However, the 3rd Respondent has indicated that the application should be the one dated 3rd August 2021. The court takes cognisance of this and notes that the application/ supporting affidavit in the court file is dated 13th August 2021 but the one uploaded on the CTS and what was served on the Respondents is dated 3rd August 2021. However, both applications seek the same orders:

i. That the order issued on 16th September 2020 dismissing the suit be set aside.

ii. That the suit be listed for hearing on such terms as the court will direct.

iii. That the costs of the application be reserved.

2. This application supported by the affidavit sworn by advocate for the Applicant Stephen Gitonga dated 3rd/13th August 2021 is premised on the grounds that when the matter came for hearing on 16th September 2020 the advocate was not present due to the Covid-19 Pandemic and only realised that the suit had been dismissed when they perused the file to list it for hearing. Prior to that, the matter had been scheduled for hearing on 30th October 2019 but the advocate had just been appointed and could not proceed. He also averred that his associates had left the firm and he was not aware of this.

3. In the replying affidavit by Counsel for the 3rd Defendant Michael Osundwa dated 12th November 2021, it is averred that the application is defective, a waste of judicial time and should be dismissed with costs since the Plaintiff had not filed the application at the earliest opportunity having taken close to a year to move court for the said orders. It is further stated that the Applicant has not shown the challenges he had encountered in attending court on the 16th September 2020 stating that the advocate was in court on 30th October 2019 when the hearing date was given by court. The 3rd Defendant also outlined the steps taken by courts to ensure that the Covid-19 pandemic would not greatly inhibit access to justice including carrying out court sessions virtually.

4. He also noted that there were contradicting statements by the Applicant's advocate noting that on paragraph 6 he had averred that his absence was due to Covid-9 and on paragraph 9 he averred that it was because he was not notified of his associate's departure from the firm.

5. Having analysed the application together with the affidavits, relevant legal framework and jurisprudence, this court finds that the issue for determination is whether:

The order issued on 16th September 2020 dismissing the suit for non-attendance should be set aside?

6. Order 12 Rule 3 of the **Civil Procedure Rules, 2010** provides for consequences of non-attendance of a hearing by the Plaintiff. The Plaintiff contends that non-attendance was as a result of the Covid-19 pandemic and being unaware that his associates had left the firm. The

3rd Defendant opposes these averments stating that the reasons given were not sufficient to warrant the setting aside of the said orders.

7. It has been held that in setting aside dismissal orders, courts should consider whether the grounds presented are reasonable to warrant reinstatement of suits and if any prejudice would be suffered in the process. The Court of Appeal in the case of **Attorney General v Law Society of Kenya & another [2013] eKLR** Musinga, JA stated:

> ***"In my view, the reasons advanced for Mr. Ombwayo's failure to attend court are not satisfactory and cannot amount to sufficient cause… Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."***

8. This court finds and also agrees with the sentiments of the 3rd Defendant that the reasons given by the Applicant for non- attendance are neither reasonable nor sufficient. This court, while acknowledging that when the Covid-19 pandemic hit the country there was a shift on normal court operations which might have affected service delivery at first, wishes to state that as of October 2020 the digital systems and structures established to ensure that access to justice was not impeded had been streamlined and courts/litigants had appreciated and conformed to the new *modus operandi*. To this end, the matter was called out on the virtual platform on 16.9.2020 but there was no appearance for the Plaintiff, while Mr. Osundwa for the 3rd Defendant was present. As such, the issue of Covid-19 being the reason for non-attendance is not satisfactory.

9. Similarly, the court also in agreement with the 3rd defendant is not content that the application was filed within a reasonable period of time. The suit was dismissed on 16th September 2020 and the current application was filed almost a year later on 3rd August 2021.

10. Finally, this court has given the entire record a quick glance which reveals the general indolence on the part of the Plaintiff. This suit was filed on 25.2.2014 contemporaneously with an application for injunction which was eventually dismissed on 21.4.2015 for want of prosecution. For the next 3 or so years, the matter was not set down for hearing. On 27.2.2018 in the presence of Plaintiff's advocate, the matter was given a hearing date on 21.1.2019 with directions that Plaintiff was to effect service. However, there was no compliance on the part of the Plaintiff hence the hearing of 21.1.2019 aborted and a new hearing date of 30.10.2019 was given. Come the date of 30.10.2019 and it emerged that the 3rd Defendant had been served only 5 days earlier on 25.10. 2019. Then the court noted the following;

> ***"Mr. Owang Counsel for the Plaintiff has suddenly vanished from the court room. I will adjourn the hearing because counsel for the Plaintiff has suddenly vanished."***

11. In light of the foregoing analysis, it is apparent that the Applicant has not demonstrated vigilance in the overall prosecution of this case. From his conduct, there is no assurance that the Applicant will be active and present in the trial of this case in the event that it is reinstated.

12. In **Fran Investments Limited vs G4S Security Services Limited [2015] eKLR**, the court held that:

> ***"The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter."***

13. It cannot be gainsaid that our judicial system is clogged up with backlog of cases. To this end, the litigants and their advocates have a duty under **Section 1A (3)** of the **Civil Procedure Act** to assist the court in furthering the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. The Plaintiff and his advocates appear not to have embraced this provision of law.

14. In the final analysis, I find that the applications dated 13.8.2021 (and the one of 3.8.2021) is not merited, the same is dismissed with costs to 3rd Defendant. This matter stands as CLOSED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Osundwa for the 3rd Defendant

Gitonga for the Plaintiff

Court Assistant: Eddel Barasa