



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 42'A' OF 2014
FORMERLY KERUGOYA E.L.C 123 OF 2014

HENRY NTHUNGURI.....PLAINTIFF

VERSUS

ELIZABETH MUTITU MUTURI.....DEFENDANT

RULING

INTRODUCTION

Mr Henry Njagi Nthunguri, the plaintiff/applicant has by his notice of motion dated 7th October, 2013 moved this court to set aside an order which dismissed his suit on 30th March, 2011 for failure to deposit in court Kenya shillings 100,000/- as security for costs. This amount of money and the resulting order were recorded as a consent between the plaintiff/applicant and defendant/respondent.

The defendant/respondent has opposed this application stating that the plaintiff/applicant does not deserve to be granted the sought order.

The Case for the Plaintiff/Applicant:

The plaintiff has filed written submissions urging the court to set aside the dismissal of his suit because he had deposited shillings 100,000/- with his former advocates, M/S Muriuki Njagagua and Co Advocates. He states that it is the failure of his counsel who did not deposit the money in court as ordered. And it is for that reason, that he urges the court to exercise its discretion in granting him the order sought.

According to him, he learnt that his former advocates had failed to deposit the money as ordered by the court. In respect of matters of taxation that took place after the entry of the consent order, he has categorically stated that his former advocates did not inform him of the same. He concludes by stating that his former advocates kept him in the dark.

He has made attempts to contact his former advocates and has been unable to get him because he was elected as a member of parliament for Siakago Constituency.

The applicant's counsel has cited a ruling of the Court of Appeal namely ***Benard Nguo Gerald v. Mt Kenya Bottlers Ltd, Civil Application No, NAI 2005 of 2003***. According to that ruling, it is not proper to penalize an applicant for the omissions of his counsel. The application in that Court of Appeal was in relation to extension of time within which to lodge an appeal in that court.

The Case for the Defendant/respondent:

As I have already indicated, the defendant/respondent has opposed this application. According to her, this was a consent order which was made in the presence of the plaintiff and his defendants and the plaintiff failed to deposit shillings 100,000/= within 2 months as ordered by the court. The suit stood dismissed on 30th May, 2011.

According to her, the plaintiff/applicant has not offered any proper explanation as to why he did not comply with the court order within the time frame given by the court. She further says that the allegations by the plaintiff that he deposited shillings 100,000 with his advocates who failed to deposit them in court is an effort by the plaintiff/applicant to pass blame to his advocates for his failure to ensure the expeditious prosecution of the suit. The defendant/respondent's counsel has cited a number of authorities which I have carefully perused. According to these authorities, it is the duty of the plaintiff to expeditiously prosecute the suit in court.

The Applicable Law:

The law that governs the dismissal and reinstatement of a suit that is dismissed for want of prosecution is found in ***Order 7 Rule 2 of the 2010 Civil Procedure Rules***. The provisions of that order have given the court a wide discretion to dismiss or reinstate a suit if the circumstances warrant such course of action. I need to emphasize here that the exercise of that discretion must be exercised judiciously.

The issue of dismissal of an action for want of prosecution was canvassed and decided upon by the ***English Court of Appeal in Allen v. Sir Alfred Mc Alpine and Sons Limited 1968 (1 All E.R) 543***. According to that court an action will be dismissed where the delay or default is intentional and contumelious. It went further to elaborate that where a party has disobeyed a court order, dismissal for want of prosecution is warranted.

Furthermore, prolonged delay *per-se* is not in itself ground for dismissing the suit for want of prosecution. However, if the prolonged delay is in-excusable then the court may dismiss the suit for want of prosecution.

Issues for Determination:

In the light of the affidavit evidence of both parties, their submissions and the law, the following are the issues for determination:

1. Whether or not the plaintiff/applicant has made out a case for the setting aside of the dismissal order.
2. Whether or not the plaintiff/applicant has satisfactorily explained the delay of about 2 years.
3. Whether or not the setting aside of the dismissal order will prejudice the defendant/respondent that will not be adequately compensated by costs.
4. Who should pay the costs of this application.

Evaluation of the Evidence, Findings and the Law:

I have evaluated the affidavit evidence of the parties, the submissions of their counsel and the applicable law. I find that the plaintiff/applicant has explained to the satisfaction of the court as to why the consent order was not complied with. I accept his evidence that his former advocate failed to deposit shillings 100,000/- into the court for reasons which he does not know. This cannot be blamed on the plaintiff/applicant. I also find that it is possible to have a fair trial of the issues in the suit after taking into account all the circumstances of the suit.

Furthermore, the subject matter of the suit is land which the plaintiff/applicant states that he has acquired ownership by virtue of adverse possession. The issue as to whether he will succeed or not has not been tried. It is important to bear in mind that to shut out doors to litigants from the court should be a

matter of last resort. In the application under reference, I find that the defendant/respondent will be adequately compensated by an award of costs. It therefore follows that the defendant will not be gravely prejudiced.

Verdict and Disposal Order:

In the light of what I have stated in the foregoing paragraphs, I hereby make the following orders:

1. The application of the plaintiff/applicant is hereby granted.
2. The plaintiff applicant to pay shillings 5,000 to the defendant/respondent as costs.
3. The plaintiff/applicant has to deposit in court a sum of shilling 100,000/- within 2 weeks from the date of this ruling, failing which his suit dismissed.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **29th** day of **JANUARY, 2015**

In the presence of Mr Momanyi Advocate holding brief for Mr Mogusu Advocate and Mr Kathungu Advocate holding brief for M/S Kaplan & Stratton

Court clerk Mr Muriithi.

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE