



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2201 OF 2007

GIBSON KAMAU KURIA..... PLAINTIFF/APPLICANT

-VERSUS-

RACHEAL WAMBUI KAMAU.....DEFENDANT/RESPONDENT

RULING

The application for determination before the Court is a Notice of Motion dated 8th February 2012 brought by the Plaintiff under Order 51 Rule 1 of the civil Procedure Rules and sections 1A and 3A of the Civil Procedure Act. The plaintiff seeks an order to set aside an order dismissing the suit for want of prosecution issued by the Court on 26th January 2012. The Plaintiff seeks an opportunity to show cause why the suit should not be dismissed for want of prosecution and in the alternative, an order reinstating the suit for hearing and determination on merits.

The application is supported by the Plaintiff's affidavit sworn on 8th February 2012 where he states that on 16th January 2012, his firm was served with a notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff contends that the notice to show cause was scheduled for hearing on 26th January 2012 and an excerpt of the firm's diary for the said day has been annexed as evidence.

It is the Plaintiff's case that on 26th January 2012, he misinterpreted the cause list of Hon. Lady Justice Nyamweya before whom the notice to show cause was listed. The Plaintiff has exhibited the court's cause list for the day and contends that the list showed that the court was to hear some matters from 2.30pm and that just below it, were the notices to show cause which were to start at 9.00am. It is the Plaintiff's case that he believed that the notices to show cause were to be heard in the afternoon due to the listing. The plaintiff avers that he had filed an affidavit sworn and filed on 25th January 2012 showing cause why the dismissal should not take place. A copy of the affidavit marked "GK4" has been availed.

The Plaintiff attributes failure to attend court to respond to the notice to show cause to an inadvertent mistake on his part and avers that the court has jurisdiction to revive a suit dismissed under Order 17 Rule 6 of the Civil Procedure Rules.

The Defendant opposed the application through grounds of opposition dated 7th April 2014 where he avers that the application is misconceived, mischievous and an impediment to just, expeditious, proportionate and affordable resolution of the suit contrary to section 1A(1), (2), (3) and 1B(a), (b), (c) and (d) of the Civil Procedure Act.

The Defendant contends that the Plaintiff's delay in prosecuting the suit is inordinate, inexcusable, and unjustifiable and has surpassed the time frame envisaged under Order 17 Rule 2 (1) of the Civil Procedure rules. It is the Defendant's averment that on 26th January 2012, the Plaintiff failed to show cause why this suit should not be dismissed as envisaged by Order 17 Rule 2 and therefore, that the Plaintiff has no one to blame for the lethargy exhibited towards prosecution of the dismissed suit.

Parties were directed to file and exchange submissions and the Plaintiff in submissions dated 14th April 2014 reiterated the facts as pleaded and argued that it was unusual to have a cause list where the usual sequence of time is not followed and that when the same happens, one can be forgiven for believing it was a mistake. The Plaintiff submitted that the overriding objective provided under section 1A of the Civil Procedure Act confers upon the court considerable latitude in the exercise of its discretion always with a view to achieving any or all of the overriding objectives.

The plaintiff submitted that the Defendant had not shown what injustice if any, she would suffer if the application was allowed and the suit reinstated or the Plaintiff given an opportunity to show cause why the suit should not be dismissed. Counsel relied on the case of **Ivita vs. Kyumbu (1984) KLR 441** where it was held that the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Reliance was also placed on the case of **Zipporah Mumbi Ngugi vs. Joseph Ngae Njuguna & others, Milimani HCCC No. 321 of 2002** where the court declined to dismiss a suit for want of prosecution stating that the Defendants had not demonstrated that they would suffer prejudice which cannot be compensated by costs if the suit was not dismissed.

The Plaintiff contended that the reason for not attending court to show cause why the suit should not be dismissed was excusable and that no prejudice would be suffered by the Defendant. It is the Plaintiff's submission that justice can still be done to the parties despite the delay in prosecuting the suit. The case of Alice Mumbi Ng'anga' cited by the Plaintiff was distinguished on grounds that the application for dismissal of the case was filed by the respondent and the respondent did not respond to it unlike in the present case where the notice to show cause emanated from the court and the Plaintiff responded to the notice to show cause by filing an affidavit to show cause.

Counsel argued that the cases of **Peter Kinyari Kihumba** and **Gerphas Alphonse Odhiambo** were irrelevant as they relate to appeals and extensions of time to file notices and or record of appeal out of time whose principles are different. Lastly, the Plaintiff argued that although the case of **Shah vs. Mbogo** was relevant, he had demonstrated that the mistake was not deliberate but that the same was inadvertent and excusable and that he was not seeking to obstruct or delay the cause of justice.

The Defendant in submissions dated 16th May 2014 argued that the reasons advanced for non attendance are inexcusable since the annexed cause list clearly indicated that the show cause matters would be handled at 9.00am and therefore, that it was dishonest and unbelievable how the Plaintiff would interpret the same to mean 2.30pm. Counsel submitted that in respect to prayer 3, the Plaintiff had failed to proffer any reasonable explanation why he failed to take any step towards prosecution of this matter for over 5 years, from November 2008 when the court directed him to file a site plan.

Counsel for the Defendant argued that the Plaintiff failed to provide any evidence in his affidavit to demonstrate attempts made, if any, towards obtaining a site plan from the city Commission and therefore, that no material has been placed before the court to warrant exercise of discretion in the plaintiff's favour. In further submission, the Defendant averred that from the time of the dismissal, it has taken the Plaintiff over two years 4 months to prosecute the instant application to reinstate the suit. It is the Defendant's submission that the Plaintiff has lost interest in this matter and is employing delay tactics with full knowledge that the suit does not disclose any reasonable cause of action as against her.

The Defendant submitted that the Plaintiff's conduct offends the overriding objective envisaged as sections 1A (1), (2), (3) and 1B (a), (b), (c) of the Civil Procedure Act which provides for just, proportionate and expeditious disposal of suits. The Defendant submitted that it was unfair and unjust for the Plaintiff to endlessly subject her to anxiety of defending a suit which is not being prosecuted. Counsel

averred that the delay by the 5 year delay by the Plaintiff has surpassed the time limit set out at Order 17 Rule 2(1) and (3) of the Civil Procedure Rules and is therefore unworthy of any discretion of the court.

The Defendant relied on the case of **Alice Mumbi Ng'ang'a vs. Danson Chege Ng'ang'a & another (2006) eKLR** and **Peter Kanyari Kihumba vs. Gladys Wanjiru Migwi & another (2006) eKLR** and urged the court to look at the circumstances and the Plaintiff's conduct prior to the dismissal of the suit. The Defendant also made reference to the case of **Shah vs. Mbogo & another (1967) EA** and submitted that the application before the court is meant to obstruct justice, cause hardship and delay the cause of justice. Lastly, the Defendant submitted that the application offends her right to have a trial begin and conclude without unreasonable delay as guaranteed under Article 50(e) of the Constitution.

The issue for determination is whether reasonable grounds have been shown for the Court to set aside the orders dismissing the suit herein for want of prosecution. Order 17 Rule 2 grants the Court powers to set aside orders dismissing a suit for want of prosecution by providing as follows:-

“2. (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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

The Plaintiff has explained why he did not attend court on 26th January 2012 when the notice to show cause was fixed for hearing. The Court has perused the cause list for 26th January 2012 for matters listed before Hon. **Lady Justice Nyamweya** before whom the notice to show cause was listed. The cause list indicates that the court had 15 matters being mentions, submissions, chamber summons, notice of motions and hearings fixed from 9.00am while rulings were slated for 2.30pm. Page 2 of the same cause list shows that 106 matters for notice to show cause were also scheduled for hearing at 9.00am of the same day. The Court agrees with the explanation advanced by the Plaintiff that the cause list could have caused confusion by giving the impression that the 106 matters for notice to show cause were to be handled after the ordinary business of the court for the day.

The test to be applied by the courts in an application for the dismissal of a suit for want of prosecution was laid down in the case of **Ivita vs. Kyumbu**

(1984) KLR 441. First, the court has to consider whether the delay is prolonged and inexcusable and secondly, whether justice can be done despite the delay.

The Court will now consider whether satisfactory cause has been shown to enable the court exercise its discretion in the Plaintiff's favour. The Plaintiff in an affidavit to show cause sworn and filed on 25th January 2012 stated that when the matter was last in court on 30th October 2007, he was directed to file a site plan approved by the City Commission. The Plaintiff contended that he was yet to receive the said plan.

The Defendant has not demonstrated any prejudice she stands to suffer if the suit herein is reinstated. Her opposition is on grounds that the application is an impediment to just, expeditious, proportionate and affordable resolution of the suit contrary to section 1A(1), (2), (3) and 1B(a), (b), (c) and (d) of the Civil Procedure Act and further, that the delay is inordinate, inexcusable, and unjustifiable. The court in the case of **Ivita vs. Kyumbu (1984) KLR 441** held that even if the delay is prolonged, the court will not dismiss the matter where it is satisfied with the Plaintiff's excuse for the delay and is of the opinion that

justice can still be done to the parties

The Plaintiff has shown reasonable cause why the suit should be reinstated and I accordingly order the same reinstated.

The Defendant has not demonstrated the impracticability of holding a fair trial or the prejudice likely to be suffered, and it is of the view that it is in the interest of justice that the suit be reinstated for hearing on merits. The court with a view to facilitating the expeditious trial of this matter directs the parties to comply with the provisions of Order 11 of the Civil Procedure Rules and have the suit set down for pre trial conference within the next ninety (90) days from the date of this ruling.

The costs of this application shall be borne by the plaintiff.

Order accordingly.

Ruling dated signed and delivered this.....**25th**.....day of.....**February**.....2015.

J. M. MUTUNGI

JUDGE

In the presence:

..... Plaintiff

..... Defendant