



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC ORIGINATING SUMMONS NO. 13 OF 2018

WILFRED MUTEMBEI.....APPLICANT

VERSUS

ANDRIANA NKUENE NJIRU.....1ST RESPONDENT

PHINEAS MUGAMBI GICHURU.....2ND RESPONDENT

CO-OPERATIVE BANK LTD – NKUBU.....3RD RESPONDENT

RULING

A. APPLICATION

1. By an application dated 10.11.2021, the court is asked to set aside the dismissal order dated 10.11.2021. The application is supported by an affidavit sworn on the even date by Kimathi Kiara Advocate.
2. The reasons given for non-attendance are that the matter was called while counsel was already in a Succession Case No. 699/2013 before Hon. Lady Justice T. Cherere hence the non-appearance was not intentional.
3. Counsel avers the plaintiff has been active, the last action being in January 2021 when an application was made and that if there is no reinstatement, the plaintiff shall suffer grave consequence for he will lose his land.

B. OPPOSITION

4. The 3rd respondent opposes the application through a replying affidavit sworn on 8.12.2021. It is averred the case has been in court since 2003 and was dismissed for want of prosecution in 2012 thereafter reinstated by a ruling delivered on 11.4.2018 whereby strict timelines were imposed on pretrial conference.
5. That the applicant did not comply by setting the suit for pretrial conference until a notice to show cause was issued in November 2021.
6. That there is nothing to show the advocate was before another court and in any case the cause list for 10.11.2021 does not contain such a case as alleged or at all.
7. Similarly, it is averred there is no evidence counsel for the plaintiff engaged another counsel to hold his brief yet he left the matter unattended when it was coming for a notice to show cause.
8. Further, it is averred the case has been dormant since September 2020 which is a clear evidence that once the suit was reinstated, the applicant went back to slumber and hence had no intention of prosecuting it.

9. The 2nd respondent continues to state that there must be an end to litigation and since the suit was conditionally reinstated, the applicant did not adhere to these conditions hence should not deserve the mercy of the court based on flimsy excuses, lack of vigilance, breach of court directions and where there is no guarantee that if reinstated for the 2nd time, the applicant will be zealous to prosecute it going by his past behavior.

C. HISTORY OF THE SUIT

10. The originating summons dated 3.3.2003 was filed on 3.3.2003. A reply by the defendant was filed on 20.11.2003. No action was taken

until 22.11.2011 when a notice to show cause was issued and Lesiit J. dismissed the suit for want of prosecution.

11. The applicant came under a certificate of urgency dated 18.11.2013 seeking the joinder of the 2nd respondent and inhibition orders.
12. Similarly by an application dated 22.1.2018, the court was asked to set aside the dismissal orders made on 12.11.2012.
13. Upon reinstatement, the applicant filed pretrial conference, papers and an amended notice of motion dated 3.4.2020, in which he sought for temporary orders of injunction against the respondents stopping a public auction.
14. The court by a ruling delivered on 16.9.2020 granted interim orders of injunction pending the hearing of the suit.
15. It appears without leave of court, the applicant filed an amended originating summons dated 17.11.2020. Thereafter, the matter was mentioned on 12.7.2021. There was no appearance of parties and the court listed the case for 6.10.2021.
16. On 6.10.2021 there was no appearance and the court ordered a notice to show cause for the dismissal for want of prosecution to be served afresh for 10.11.2021.
17. The applicant's lawyers on record were served and acknowledged service on 15.10.2021.
18. On 10.11.2021, both the applicant his lawyers on record did not attend court and hence the suit was dismissed for both non-compliance and non-prosecution.
19. Looking at the ruling delivered on 11.4.2018, the case was to be heard on priority basis and pretrial directions were to be complied with in 30 days in default of which the suit was to stand dismissed. Other than the amended originating summons filed, the applicant did not file any case compliance documents in line with the court directive. There were also orders given on 8.5.2018 the case will never be adjourned again at the instance of the plaintiff.
20. After various mentions, the case was listed for hearing on 4.12.2019. The case could not proceed since the lawyer for the plaintiff was absent.
21. The matter was again listed for hearing on 25.2.2020. The case could not proceed for lack of service upon the 1st defendant hence another date was given for 17.6.2020 and service was ordered to be effected otherwise the case would stand dismissed.
22. On 6.5.2020, the applicant filed an application dated 30.4.2020 seeking for injunction and joinder of the 3rd defendant. The same was certified urgent for interpartes on 24.6.2020. Parties opted to put in written submissions and a date for ruling was given for 16.7.2020.
23. The court granted the twin prayers and the 3rd respondent was ordered to file and serve a defence within 14 days from the date thereof.

D. FINDINGS

24. It is apparent from the record that after obtaining interim orders on 16.9.2020, the applicant did not file the amended originating summons as required by law in 14 days but waited for 3 months to file on 25.1.2021. There is also no evidence that the same was served upon all the defendants on record.
25. Even assuming the applicant took some action, there is no evidence that the orders for pretrial compliance were ever complied with so as to fastrack the hearing of the suit.
26. As at the time the court on its own motion listed the matter for mention on 12.7.2021, the applicant had taken no action at all to have the matter listed for hearing one way or the other.
27. Similarly, the court record indicates the matter came up for mention on 6.10.2021. There was no appearance and hence another chance was given for 10.11.2021 when there was yet absence of both the plaintiff and his lawyers on record. The reason given is that the counsel on record was before another court.
28. It is submitted by the 3rd respondent the cause list did not indicate such a matter as appearing before the court. No counter-evidence has been availed before this court.
29. Similarly, it is evident even when the matter was coming for the hearing of this application, the applicant did not show up to argue the application.
30. Nevertheless, the court ordered for written submissions to be filed by 7.1.2022. The applicant did not comply as ordered or at all.
31. The application herein is made under **Sections 3 & 3 (a) of the Civil Procedure Act.**
32. **Order 17 Rule 1 Civil Procedure Rules** provides when a court grants an adjournment, it shall give a date for further hearing or directions and where no step is made, for a year, the court may give notice in writing for the parties to show cause why the suit should not be

dismissed and if no cause is shown to the satisfaction of the court, the court may dismiss the suit.

33. Further, under **Order 17 Rule 4** the court may dismiss the suit for non-compliance with any directions given under this Order.

34. There is no doubt several orders and directions were issued in this matter for the fasttracking of the hearing of this matter.

35. The same appear to have fallen on deaf ears of the applicant. The matter was last in court for the ruling on the application for injunction and joinder of the Bank on 16.9.2020.

36. In accordance with **Order 17 Rule 2 (1) Civil Procedure Rules**, the one year elapsed on 16.9.2021. During that one year, the plaintiff did not list down the matter for hearing nor make a precipitate effort to comply with the court directions to have the matter heard on priority basis. When the matter was listed for a notice to show cause, the plaintiff had the option to comply with the court directions, under **Order 11** by filing list of issues, list of documents, and by filing of case conference checklist.

37. In absence of that action, the averment at paragraph 7 of the supporting affidavit by Mr. L. Kimathi Kiara Advocate is far from the truth.

38. In *Ivita –vs- Kyumba [1984] KLR 441*, the court held the test is whether the delay is prolonged and inexcusable and if justice can be done despite the delay.

39. The 3rd respondent states the delay has caused grave injustice to them and that the applicant never takes court orders and or directives seriously and that even if the matter was to be reinstated, there will be no guarantee he was ready to have the matter heard on priority.

40. In *Mwangi S. Kimenyi –vs- Attorney General & another [2014] eKLR*, the court held there was need to do substantive justice and the test should be on whether:

a) **The delay has been intentional and contumelious**

b) **Whether the delay or the conduct of the plaintiff amounted to an abuse of the court**

c) **Whether the delay was inordinate and inexcusable**

d) **Whether the delay was one that gave rise to a substantial risk to fair hearing in that it was not possible to have a fair hearing of issues in action or was likely to cause serious prejudice to the defendants and the prejudice the dismissal would occasion to the plaintiff.**

41. Looking at this case, the plaintiff was last in court on 27.6.2018. He has not sworn any affidavit in support of the motion herein so as to explain what prejudice he stands to suffer if the suit is not reinstated for hearing.

42. The applicant filed an application for inhibition orders which has never been prosecuted before this court. As a result of the delay, the applicant has enjoined more parties to this suit.

43. The applicant lastly sought and obtained temporary orders of injunction which in law have to be in operation for not more than one year. The same expired by operation of law on 16.9.2021. It means the court acted in vain by granting orders which did not make the plaintiff active in prosecuting such an old case of 2003.

44. Justice herein has been delayed without explanation. Such, a justice delayed is justice denied and delay defeats equity.

45. In *Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium v-vs- MD Popat and others & another [2016] eKLR*, the court held the discretion must be exercised on the basis that it is in the interest of justice regard being whether the party instituting the suit had lost interest in it or whether the delay in prosecuting the suit was inordinate, unreasonable, inexcusable and would occasion grave injustice to the other party.

46. The court reinstated the suit for hearing but apparently, the plaintiff did not learn from his past mistakes and take remedial action.

47. In *Argan Wekesa Okumu –vs- Dima College Ltd & 2 Others [2015] eKLR*, the court held a court should strive to sustain a suit where possible rather than terminating the same.

48. As regards prejudice, the 3rd respondent submits they should not be kept in abeyance by a vexatious litigant who has no zeal to prosecute the suit and should not be kept in constant fear of the suit.

49. This court is aware that out of the delay in prosecution of this suit, the grant was confirm in **Meru High Court Succession Cause No. 68 of 2000** whereof there was transmission of the property to the 2nd defendant who charged the property to the 3rd respondent.

50. That by itself is enough prejudice to the 3rd respondent and hence the need to promptly prosecute the suit as held in *John Harun Mwau –vs- Simone Haysom & 2 others; Attorney General & 2 Others –vs- Standard Group Limited & Another [2017] eKLR*.

51. The applicant came to court and has been given all the opportunity to have his matter heard on priority but has squandered the opportunity. She has been indulged once and secondly granted temporary orders.

52. There is therefore no good reason preferred while for a year no action was taken to list the matter down for hearing.

53. In the interest of substantive justice and expeditious disposal of suits, my view is that the plaintiff has not demonstrated why he deserves a second chance to have the suit re-instated for hearing.

54. The upshot is the application dated 10.11.2021 lacks merits and is also incompetent. It is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF FEBRUARY, 2022

In presence of:

No appearance for parties

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE