



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 132 OF 2006

JOSPHAT OGINDA SASIA.....PLAINTIFF/APPLICANT

VERSUS

WYCLIFFE WABWILE KIIYA.....DEFENDANT/RESPONDENT

RULING

(On an application to set aside an order for dismissal of suit for want of prosecution)

THE APPLICATION

1. The Applicant brought a Notice of Motion dated **26/04/2021**. It was filed on **23/11/2021**. He sought generally the reinstatement of his suit after it was dismissed for want of prosecution. The Application was brought under **Sections 1A, 1B, 3, 3A, 63(e), 80 and 100** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya, and **Order 8 Rules 1 and 5, Order 12 Rule 7, Order 45 Rules 1 and 2, and Order 51 Rules 1** of the **Civil Procedure Rules 2010, Article 159(2)** of the Constitution and all Enabling Provisions of the law. The Applicant prayed for the following specific orders:

- (a) **THAT this application be certified as urgent for hearing.**
- (b) **THAT the order made by this Court on 16/10/2017 dismissing the Plaintiff's suit be vacated and set aside and this suit be for hearing on merit (sic).**
- (c) **THAT the defendant be at liberty to file an amended Defence if he so wishes.**
- (d) **THAT the costs of this application be in the cause.**

2. The grounds of the Application were the Plaintiff was the registered owner of title numbers **Waitaluk/Mabonde Block 12/Sirembe/90** and **91** onto which the Defendant encroached in the year **2004**. The Defendant's actions prompted the filing of the instant suit. It was dismissed for want of prosecution on the material date. The other ground was the Applicant was unaware of the dismissal because his Advocates stopped communicating with him. He alleged that he only learnt of the dismissal on **15/11/2021** when he visited the Court Registry to peruse the file. The other ground was that he was desirous of proceeding with the suit and that it would be gravely prejudicial to him if the order of dismissal of the suit was not set aside and or vacated and the suit reinstated. Lastly, he stated that he should not be punished for his advocates' mistakes and the interest of justice demanded the grant of the Application.

3. The Affidavit in support of the Application was sworn by him, one **Josephat Oginda Sasia**, on **18/11/2021**. It was filed on **23/11/2021**. Apart from containing annexures of the copies of his Identity Card, the title deeds, letters showing the existence of the dispute, a survey report about the dispute and the order of dismissal of the suit, the Affidavit basically repeated the contents of the grounds in support of the Application hence there was no need to summarize the depositions in it. However, at paragraph 7 he deponed that the suit was fixed for hearing on **16/10/2017** when it was dismissed for want of prosecution. He then deponed that he had paid his former advocates their fees and he did not understand why they never communicated to him or prosecuted the case on his behalf.

4. The Application was opposed. The Respondent swore an Affidavit on **6/12/2021** and filed it on **9/12/2021**. In it he stated that the Application was an abuse of the process of the Court, brought in bad faith and designed to obstruct justice. He then stated that the Plaintiff had never been keen to prosecute his case since the year **2006**. He restated that up to the time the case was dismissed, **11** years had elapsed without a single step being taken by the Plaintiff, which period of delay was inexcusably long. He stated that on the material date, the Plaintiff was absent though served. He also stated that the Applicant took a further **four (4)** years after the dismissal to bring the present Application, another inordinate and unreasonable delay. He then summed it up that fifteen years of delay in prosecuting the case would lead to great prejudice if the Court excused it because justice delayed is justice denied.

SUBMISSIONS

5. When the Application came up before me for determination, I gave directions for its disposal by way of written submissions. The Applicant filed his dated 29/11/2021 on 30/11/2021. The Respondent filed his dated 06/12/2021 on 09/12/2021. Each learned counsel referred to and annexed some case law to the submissions.

DETERMINATION

6. I have carefully considered the Application, the affidavit in its support and the one in response. I have also studied the submissions for and against the Application, the case law cited and analyzed the provisions relied on. Three issues fall squarely before me for determination. They are:

a) Whether the Application merits the setting aside of the order made on 16/10/2017;

b) Whether the Defendant should be given leave to amend his Defence;

c) Who to bear the costs of the instant Application?

7. The Applicant expounded on the meaning and import of four of the provisions he cited, to show their relevance to the Application. These were, **Sections 1A and 3A of the Civil Procedure Act** and **Order 12 Rule 7** and **Order 45 Rule 1** of the **Civil Procedure Rules**. This Court takes it that when submitting, the Applicant knew, understood and it dawned on him, and he settled on the truth, that the rest of the provisions he cited but did not highlight on were irrelevant. However, as much as the Applicant referred to **Order 45 Rule 1** in the submissions, he would not explain it further than stating what the Rule provided for generally. Its irrelevance too to the instant application must have sunk in him because the application did not seek any prayer relating to the provision and that may be the reason he downed his arsenal thereon at that point.

8. At the determination of the Application, I had to start by analyzing first the irrelevance of the rest of the provisions cited. First, it is worth stating that where there are express provisions of the law on an issue brought before a Court by way of Application, there is no need for a party to cite other provisions in support of it because the other provisions would be basically irrelevant. Thus, the other provisions cited but that were irrelevant were, for instance, **Section 63 of the Civil Procedure Act**. It provides for the conduct of Supplemental Proceedings. Thus, **Sub-Section (e)** thereof gives the Court power to make any interlocutory order as may be just and convenient to so as to prevent the ends of justice from being defeated. **Order 51 Rule 1** of the **Civil Procedure Rules** only provides for the form of an Application should be in. **Order 8 Rules 1** and **5** of the Procedure provide for amendment of pleadings and I need not go into discussing them herein, **Order 12 Rule 7** provides for setting aside judgment or dismissal of suit, and **Order 45 Rules 1** and **2** for review of a court's decision.

9. To the extent that the instant Applicant did not seek a review of the orders of the Court, both **Section 80, 100** of the **Act** and **Order 45 Rules 1** and **2** of the **Procedure** were irrelevant. Similarly, reliance on **Order 12 Rule 7** was sheer misconception of the law, as explained in paragraphs **14** and **15** below. In my humble view, in regard to the Applicant's act of citing irrelevant provisions, particularly the ones on review of a judgment or order of the Court while he knew clearly that he did not pray for anything of the sort, this conduct exemplifies a classic example of poor drafting of pleadings, lack of due attention and poor professionalism. I say so because of the following further reason, namely, that the Application was brought by the Plaintiff but one of the prayers therein was for an order in favour of the Defendant/Respondent, as shown below.

10. Again, this goes to explain further why the Applicant's counsel included the meaningless phrase that I usually see many a learned counsel insert in applications: "all other enabling provisions of the law." This Court has advised before in other decisions and will continue to do so that inserting such a phrase in any application does not and will not assist the party in the determination the Court makes. Unless the phrase is expounded in submissions to show how and which of the provisions the party seeks the Court to consider, in which case he would rather cite them first, it is of least avail to the party. At best it is waste of the ink in a printer, the printer machine's parts, and paper together with space and time. It is time, in modernity, that parties were conscious and deliberate in specificity over that which they present to and ask of Courts. A lot of investment is made to teach law in law schools. Such enlightenment should be progressive rather than retrogressive. To lump up phrases that do not have anything before a Court exemplifies the latter and negates development of the legal profession.

11. That said, prayer three (or **c**) as was in the body) of the Application was for orders that the Defendant be at liberty to file an amended Defence if he wished. In my humble view, the grant of the prayer on the amendment of pleadings was dependent on the success or otherwise of prayer two (**b**) as stated above. But even if this Court were to consider the prayer in exclusion of others, it was a non-starter. It is clear from the content that the Applicant prays for the Defendant to be granted an order for amendment of his defence (*emphasis mine by way of underline*) if need be. I have never heard of or come across an adversary rooting for the welfare of his foe, if I could use the imagery of war! Perhaps, where there is collusion and parties know where their sinister move will lead to. It is not possible for the Court to grant the prayer because an adverse party sought it, without any solicitation and foundation in law, for the other: the Plaintiff sought it on behalf of the Defendant. How could the Plaintiff make a prayer in favour of the Defendant? On whose bidding and under what law? It is inconceivable.

12. With due respect to learned counsel and great humility, I point out sadly that this is the second Application, I recall well, which has been filed by the same law firm within a span of two (**2**) months in which this Court called on to make a ruling on, wherein prayers are made for and on behalf of an adverse party. I humbly advise learned counsel who is either the proprietor or managing partner to make a keen reflection on these clear damaging actions and negative perception shaping manifestations and stamp them out. If there is any form of poor drafting of documents I do not know which one exemplifies such other than the present one and the one I came across in **Kitale ELC No. 46 of 2021** of pleadings filed by a different law firm. I indicated in that matter that such pleadings were to be used to teach law students on what not to do in drafting pleadings and documents. I am alive to the fact, as was held by the Court of Appeal in **D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority [2017] EKLr** that "...courts exist for the supreme purpose of deciding rights of the parties and not for the purposes of imposing discipline." I am not doing so. But where errors are so repetitive and bad that they have the possibility of affecting an innocent client, it is worth pointing them out lest it shall keep the doors of Courts busy open with complaints by litigants that they are being visited

with counsel's mistakes. At the risk of repeating myself, I advise counsel and any other party who drafts documents to be filed that it is better to read and thoroughly check on any errors in a document before presenting it to Court or other office. By so finding I do not mean that drafters and other participants have to bring out 'heavenly' perfection in their work. But just as He who called his followers to be perfect in faith and character as His Father was (*see Mat 5:48*, for believers in the Holy Bible), so is the call herein made to legal professionals to be perfect in their calling as is expected of learned friends. The profession does not envisage mediocrity and carelessness. I leave it at that.

13. A party wishing to set aside an order of dismissal of suit for want of prosecution as envisaged under **Order 12 Rule 7** of the **Civil Procedure Rules** has to satisfy the Court that the dismissal was pursuant to the provisions in the **Order** and not any other. **Order 12** generally deals with hearing and consequences of non-attendance. In regard to a Plaintiff or a defendant who filed a claim or Counterclaim respectively and fails to attend Court, the **Order** provides for the steps the Court should take at each stage of the claim or Counterclaim. Needless to say then, that where a suit or counterclaim is dismissed on the day it is fixed for hearing and the party does not attend Court, **Order 12 Rule 7** provides for the remedy available to such a party whose matter is dismissed.

14. The circumstances that led to the dismissal of the suit sought to be reinstated herein are different from those envisaged in **Order 12** of the **Civil Procedure Rules**. I find so based on the perusal and analysis of the Court record which I hereby summarize. This suit was filed on **03/07/2006**. It would appear that the Defendant was served and did not enter appearance or file Defence. Therefore, on **07/08/2006** the Plaintiff requested for interlocutory judgment to be entered against him. It was done on **18/08/2006** and the suit was set down for formal proof on **10/10/2006**. It did not take place. It appears that somewhere along the line, the parties entered into and filed a consent for the surveyor to visit the suit lands and report to Court. The consent was adopted as the order of the Court on **12/10/2007**. From then on nothing took place until **16/10/2017** when the suit came up for mention before the Court, as per the duly served Notice, parties to "*Show Cause why it should not be dismissed for non-prosecution pursuant to Order 17 Rule (2) (1) of the Civil Procedure Rules 2010.*" Thus, the record does not bear the deposition of the Applicant in **paragraph 7** of the Supporting Affidavit that the suit was fixed for hearing on **16/10/2017** when it was dismissed.

15. Clearly, the order of **16/10/2017** was made in terms of **Order 17 Rule (2)(1)** of the **Civil Procedure Rules**. Thus, the Applicant ought to have borne in mind the application of the provisions of **Order 17** before bringing this Application. A further reading of the **Order** shows that the Court does not have room for setting aside a suit that has been dismissed for want of prosecution under it. The **Order** is silent on what happens when a party's suit or counterclaim for that matter has been dismissed within the provisions under it. If the Rules Committee contemplated the setting aside of an order of dismissal made under the **Order** nothing could have been easier than doing so as it did for **Order 12**.

16. For now, granted that it may be that a party may move the Court to set aside the order, he cannot certainly do so under Order 12 Rule 7 of the Civil Procedure Rules; perhaps under **Sections 3 and 3A** of the **Civil Procedure Act**. Whereas a Court can exercise discretion under **Order 12 Rule 7**, for a party to ask it to exercise discretion where a dismissal of a suit or claim is done under **Order 17** in a similar manner as in **Rule 7** of **Order 12** would be stretching the said discretion too far. If the Rules Committee intended that the discretion be exercised similarly, it could have stated so or combined the **Orders** so as to have the same import. This is because there is a wide difference between a case where a suit or claim is dismissed on account of the Plaintiffs' failure to attend Court when the matter is due for hearing, and where a suit or claim is dismissed for want of prosecution under **Order 17 Rule (2)** of the **Civil Procedure Rules**. In my humble view, whereas the Court is clothed with the discretion to set aside orders in both circumstances, the parameters it is to use in making consideration to exercise that discretion should be different. In the latter circumstances, even when considering the facts of each case as it should be, the Court should raise a higher bar to the Applicant seeking to move it. Matters are not filed in Court to lie idle and therefore clog the justice system. They ought to be prosecuted speedily.

17. I hold the above humble view basing it on the duty of the Court as provided for under **Section 1B** of the **Civil Procedure Act**, which is that there should be the just, efficient and timely disposal of disputes presented before it. With regard to this Court the duty is firm by the overriding objective of the **Environment and Land Court Act** as given under **Section 3(1)** which is the "just, expeditious, proportionate and accessible resolution of disputes governed by" it. Equity and discretion are conjoined twins which require purity of hands asking for their help. They will never and do not aid the indolent.

18. The Plaintiff argued that he was not served with notice hence his inability to attend Court. But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to "give notice" of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards. (*see the cases of Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR and Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others [2018] eKLR*). From the court record herein, that was done. The Court needed to do any more than that. Moreover, the Applicant has not demonstrated by way of Affidavit from his previous Advocates that they did not receive the notice which the Court issued on **07/09/2017**.

19. Turning to the merits or otherwise of the Application before me, the Applicant relied on a number of grounds for his Application. These were, in summary, that his former advocate did not communicate to him about his case and more so about the date when the matter was dismissed hence he should not be punished for his advocates' mistakes, that he was not served with the notice for dismissal of the case hence he was unaware that it had been dismissed, that he only learnt of the dismissal on **15/11/2021** upon visiting the Court Registry and perusing the file.

20. Upon those grounds I restate the law on setting aside of a matter dismissed for want of prosecution. As I stated above, a Court is called upon to exercise discretion to do so and the discretion is very wide. However, it should be exercised judiciously and on a case by case basis, which means that the facts of each case and the circumstances of both the dismissal and application for setting aside the dismissal should be carefully interrogated by the Court. The main point for consideration then would be the reasons for failure to prosecute the case and for delay in bringing the application to set aside the order.

21. In *Ivita vs. Kyumbu [1984] KLR 441* the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

22. On the one hand, courts should not act as stumbling blocks to parties who wish to litigate their issues before them. They should be willing to, at all times, provide a forum to parties to settle their disputes before them. After all that is why they were given judicial power by the people. In CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173 that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

23. On the other hand, courts should not be used as fora to breed injustice to parties who have been diligent to proceed with their matters but have been met by inexcusable indolence by the adverse parties. It is a rule of law and equity that justice delayed is justice denied however pure it may look. Thus, where a suit is dismissed for want of prosecution, the onus is on the party applying to reverse the order to explain sufficiently to Court as to why his application merits the exercise of the Court’s discretion. From the authority cited above, and applying proper reason on it, it goes without saying that when then a suit has been dismissed for want of prosecution as was in the instant case, the Defendant is considered to have discharged his burden as would be found in the principles. It means further that, for the Plaintiff to successfully move the Court to exercise discretion in his favour, the burden lies on him to demonstrate the opposite of that which the Defendant already did, besides explaining the delay in applying to set aside the order. The Plaintiff is not expected to leisurely walk into the Court and cry foul and is given the discretion.

24. Balancing the two contending perspectives explained above, and doing the best I can, I now analyze the reasons advanced by the Applicant to find if this Court can exercise discretion in his favour. First, in regard to the reasons given for not prosecuting the suit, I find it absolutely unreasonable of a litigant who wants this Court to believe that he is anxious to proceed with this matter when he has exhibited inexcusable and inordinate delay three times. First, this matter was last in Court on **12/06/2007** before it was dismissed nine **(9) years and four (4) months** later, on **16/10/2017**. The Plaintiff did not explain the steps he took from the time the matter was in last in Court to the material date (of dismissal) about the matter. He did not demonstrate that he followed up the matter with either his Advocate or the Court Registry for the Court on any single occasion for the almost a decade. Again, after the suit was dismissed, he took **Four (4) years** to bring the Application. He offered no explanation for that delay. Thus, he did not explain the steps he took for **thirteen (13) years** cumulatively about the prosecution of his matter only for him to visit the Registry from nowhere and without any prompting, and find the suit dismissed.

25. Of interest, and the last straw that broke the camel’s back in this Application, is the simple and plain lie that the Applicant made on oath about the knowledge of the dismissal of his suit. At **paragraph 10** of this Affidavit sworn on **18/11/2021** he deponed that he knew of the dismissal upon visiting the Registry on **15/11/2021** and perusing the Court file. But a keen perusal of his Application shows clearly that he must have been aware of the dismissal of the suit some time in **April 2021**. That is why he instructed his learned counsel to draw the Application and sign it on **26/04/2021**. Clearly, this shows that the Applicant had a lot to hide from the Court about his actions leading to the filing of this Application.

26. I would have said much about the Applicant’s attempt to shift blame to his former Advocates about the conduct of this matter but for reasons I have given above it does not warrant much brain energy and waste of judicial time to put down much. I can only summarize it as follows, that the Applicant did not avail evidence even by way of affidavit from his former counsel to the effect that he lost contact with them and vice versa. Again, it is not every mistake between learned counsel and a client that learned counsel must be blamed over, as a scape goat. It must be clearly demonstrated that it was learned counsel who committed a mistake and that it cannot be attributable to the client in any way or that it cannot be compensated by way of other remedies. I am guided by the authority the Applicant relied on in his submissions about this point. It was the case of Edney Adaka Ismail v Equity Bank Limited [2014] eKLR where the learned judge held as follows:

“It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff’s Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant.”

27. The Plaintiff’s actions demonstrate the opposite of what the party in the above cited authority did. In it he followed on the dates of his Application hence his Advocate was blamable for the mistake. In the instant case, there was no follow up by the Applicant on the dates of his matter for over **thirteen (13) years**. Even if his former advocates could have been blamed for any error of miscommunication, their mistakes surely faded from the scene long ago and they left those of the Applicants born, alive and growing to teenage.

c) What orders to issue and who to bear costs?

28. Much has been said about the incompetency of one of the prayers in this Application. A lot has been given on the manner in which the instant Application dated **26/04/2021** but filed on **23/11/2021** (seven months later) was not merited whatsoever. Therefore, I can do no more than dismiss it with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF FEBRUARY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.