REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 115 OF 2005

PETER BEKYIBEI LANGAT……..……..PLAINTIFF/APPLICANT

VERSUS

RECHO CHEPKURUI MOSONIK……..1ST DEFENDANT/ RESPONDENT

RAEL CHEPKOSKEI MOSONIK…….....…2ND DEFENDANT/ APPLICANT

RULING

1. On 19TH December 2013, the plaintiff filed a Notice of Motion of the same date. The prayers in that motion among others are as follows;

i. That this Honorable court be pleased to grant leave to the firm of M/S Orina and Company to come on record in place of M/S Korir & Company Advocates.

ii. That this Honorable court be pleased to issue an order staying the execution of the warrants of attachment and sale of the plaintiff's/applicant's properties pending the hearing and determination of the application inter parties.

iii. That this Honorable court be pleased to set aside the order dated 25th May, 2009 dismissing the plaintiff's/applicant's suit and order that the matter be set down for hearing.

iv. That costs of the execution be borne by the defendant

v. Those costs of the application be provided for.

2. In his motion for stay of execution, the defendant has set the following grounds in support thereof;-

i. That the defendants/respondents through Hegeons Auctioneers have proclaimed for attachment and sale the plaintiff/ applicant's properties and the same are due for sale on 23rd December 2013.

ii. That the order dismissing the plaintiff/ applicant's suit did not specify that costs were payable.

iii. That the suit herein was dismissed without the knowledge of the plaintiff/ applicant as the former advocates on record kept on telling him that the suit was still alive awaiting hearing.

iv. That the failure to attend court on 25th May, 2009 was not deliberate on the part of the plaintiff/ applicant but due to the aforesaid misinformation and in any event the plaintiff/applicant has a good case with overwhelming chances of success.

v. That the issuance of the warrants of attachment and sale of the plaintiff/applicant's property is irregular, unprocedural and illegal.

vi. That unless the orders herein are granted the plaintiff/applicant stands to suffer irreparable loss and damages which might not be compensated in monetary terms.

3. Additionally, a supporting affidavit dated 19th December, 2013 was filed.

4. The Defendants/ respondents have also filed a replying affidavit and grounds of opposition on the following grounds;

a. That the suit filed herein by the plaintiff was dismissed for want of prosecution due to the plaintiff's failure to be in charge of his suit and indolence on his part, which offends the overriding objective, which he relies upon in his application for reinstatement.

b. That the plaintiff's application is defective as it has been drawn and filed by the firm of M/S Orina & Co. Advocates which is not properly on record for the plaintiff.

c. that the plaintiff is guilty of laches.

5. In addition the respondent filed a replying affidavit dated 23rd January, 2014.

6. Both parties filed written submissions through their respective counsels which l have considered.

7. In his submissions counsel for plaintiff reiterates what is contained in his grounds. In addition he states that there was no evidence that the applicant was served with the notice to show cause as both parties were absent during the dismissal: that the suit was dismissed without an order as to costs and that the applicant is not guilty of laches.

8. He relied on the case of **John Kundu Khisa V Florence N Wanjala (2013) e KLR** but failed to avail a copy of the authority to the court.

9. The defendant in his submissions contends that it is the duty of litigants to assist their counsels in expeditious determination of suits but the applicant had failed to demonstrate due diligence on his part in prosecuting the suit.

10. He further submitted that although it was the discretion of the court to reinstate a suit, such discretion should be exercised judiciously based on law and fact. The party seeking to have the suit reinstated must demonstrate good faith, the application should be brought to court without unreasonable delay and the reason advanced by the applicant in failing to prosecute his matter for long should outweigh duration the prejudice that the defendant suffers.

11. He relied on the cases of **Hotwax Hotels Ltd V Nairobi City Council (2005) Eklr**, **Simion Waiti Kimani & Three Others v Equity Building Society (2010) eKLR and Alice Mumbi Nganga V Danson Chege Nganga & Another (2006) Eklr.**

12. After considering the pleadings and submissions, I find the issues for determination to be as follows;

1. Should the suit be reinstated?

2. Is the advocate for the applicant properly on record?

3. Was the respondent entitled to costs when the suit was dismissed?

4. Who is entitled to costs for this application?

***should the suit be reinstated*?**

13. In the instant case, a notice to show cause why the suit should not be dismissed was issued by the court. On the hearing date, none of the parties turned up and the court proceeded to dismiss the suit. From the record no further action was taken by the applicant until the current application.

14. It is also interesting to note that after the bill of costs was filed, the applicant's former Counsel by consent took a date for taxation before the Deputy Registrar on 8th December, 2013. On 29th October, 2013 the bill was taxed at 251.145.80. It can therefore be inferred that the applicant's counsel knew all along what was going on.

15. The explanation given by the plaintiff for not taking any step for the facilitation of the hearing of this suit is not satisfactory and neither is the explanation given for not challenging the dismissal for the last 4 1/2 years. when l apply the principles governing dismissals of suits, namely that the applicant should demonstrate good faith, bring the application within reasonable time and have a cogency reason that will not prejudice the respondent, I find that the applicant does not deserve the order sought. He has failed in prosecuting his case as required by law. This suit was filed in 2002. Before the notice to show cause was issued the matter was last in court in 2007. The court on its own motion issued a notice to show cause why the suit should not be dismissed under **order XVI Rule 2** of the old **Civil Procedure Rules** and neither the applicant nor his Counsel attended court and the suit was dismissed on **25thMay, 2009** in the absence of both parties. l am not prepared to overlook the indiscretion of the applicant in failing first to prosecute his case and secondly upon dismissal, to file his application for reinstatement within a reasonable time. The applicant's conduct in this matter precludes me from exercising my discretion in his favour.

16. I have read and considered the authorities relied on by both parties. I am more persuaded by the authorities cited by the defendant.

17. See **Simion Waitim Kimani & Three others vs Equity Building Society (supra)** In this case Koome J in Paragraphs 4 and 5 held;

4. "**The courts have discretion generally to reinstate a suit which is dismissed for non attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12th March 2002 and since 29th November 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years."**

5. **Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation……......"**

18. I also agree with the views expressed in **Alice Mumbi Nganga vs Danson Chege Nganga & Another (supra)** by **Kimaru J** where he states;

> **"This court has unfettered discretion to set aside any order which was entered *exparte.* This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application**

for dismissal was heard and determined in her absence. ……In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, *per se*, make this court to exercise its discretion in favour of an aggrieved litigant."

19. In the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR)** (*unreported)* **Waki J.A**, held at page 3 that;

" **With respect, l think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and deligence that entails such matters. Instead the applicant and his advises exhibited undesirable nonchalance, which l am not inclined to countenance''**

Is the applicant's incoming Counsel properly on record?

20. The procedure for change of Advocate after judgement is delivered is well laid out in Order 9 rule 9 of the Civil Procedure Rules 2010. " **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

21. In the current application, the incoming Counsel for the applicant filed a notice of motion dated 19th December, 2013 seeking among other orders, leave from the court to come on record.

22. The correct procedure applied by the incoming counsel should have been to make an application with notice to all the parties or to get a consent filed between the outgoing advocate and his firm.

23. Since the aforesaid outlined procedure was not followed, l find that the Firm of Orina and Company Advocates are not properly on record.

Was the respondent entitled to the costs when the suit was dismissed?

24. In the cause of reading the file and writing the ruling, l made some observations. When this suit was dismissed on 27th May 2009, the court made the following remarks; "**Case called out. Parties absent. Suit dismissed.''**

25. There was no express order of costs by the Honourable Judge. That notwithstanding the Deputy Registrar proceeded to tax a bill of costs at 251,145.80 in favour of the defendant and issued a decree dated 29th October 2013 that the plaintiff pay the defendant the aforementioned amount. A warrant of execution against the plaintiff was later issued on 9th December 2013 to execute the said amount against the plaintiff.

Section 27. (1) of the Civil procedure Act provides; "**Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; (emphasis mine) and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."**

26. Granting of costs is purely discretionary by the court. it was not right for the respondent in this case to award himself costs or assume that once the suit was dismissed "costs follow the event". The defendant had not won the case. If he wanted costs granted he should have made effort and attended the hearing on the day the case was dismissed and asked for costs or moved the court to grant such costs thereafter.

27. The Deputy Registrar also had a duty to confirm what the express Orders of the court were before proceeding with the taxation.

28. I hold the view that the defendant was wrong in filing a bill of costs, setting it down for taxation and subsequently proceeding with execution against the plaintiff for costs which were not expressly awarded by court.

29. For the above reasons I find that the Notice of Motion dated 19th December 2013 must fail. It is hereby dismissed with costs.

Dated and delivered at Kericho this 26th day of March 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Orina for the plaintiff/Applicant

Mr Mutai Julius for the Defendant/Respondent

CC:

L N WAITHAKA

JUDGE