



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 371 OF 2016

THATHINI DEVELOPMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

- VERSUS -

MOMBASA WATER & SEWERAGE COMPANY.....1ST DEFENDANT/RESPONDENT

MOMBASA WATER SERVICE BOARD.....2ND DEFENDANT/RESPONDENT

RULING

I. Introduction

1. The Notice of Motion application for determination by this Honorable Court is the one dated 13th September 2021. It is by the Plaintiff/Applicant made under the provisions of Sections 1A, 1B, 3A 63 (e) of the Civil Procedure Act and Order 1x A Rule 10 (Sic) of the Civil Procedure Rules, 2010.

II. The Plaintiff/Applicant's case

2. It seeks to set aside the orders of this Court issued on 7th September 2020, which dismissed the suit by the Plaintiff for want of prosecution. The Plaintiff/Applicant also in the given circumstances seeks to have the suit reinstated for hearing and determination on merit. On 20th September, 2021 the Learned Counsel for the Plaintiff/Applicant, Mr. Mwaniki Gitahi swore the 11 Paragraphed Supporting Affidavit dated and sworn On 13th September, 2021 and attached two (2) annexures Marked as "MG 1 to 2" annexed thereto. He claimed that he was never served with the Notice to show cause by the court. The deponent annexed the Notice to Show Cause that was served to his email address, which was for a different suit ELC 370 of 2016 and where the Plaintiff apparently has sued the Kenya Power & Lightning Company Limited and not the current Defendant in this case. He maintained that he never received the Notice to Show Cause for this suit and court ought to set aside the orders dismissing the suit based on a different Notice.

3. The Learned Counsel also annexed several letter written and exchanged between the law firm of Messrs. Muturi Gakuo Advocates and himself and to state that the parties were involved in an out of Court negotiations with an intention of settling the matter amicably. The Learned Counsel pleaded with court to find that the orders by Court on of 7th September 2020 were based on an oversight of the court that should not be visited upon an innocent litigant.

III. The 2nd Defendant/Respondent's case.

4. The 2nd Defendant/Respondent herein opposed the application based on filed a five (5) pointer Grounds of Opposition dated 12th October 2021 by the law firm of Messrs. Muturi Gakuo & Kibaba Advocates. Mr. Oruta Counsel argued that the application was an abuse of the court process and ought to fail, that the reasons given for reinstatement are unsatisfactory and unfounded since the suit was dismissed for want to

prosecution. He contended that the application was a waste of court's time as the issues raised therein were misguided and predicated on a wrong premise.

IV. Submissions

5. On 20th January, 2022 while all the parties were in Court, they were directed to have the Notice of Motion canvassed by way of written Submissions. Pursuant to that, only Plaintiff/Applicant herein obliged and the same was reserved for ruling.

A. The Plaintiff's written Submissions

6. On 25th October 2021, the Learned Counsel for the Plaintiff/Applicant herein filed their written submissions in support of the application. He submitted that the court has the discretion to set aside ex parte proceedings in order to do justice to the parties before it. The Counsel submitted that the Plaintiff/Applicant had demonstrated to the court that he had a good cause not to attend court as the matter that was contained in the Notice to show cause was never listed on the date that this matter was dismissed. He pointed out to Court that the notice to show cause that was served upon the Plaintiff/Applicant was for a different file, a sufficient cause for court to consider and allow this application.

7. The Learned Counsel submitted on sufficient case, he argued that the applicant has demonstrated to court that he was prevented from attending court by a sufficient cause, which is being served with a notice to show cause for a different matter and not the present one. He submitted that sufficient cause is a question of facts and this court ought to find that the applicant could not be blamed for his absenteeism when the matter came up for hearing. He reminded court that the parties were negotiating for an out of court settlement, implying that the applicant was keen on having the matter resolved; had a correct notice to show cause been served on him, he would have appeared in court and explained to court what happened.

V. Analysis and Determination

8. I have read through the pleadings, the written submissions, the cited authorities and considered the relevant provisions of the law in this matter. In order to arrive to an informed, just and fair decision the issues before court for determination are:-

a) Whether court ought to set aside the order that dismissed with suit for want of prosecution.

b) Whether the Plaintiff/Applicant is entitled to the relief sought.

c) Who will bear the cost of the Notice of Motion dated 25th March, 2021.

ISSUE a). Whether court ought to set aside the order that dismissed with suit for want of prosecution.

9. The Plaintiff/Applicant cited the provisions of Sections 1A, 1B, 3A 63 (e) of the Civil Procedure Act and Order 1x A Rule 10 (sic) of the Civil Procedure Rules, the application did not seek any prayer relating to the provisions cited, save for the general provisions of the Civil Procedure Act. This Court is still to decipher which provisions of law this are as the same are strange on the face value. Where there are express provisions of the law on a cause of action brought before court through an application, litigants should cite the relevant provisions of the law. Citing irrelevant provisions of the law especially from the Civil Procedure Rules is a classic example of poor drafting of pleadings and lack of attention to detail. Parties have to be conscious and deliberate in specifying in the applications with details and precision the law they seek to rely on as well as the prayers sought. I do call upon litigating counsel to uphold professionalism and draft pleadings that are of quality and avoid unnecessary carelessness.

10. When a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of **Order 12 Rule 7 of the Civil Procedure Rules. It provides that, "Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just."**

The Legal substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and

concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – **Justice delayed is justice denied**” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable May in its discretion dismiss the action straight away.

11. Additionally, the Provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules provides, *inter alia*:-

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).

3). **any party to the suit may apply for its dismissal as provided in Sub-rule 1”.**

12. In order for these legal principles to be applicable the following need to be demonstrated:-

(a) That no application has been made or step taken by either party for one (1) year from the time of filing the suit and

(b) That the Respondents have failed to comply with the directions of the court clearly.

Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously.

In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words if the delay is satisfied with the Plaintiff’s excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.

This court on the legal ration of Order 17 (2) (3) of the Civil Procedure Rules, 2010 relies on the decision of “**Investment Limited –Versus - G4s Security Services Limited (2015) eKLR where court held :- “This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.**

Therefore, this Honourable Court shall apply this test in the instant case

ISSUE b). Whether the Plaintiff/Applicant is entitled to the relief sought.

13. From the facts and the legal principles founded on Order 17 Rule 2 (3) of the Civil Procedure Rules 2010, this Honorable court takes Judicial Notice to the fact that old and delayed matters still pending before this court are now being addressed so mechanically. These cases seem to have stagnated and stalled at the behest of the parties. In the recent past, cognisance will be taken that these category of cases are having Notices to show cause under Order 17 Rule 2 (1) of the Civil Procedure Rules as a wake up call being issued and listed in the daily cause list and the judges service week activity all intended to clear them from unnecessarily clogging the Judiciary system. The decision is working marvelously and borne positive robust results whatsoever. One such cases is that of the Plaintiff/Applicant herein.

The circumstances that led to the dismissal of the suit by the Plaintiff are that, the same was filed on 1st December 2016 together with an application dated 30th November 2016 seeking temporary injunctive orders. On 20th March 2018 in the absence of both parties, the court allowed the application restraining the Defendants from trespassing and laying huge pipes on the suit land until the suit is heard and determined.

14. From then on, nothing took place until 7th September 2020 which is close to two (2) years when the case came for mention to show cause why the suit should not be dismissed for want of prosecution. Despite of the notices having been served, neither of the party appeared in court. In the given circumstances the Honorable Court was left with no alternative but to have the suit dismissed for want of prosecution.

The Plaintiff/Applicant argued that he was served with the wrong notice hence his inability to attend court. He maintained that he was served with a notice in ELC 370 of 2016 and not ELC 371 of 2016, which is this present case. Be that as it may and indeed acknowledging the error caused by the Court in sending a wrong Notice to show cause but still, the Honorable Court finds the reason given by the Plaintiff/Applicant for failing to attend court as inexcusable. When this Honorable Court peruses the Notice to show cause issued on 24th July 2020, I do note that though it has been indicated as ELC 370 of 2016 and not ELC 317 of 2016, the Plaintiff therein is the same as the Plaintiff herein save for the Defendant who is Kenya Power & Lightening Co. Limited. The firm of Mwaniki Gitahi & Partners Advocates is also on record for the Plaintiff therein.

15. Undoubtedly the Notice to show cause was directed to the Plaintiff/Applicant and not to anyone else, the mistake of indicating ELC 370 of 2016 as opposed to ELC 371 of 2016 cannot be the reason why the Plaintiff/Applicant failed to attend court. The Plaintiff/Applicant is the same in both suits and Counsel is still the same. The Plaintiff/Applicant ought to have been anxious enough to know the status of his suits, since he was the Plaintiff in both.

It is the duty of court to do justice between the parties, Section 1B of Civil Procedure Act, Cap. 21 provides that there should be just determination, effective and timely disposal of proceedings and effective use of judicial time and resources. It is upon this duty of overriding objective does this court, take time and puts in resources to dismiss suits that have been unprosecuted for more than one year to ensure that other active cases have ample time to be determined. The court will not allow matters to be filed and whereby once the parties obtain interim orders then proceed to keep the file idle. This causes the clogging the justice system and unacceptable for nothing.

16. In the case of **Josphat Oginda Sasia – Versus - Wycliffe Wabwile Kiiya [2022] eKLR, the court held “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 – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR).”**

17. The Counsel for the Plaintiff/Applicant has pleaded in the supporting affidavit that the parties have been negotiating with the aim of settling the suit out of court. However they have been looking for the file to take a mention date but released the same was dismissed for want of prosecution. In the case of **“Ivita – Versus - 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”.

18. The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion. The reason advanced by the Plaintiff/Applicant that parties are negotiating a settlement cannot be reason enough as to why the he did not inform court of the same.

19. Once the Plaintiff/Applicant was served with the Notice, he ought to have anxious enough to proceed and fix the matter for mention in order to inform court of the said settlement negotiations. From the court proceedings, the Plaintiff/Applicant has never visited the court registry even once to fix the matter for mention or even to comply with Order 11 of the Civil Procedure Rules. It appears to me all the Plaintiff/Applicant was interested with all along were the interim orders that were granted by court on 20th March 2018 and resulted to being indolent.

20. The Plaintiff/Applicant's counsel claimed to be searching for the file at the registry since the beginning of 2021 but it was missing until they were able to trace it a day before they drafted the application, which would have been 12th September 2021. Another reason that cannot warrant court to set aside the order of dismissal, on the ground that this application was brought one year after the orders were issued. The excuse that the file was missing is rather weak, given that there was been no letter produced by the Plaintiff/Applicant to demonstrate they were looking for the same at the registry.

21. The numerical and grammatical errors in citing the case cannot be used as a scape goat by the Plaintiff/Applicant to seek the setting aside of dismissal orders. The Plaintiff/Applicant and his Counsel were not keen on following up on the suit or taking up any action to prosecute the suit more than four years as a result they clogged the justice system .

ISSUE No. C. Who will bear the cost of the Notice of Motion dated 25th march, 2021.

22. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Plaintiff/Applicant has partially succeeded with certain pre – conditions to be fulfilled in their Notice of Motion application dated 13th September 2021, they should bear the costs of the application to the Defendants/Respondents accordingly.

Conclusion and Disposition.

23. I have no doubt in my mind that the application dated 13th September 2021 ought to be dismissed with costs to the Defendants/Respondents but nonetheless in the interest of Justice equity and conscience to have the Plaintiff/Applicant. First and foremost the following conditions.

(a) **THAT** the Notice of Motion application dated 13th September, 2021 be and is hereby allowed but only upon fulfillment of these conditions.

(b) **THAT** the Plaintiff be and is hereby granted ninety (90) days leave to have fixed and had the suit via a Plaint dated 30th November, 2016 and filed on 1st December, 2018 to be heard and finally determined.

(c) **THAT** Should the Plaintiff fail to have taken the step stated here above Under Clause (b) of this Order on or before 31st July, 2022 the Notice of Motion application dated 13th September, 2021 will automatically and by operation of law stand dismissed for want of prosecution without any further reference to this court.

(d) **THAT** the costs of this Notice of Motion application to be borne by the Plaintiff to the 2nd, Respondent who participated in this application.

21. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Hassan, Court Assistant.

Mr. Mwaniki Advocate for the Plaintiff/Applicant.

No appearance for the 1st Defendant/Respondent.

No appearance for the 2nd Defendant/Respondent.

No appearance for the 3rd Defendant/Respondent.