



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL COURT OF KENYA AT SIAYA

ELC NO.38 OF 2021

ACHIENG AJUALA.....1ST PLAINTIFF

ALICE OGOLA OGUNDO.....2ND PLAINTIFF

VERSUS

JOSEPH ONYANGO OBUOLO.....DEFENDANT

RULING

Introduction

1. By a plaint dated 8/12/2016, the plaintiffs filed suit against the defendant whereby they sought several orders: The defendant do vacate a portion of land parcel number **South Gem/Ndori/1200[suit property]**; Prohibit and restrain the defendant from further building, entering or interfering with the suit property and costs of the suit and interest. Together with the plaint, the plaintiffs filed a notice of motion seeking restraining orders.
2. The defendant who was acting in person entered appearance and filed a defence dated 6/01/2017 in which he denied the plaintiffs' claim.
3. After filing the suit, the plaintiffs did not take any action to prosecute it and this prompted the defendant to file a motion dated 8/02/2018 which sought to dismiss the plaintiffs' suit for want of prosecution.
4. When the defendant's motion came up for hearing, the plaintiffs sought to transfer the suit to Bondo law courts for hearing and determination and upon an objection by the defendant, the court gave the plaintiffs one last chance to file a replying affidavit within 7 days; which they did not.
5. When the matter came up for hearing on 5/3/2019, the plaintiffs' suit was dismissed pursuant to the provisions of **Order 17 Rule 2** of the **Civil Procedure Rules**.
6. Close to two years later, the defendant filed his bill of costs dated 26/07/2021 which triggered the plaintiffs to file the instant motion dated 22/11/2021 which was filed pursuant to **Sections 1A, 1B, and 3A** of the **Civil Procedure Act, Order 45 Rule 1** and **Order 51** of the **Civil Procedure Rules**.

The plaintiff's case

7. Prayer 1 is spent while prayer 2 has been overtaken by events and the only reliefs pending determination are; (i) The court's orders issued on 5/03/2019 be set aside and, (ii) The plaintiffs' suit be reinstated.
8. The motion is premised on the grounds set out on the face of the motion and supported by an affidavit dated 22/11/2021 and sworn by both plaintiffs. The main ground is that their then counsel one **Dola Indidis** had severely misled them on the status of the suit and that they only became privy that their suit had been dismissed for want of prosecution when they were served with a bill of costs.

The defendant's case

9. Despite service, the defendant neither filed a response nor written submissions. Though the application is unopposed, it has to be determined on its own merits.

The plaintiff's submissions

10. The plaintiffs filed written submissions dated 25/11/2021. In their submissions, they identified one issue as falling for determination: Whether the plaintiffs' suit should be reinstated.

11. They submitted that this court has discretion to set aside any order issued *ex parte* as long as there is sufficient cause shown for it to exercise such discretion. They asserted that their previous advocate was solely to blame for their failure to prosecute the suit. They stated that they had always wanted to pursue their case and that they should not be driven away from the seat of justice. They placed reliance on the case of **Martha Wangari Karua v Independent Electoral and Boundaries Commission & others, Nyeri Civil Appeal Number 1 of 2017** which held that rules of natural justice require that the court should not drive a litigant from the seat of justice without a hearing however weak his or her case may be. They also placed reliance on the case of **Rukenya Buuri v M'arimi Minyora & 2 others [2018] eKLR** which stated that a mistake or oversight of counsel should not be visited upon a diligent litigant. The plaintiffs also cited the oft cited case of **Philip Chemwolo & another v Augustine Kubende [1982-88] 1 KAR 103** that stated that unless there is fraud or intention to overreach, a case should be reinstated.

12. They submitted that the defendant would not be prejudiced by the reinstatement of the suit.

Analysis and determination

13. I have carefully considered the plaintiffs' motion, the grounds in support, the supporting affidavit and submissions and the only issue falling for determination is whether the plaintiffs have demonstrated sufficient grounds for reinstatement of the suit.

14. **Sections 1A and 3A of the Civil Procedure Act** breathes life into **Article 159(1)(b) of the Constitution** with underpinnings that civil cases should be conducted in a manner that are just, expeditious, proportionate and in a manner that ensures affordable resolution of civil disputes.

15. The case of **Ivita -vs- Kyumbu (1984) KLR 441** cited by the Plaintiffs held thus;

“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 disappearance of human memory resulting from lapse of time.” [Emphasis added]

16. The plaintiffs filed this motion close to 3 years after the case was dismissed. This court considers this period of time as inordinate. The plaintiffs' have asserted that the main reason they did not prosecute their suit was because their then Counsel failed to inform them of the various court sessions. Save for purported visits to their advocates offices which they have failed to furnish evidence in support of this assertion, they have not proffered any information on the personal steps that they had undertaken to ensure that their suit was prosecuted. A case belongs to a litigant and not his advocates. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**, the Court of Appeal held thus;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of litigation...parties have responsibility to show interest in and follow up their cases...”

17. Though not mentioned in their submissions, the plaintiffs availed copies of two authorities in their submissions; **Edney Adaka Ismail v Equity Bank Limited [2014]** and **Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others [2018] eKLR**. In the two decisions, the court was of the view that parties should not merely blame their advocates for non prosecution of their cases but should be proactive in prosecuting them.

18. In upshot, it is my finding that the motion is not merited. It is trite law that costs follow the event and because the defendant did not participate in these proceedings, I will not award costs to him.

19. Ultimately, I make the following disposal orders;

a) The Notice of Motion dated 22/11/2021 is hereby dismissed with no orders as to costs.

20. It is so ordered.

RULING DELIVERED VIRTUALLY. DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MARCH 2022

In the Presence of:

N/A for the parties

Court assistant: Ishmael Orwa

HON. A. Y. KOROSS

JUDGE

