



REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 60 of 2001

NICHOLAS MAKHANU CHERONGO.....PLAINTIFF

VERSUS

JOSEPH MATIFARI SITUMA.....DEFENDANT

RULING

The applicant has begun his notice of motion dated 16th August 2012 sought orders;

- i). The honourable court be pleased to set aside, vary, and/or review orders made on 6th March 2009.
- ii). The said suit be reinstated forthwith.
- iii). The costs of the application be provided for.

The application is supported by the grounds on the face of it and on the affidavit sworn by Nicholas Makhanu Cherongo. There are two main grounds relied by the applicant. First that notice of dismissal was not served on the applicant and secondly mistake of counsel should not be visited on client and lastly the respondent will not suffer any prejudice.

In his supporting affidavit, the applicant avers that he was advised by his advocates on record then Mrs. Omagwa Angima & Co. advocate to wait the outcome of appeal lodged by the respondent before prosecuting this matter. The advocate also advised him to look for money to proceed with the case but he was unable to get finances on time due to ill-health and school fees demands.

He was only able to get money after the suit was dismissed. That he also knew for a fact that the said firm was not served with notice of dismissal. He also pleaded that mistake of counsel should not be visited on him.

The respondent opposed the application and filed a replying affidavit. At paragraph 4 of his affidavit, he states that the application is incompetent as the same is filed by a law firm that is not on record and therefore is a stranger to the proceedings. He contends that the suit was filed in 2001 and dismissed in 2009 properly so as the applicant had not taken any steps to prosecute the matter. He averred at paragraph 8 that the applicant has not annexed an affidavit to buttress factual matters alleged in paragraph 6 & 9 of the supporting affidavit. According to the respondent, the applicant is not being candid and there is no valid reason to set aside the order of dismissal.

The suit was dismissed on 6th March 2009 by the deputy registrar for want of prosecution. On that date, there was representation for the defendant/respondent and no appearance for the plaintiff/applicant.

Is the applicant entitled to be granted this courts discretion?

The applicant avers that the reasons he did not have his case prosecuted between 2001 and 2009 were two; the lack of finances and pendency of appeal no. 351 of 2002. On the later reason, there was no stay order annexed to demonstrate the proceedings were stayed. Therefore this is not excusable as the appeal emanated from a different file even though the subject matter was the same.

On the second aspect of finances, he has annexed copies of receipts for school fees for his kids. He has however not annexed any correspondence from his advocates demanding fee or threatening not to represent him, unless fee is paid. Secondly the aspect of ill-health does not help his case much. The treatment record shows general diseases such as cough and malaria that do not hinder people from carrying on their activities. The illness dates are also spread out – 2001, 2004, and 2007 and at no instance he was admitted.

The applicant only disclosed to this court that when he got finances, the suit was already dismissed. He does not indicate when this was. His application is filed on 16th August 2012, three years after the dismissal. He does not inform this court why the delay in filling the application to set aside the orders. This court can only conclude that this was due to lack of interest in his case. The respondents appeal was dismissed in July 2007 and if he did not prosecute this matter because of the pendency of the appeal, no forthright reasons can be obtained from his explanation in his motion or affidavit why he did nothing between July 2007 and March 2009 when the case was dismissed. The treatment records shows treatment administered lastly on him on 17th July 2007. There are no treatment notes annexed after this date. The applicant has been indolent.

In the case of Alice Mumbi (suing as personal representative of Joseph Nganga – deceased) vs. Danson Nganga & another [2006] e KLR Justice L. Kimaru quoted the case of Peter Kinyari Kihumba Vs. Gladys Wanyiri Migwi & another C.A Civil Appeal no. 121 of 2005 where the court of appeal held,

With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one to blame but themselves. The plea they made is that, this is a land matter, but the simple answer is that even in land matter, there must be an end to litigation. It is for this reason the land matter should have been held within sensitivity and diligence that entails such matters”.

Justice Kimaru proceeded to say,

“similarly in this case, I am not prepared to overlook the indiscretion of the applicant in failing to diligently prosecute her case just because the matter in dispute is land. The applicants conduct in this matter precluded me from exercising my discretion in her favour.

Her application to set aside the order of dismissal therefore fails.”

I do hold that the inaction of the applicant in the present suit therefore does not earn the courts discretion and the application therefore fails.

I would also like to state at this point that the firm of Njalale & Co. advocates is improperly on record. They purported to act for the applicant without filing notice of change of advocates nor filing application to seek leave of the court to so act, judgment having been entered against the applicant by way of order of dismissal of suit. This application is therefore dismissed.

Each party shall bear their respective costs.

RULING DATED, SIGNED, READ and DELIVERED in open court this 25th day of March 2013.

A. OMOLLO

JUDGE.