



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL SUIT NO. 322 OF 2009

ERIC OLUOCH OLELE PLAINTIFF

VERSUS

KENNETH O. OBAE DEFENDANT

RULING

The court in this matter on 11th December 2009 delivered a ruling granting an injunction in favour of the Plaintiff restraining the Defendant from in any manner dealing with L.R. NO. 21190/111/119. The Defendant's application for stay of execution of the orders emanating from the court's order granting the injunction pending the hearing and determination of the appeal lodged in the court of Appeal was dismissed by the court on the 27th April 2010.

The parties did not take any further action towards the prosecution of the suit for more than one year and the court on its own motion on 22nd December 2011 issued a notice to the parties to show cause why the suit should not be dismissed for want of prosecution. The notice to show cause was fixed for hearing on 3rd February 2012.

At the hearing of the Notice to show cause on 3rd February 2012 no party attended and Hon. Justice Mwilu proceeded to dismiss the suit. On 15/2/2012 the Plaintiff filed the instant Notice of motion application seeking orders that the Honourable court be pleased to reinstate the suit and that the interim orders be reinstated. The reason advanced by the Plaintiff's advocate for none appearance on the date for the Notice to show cause is that he had requested another advocate to hold his brief but the advocate left the court room before this case was called out. The plaintiff/applicant avers that he will suffer prejudice if the application is not allowed as there are orders of injunction pending in this suit. The plaintiff further states that the reason why the suit has not been placed for hearing is because the respondent appealed the ruling of the court dated 11/12/2009 and they successfully got orders of stay of proceedings in this suit pending the hearing and determination of the appeal. The plaintiff/Application is supported on the grounds contained in the undated affidavit of appeal **Alloys Kwengu, Advocate** filed in court on 15/2/2012.

The Respondent opposed the application and in the respondent's filed submissions he, charges that the applicant's application is founded on misrepresentations and misleading information. The Respondent states that the Applicant has not offered any viable reason for failure to attend the court to explain the laxity in prosecuting the suit. The reasons advanced by the Plaintiff are made up and are intended to mislead the court into reinstating the suit when no grounds exist to enable the court to do so.

The Plaintiff/Applicant in his submission repeats the averments in the affidavit in support of the application and it does appear that the main ground that the applicant is relying on is that there was an

appeal pending before the court of appeal which he argues prevented him from prosecuting the suit. It is this reason that the applicant states was to be advanced before the court when the matter came up for notice to show cause except that the advocate whom the applicant's Advocate had briefed to hold his brief was not in the court room when the matter was called out.

The court has discretion to reinstate a suit that has been dismissed such as the Plaintiff's instant suit but such discretion cannot be exercised in a vacuum. In the circumstances of the present application the applicant is obligated to satisfy the court that he was prevented from attending the court when the matter came up for hearing of the Notice to show cause by sufficient cause and that there was a reasonable explanation for the delay and/or non prosecution of the suit.

Firstly, the reason the plaintiff offered for not attending the court on 3rd February 2012 is that the Advocate on record had requested another advocate to hold his brief but the advocate left the court room before this case was called out. If there was such an advocate his/her name has not been given and neither has any explanation been given as to why he/she left the court room before the matter had been called out if he/she had been briefed and had accepted to take the brief on behalf of the Plaintiff's advocate. The alleged advocate who had been instructed has not been requested to furnish an affidavit to explain his conduct on the day the matter came up for notice to show cause to enable the court to determine whether there was any viable reason as to why he was not present in court when the matter was called out.

Even if the advocate were present in court on 3rd February 2012 when the notice to show cause came up for hearing he was expected to give a reasonable explanation as to why no action had been taken to prosecute the suit for well over 1 year. The explanation that the applicant states was to be offered is that there was a pending appeal and there was an order staying proceedings in the suit. This explanation was simply untenable as the record does not show there was search an order. It is instructive that the applicant does not give the date when such an order was given and by which court and does not exhibit any such order of stay. To the contrary the record shows that **Hon. Lady Justice Sitati** dismissed the Defendants application for stay of proceedings in this suit pending the outcome of the appeal on 27th day of April 2010 meaning that there was nothing to hinder the suit from proceeding. The Plaintiff thus has predicated his application on misleading information perhaps with the objective of influencing the court to reinstate the dismissed suit. This coming from an advocate who is an officer of the court who has sworn to assist the courts in the administration of justice is highly objectionable.

One gets, the impression that the Plaintiff was only interested in obtaining the order of injunction and as soon as the same was in place he forgot all about the suit and only got alarmed when the suit was dismissed ostensibly because the dismissal also meant that the injunction had disappeared. An order of interim injunction is but intended to act as a stop gap measure to allow parties to fortify and establish their rights through prosecution of the suit whilst the suit property is not exposed to wastage, disposal and/or alienation. An interlocutory injunction is only intended to serve that purpose and that is the reason why presently under the provisions of order 40 of the Civil Procedure Rules an injunction is granted to last not for more than 1 year unless it is extended by the court for good cause.

In the circumstances of this case the Plaintiff was complacent and casual in the manner he handled the suit and I am not persuaded he has furnished any or any valid or reasonable reason for not attending the court to show cause on 3/2/2012 and further I am not persuaded the reason proffered for the delay in the prosecution of the plaintiff's suit is reasonable. There was no order staying the proceedings in this suit and an appeal of itself cannot operate as a stay of proceedings. The information given by the applicant that there was an order staying proceedings in this suit was misleading and there was no basis for the same.

In the premises there is no basis upon which I can exercise my discretion to reinstate the suit dismissed by Hon. Justice Mwilu and I accordingly dismiss the Plaintiff's application dated 6th February 2012 with costs to the defendant.

Ruling dated and delivered at Nairobi this 17th day of November 2013.

J.M. MUTUNGI

JUDGE

RULING READ IN OPEN COURT IN PRESENCE OF :

..... **PLAINTIFF**

..... **DEFENDANT**