



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 1451 of 2007

SAMUEL NDUNG'U KIMANI.....PLAINTIFF/APPLICANT

VERSUS

ROBERT GIKURA NJOROGE.....DEFENDANT/RESPONDENT

R U L I N G

1. The application before me is the Plaintiff's Notice of Motion dated 15/10/2008 by which the Applicant seeks orders that the orders of this Honourable Court dismissing the Plaintiff's suit for want of prosecution be reviewed and/or set aside and that the suit be reinstated for hearing. The Applicant also prays that the costs of this application be provided for. The application, which is expressed to be brought under Order XLIV Rule 1, Order L Rule 1 of the Civil Procedure Rules, Ss 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law is premised on the following grounds:-

- (a) ***THAT there was breakdown of communication between the plaintiff and Advocate on record then.***
- (b) ***THAT the delay/non prosecution of the matter was due to mistake of the Advocate on record then which mistake ought not to be visited upon an innocent client.***
- (c) ***THAT the Applicant has all along been desirous of prosecuting his matter and has never failed to attend court.***
- (d) ***THAT the Plaintiff stands to suffer irreparable harm/prejudice if the suit is not reinstated as he will be rendered destitute.***
- (e) ***THAT no prejudice shall cause to the Defendant who has not been in actual possession of the suit land from time immemorial. (sic)***
- (f) ***THAT its for the best interest of justice that the orders herein are sought.***

2. The application is also premised on the sworn affidavit of Samuel Ndung'u Kimani dated 15/10/2008. The Applicant says his suit was filed through the firm of M/s Njomo Njenga & Co. Advocates whose sole partner passed away sometime after the suit, by way of Originating Summons, was filed. That thereafter the Applicant instructed the firm of M/s Baiya & Co. Advocates to represent him in the matter, and that it was only after he instructed the new advocates that he discovered that his Originating Summons was dismissed for want of prosecution on 16/01/2007. The Applicant says that he should not be punished for the mistakes of his former advocate who never updated him even after the Originating Summons had been dismissed. The deponent further says that he has always been desirous of

having his case heard and determined. The deponent says that unless the orders sought are granted, he stands to suffer irreparable loss and damage.

3. The application is opposed. The Replying Affidavit is sworn by **Robert Gikura Njoroge**, and is dated 26/11/2008. The deponent says that the Applicant failed to answer the Defendant's application filed in court on 20/04/2006 seeking to dismiss the Plaintiff's suit for want of prosecution. The deponent also says that when the application came up for hearing on 16/01/2007, both the Applicant and his counsel, Mr. Njomo Njenga did not turn up in court and consequently the Plaintiff's suit was dismissed for want of prosecution. The deponent accuses the Applicant of inordinate delay running from 20/01/2008 to 15/10/2008 when the Applicant brought the present application. According to the deponent, counsel for the Applicant, Mr. Njomo Njenga died in late July 2008, so that even if that death of counsel were the excuse for the dismissal of the Applicants suit, there is no explanation by the Applicant for the long and inordinate delay between the advocate's death and the filing of the instant application.

4. At the interpartes hearing, **Mrs. Fundi**, counsel, duly instructed by the firm of **Njoroge Baiya & Company Advocates** appeared for the Applicant, while Mr. Gikonyo, counsel duly instructed by **M/s J. Ngaii Gikonyo & Company Advocates**, appeared for the Respondent. Counsel for the Applicant said that the Applicant's main contention is that the breakdown in communication between the Applicant and his former advocates gave rise to the unfortunate situation in which the Applicant finds himself. Learned counsel for the Applicant also argues that unless the orders sought are granted, the Applicant stands to suffer irreparable harm and prejudice.

5. In opposition to the application, Mr. Gikonyo, counsel appearing for the Respondent submitted that the Applicant's application is fatally defective on grounds that the same should have been brought under Order IXB and not the orders cited by the Applicant. He also submitted that since the Applicant did not participate in the application giving rise to the dismissal orders, he should not now apply for any orders on this application. Counsel also urged this Honourable Court not to grant the order for review on the further ground that the order sought to be reviewed and or set aside has not been annexed to the Applicants' application. In his further submissions, counsel for the Respondent submitted that the Applicant did not bother to reply to the application seeking to have his suit dismissed for want of prosecution and that in any event, the Applicant was fully aware of the fact that his suit had been dismissed as per annexure marked "**RGNI**" to the Replying Affidavit of Robert Gikura Njoroge dated 26/11/2008.

6. I have looked at the annexure marked "RGN 1", which is a copy of the plaint in **HCCC No. 1452 of 2005 – Robert Gikura Njoroge –vs- Samuel Ndungu Kimani and Samuel Ngaruiya Kimani**. At paragraph 20 of the plaint, the Plaintiff therein averred as follows:-

“There is no other suit pending and there have been no previous proceeding in any court between the Plaintiff and the Defendants over the same subject matter save that the Defendant has filed Nairobi HCCC No.1249 of 2004 (O.S) against the Plaintiff where he seeks ownership of T.457 by way of adverse possession.”

If this is the paragraph upon which the Defendant relies in his assertion that the Applicant herein knew that his suit had been dismissed, then I am unable to comprehend the Defendant's arguments on this point. Paragraph 20 of the plaint in **HCCC No.1452 of 2005** thus only makes reference to **Nairobi HCCC No.1249 of 2004 (O.S) – Samuel Ndungu Kimani –vs- Robert Gikura Njoroge**.

7. Now the question that arises is whether the Applicant has made out a case for the orders sought. While he says that he has made out such a case, the Defendant thinks that the application has no life in it, having been brought under the wrong provisions of the law. The Applicant's counsel, in response to the last argument by counsel for the Respondent says that if there is any defect in the application, which is denied, then such defect is curable under the rules, though Mrs. Fundi was unable to quote the section of the Civil Procedure Act or rule of the Civil Procedure Rules under which she was making the assertion.

8. From the record, the main contention of the Applicant is that his former advocate did not keep him informed of what had transpired, hence his (Applicant's) inability to deal with his matter appropriately. I note from the pleadings that it is not denied that Mr. Njomo Njoroge, advocate for the Applicant died sometime in July 2008. The only contention by the Respondent is that the Applicant has not explained what he was doing between February and July 2008 when Mr. Njomo died and between July 2008 when Mr. Njomo died and the filing of the application in October 2008.

9. I have carefully considered the application as filed the grounds in support and those against. I have also considered the rules and the provisions of the Civil Procedure Act. I am persuaded that on a balance of probability, the Applicant has satisfied me that the dismissal order ought to be set aside. Though it is not clear in what circumstances Mr. Njomo died, I am persuaded that the death of Mr. Njomo may have had a part to play in creating the predicament in which the Applicant has found himself, and thus constituted sufficient cause for the review sought as provided under Order XLIV Rule 1(1) of the Civil Procedure Rules.

10. Before I make the final orders however, learned counsel for the Applicant says that this application should have been brought under Order IXB of the Civil Procedure Rules if the Applicant had chosen his path, as indeed he should have done under rule 8 thereof, the application would have come by way of Chamber Summons and not by way of Notice of Motion. On the other hand, Order XLIV deals with applications for Review of judgments/orders. An application under this Order would be by way of Notice of Motion as provided by Order L Rule I of the Civil Procedure Rules. I think that the Applicant in this case seems to have been confused (through his advocate), in terms of the right order under which his application was to be filed. It is however clear from the body of the application that the Applicants plea to the court was to have the dismissal orders set aside so that he could pursue his claim on its merit. It is on the above understanding that I would agree with counsel for the Applicant that the impropriety in bringing this application under Order XLIV and by way of Notice of Motion is curable by virtue of the provisions of Order L Rule 12 of the Civil Procedure Rules which reads:-

“Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

11. It is thus provided that mere technicalities and want of form should not defeat a pleading, and if this be the only problem, with the Applicant's application, then I would be obligated to give the Applicant the benefit of the doubt

12. There is another issue that has been raised by the Respondent against the Applicant's application, and that is that this application should be dismissed on grounds that the order which is sought to be reviewed and/or set aside has not been annexed to this application. It is now an accepted judicial procedure that any application for review must be accompanied by the order which is sought to be reviewed and or set aside. The Applicant in this case made no effort whatsoever to annex the order complained of to his application. It is not the duty of this court to turn the pages of the court file to find material which the Applicant should have placed before it. On this ground therefore, I would dismiss the Applicant's application.

13. The other issue that arises for determination is whether the Applicant brought his application without unreasonable delay. Taking all the circumstances of this case into account, I do not think that the Applicant acted diligently in this case. The suit was dismissed for want of prosecution on 16/01/2007. The Applicant is careful not to include any dates in his supporting affidavit as to when certain events happened. But if it is true that Mr. Njomo died in July 2008, why did the Applicant take another 3 (three) months before bringing the instant application to court. My view of the matter is that the Applicant has avoided mentioning dates because such dates would be against him. I have therefore drawn the inference that the Applicant has not come to court with clean hands. I have also concluded that the Applicant has been indolent.

14. For the reasons given above, I hereby dismiss the Applicant's application dated 15/10/2008 and filed

in court on the same day. Costs of this application shall be paid to the Respondent.

It is so ordered.

Dated and delivered in Nairobi this 4th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

M/s Njoroge Baiya (absent) for the Plaintiff/Applicant

Mr. Onyango holding brief for Gikonyo for the Defendant/ Respondent

Weche – Court clerk