



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC SUIT NO. 173 OF 2017

**JOSEPH MAKAU NDAMBUKI (Suing as legal representative of the late
NDAMBUKI KIAMBA).....PLAINTIFF/APPLICANT**

VERSUS

BENEDETTA NDULU NDETO.....1ST DEFENDANT/RESPONDENT

DAVID KILUVA NGOZI2ND DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff/Applicant's Notice of Motion application dated 24th July, 2020 and filed in court on 24th July, 2020 for orders: -

1. That this court's orders dismissing the Plaintiff's suit on 28/02/2018 be reviewed and/or set aside and the suit be reinstated.

2. That costs of and incidental to this application be provided for.

2. The application is predicated on the grounds on its face and is supported by the Supporting and further affidavits sworn by Joseph Makau Ndambuki, the Plaintiff/Applicant herein, on 24th July, 2020 and 16th November, 2020 respectively.

3. The application is opposed by the 2nd Defendant/Respondent vide his replying affidavit sworn at Machakos on 10th September, 2020 and filed in court on 23rd September, 2020.

4. The application was canvassed by way of written submissions.

5. The Plaintiff/Applicant has in paragraphs 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 of the Supporting Affidavit deposed *inter alia* that the Plaintiff/Applicant instructed M/S Kingoo Wanjua & Co. Advocates to act for him in this case, that on 28/02/2018 when this matter was coming for hearing the Plaintiff/Applicant was informed an advocate had been sent by his then advocate on record to represent him, that the Plaintiff/Applicant's counsel on record by then inadvertently thought what was for hearing was an application which they were not opposed to at that time, that when the matter was mentioned, it transpired that the matter was actually coming up for the main hearing, that the Plaintiff/Applicant was informed by advocate on record, which information he verily believe to be true, that the counsel holding brief was duty bound to inform his then advocate on record on what had transpired and seek further instructions or clarification on the matter, that the dismissal of the suit was not occasioned by himself since all that time counsel had sent instructions and a counsel was holding his brief, that it was unfair and/or unjust dismissing the case based on the mistakes occasioned by the counsel holding brief, that the mistakes of an advocate should not be borne by the client, that the Plaintiff/Applicant still desirous of prosecuting the matter within the shortest span of time and that the Plaintiff/Applicant stands to suffer irreparable loss should this court not find it appropriate to reinstate the suit.

6. On the other hand, the 2nd Defendant/Respondent has deposed on paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14 and 15 of his Replying Affidavit that the application dated 24/07/2020 has been read to the 2nd Defendant/Respondent and he had advisedly concluded that the same was frivolous, vexatious, afterthought and an abuse of the court process, That as per the plaint, the suit was filed by the Plaintiff way back on 14/10/2010 and upon service of Summons to enter appearance, the 2nd Defendant's/Respondent's advocate entered appearance on 30/11/2010 and filed defence on 15/12/2010 on his behalf, that the suit was fixed for pre-trial on 13/10/2017 in which the Plaintiff's advocate failed to attend court by the 2nd Defendant's/Respondent's advocate did attend and the suit was fixed for hearing on 29/11/2017 but on the same date the court was not sitting, and it was fixed for mention on 20/12/2017, that on 20/12/2017, the Plaintiff's advocate did not attend court but the 2nd Defendant's/Respondent's advocate did attend and the suit was fixed for hearing on 28/02/2018 and a hearing notice served

upon the Plaintiff's advocate, that on 28/02/2018 the 1st Defendant's advocate did not attend court but send his clerk to get an advocate hold his brief with irrelevant instructions that there was an application dated 15/12/2016 and same should be allowed, that the 2nd Defendant's/Respondent's advocate vehemently opposed the application for adjournment and more so that there was no such application in the court file and the Plaintiff's suit was therefore dismissed for want of prosecution with costs to the 2nd Defendant. The Plaintiff was not even in court, that from the court's record, it was clear that the Plaintiff and his advocate have never been serious in prosecuting the suit as at no time have they ever attended court whether for mention nor for hearing, that the Plaintiff's suit was dismissed way back on 28/02/2018 and this application was filed in court on 24/07/2020 and there has been inordinate delay in filing the application which delay is in excusable, unreasonable devoid of any plausible explanation, that it is now over 2 years and if the Plaintiff was serious in reinstating and prosecuting his suit, he would have filed the application immediately, that equity does not aid the indolent and the Plaintiff has not been vigilant in prosecuting this suit and it will not serve any legal purpose to revive this suit, that the Plaintiff application is an abuse of the court process and the court's discretion should not be exercised in his favour and that would the court be inclined to allow the application then the 2nd Defendant/Respondent urges the court to order Plaintiff/Applicant to pay throw away costs of Kshs. 30,000/=.

7. In rejoinder, the Plaintiff/Applicant deposed in paragraphs 3, 4, 5, 6, 7 and 9 of his further affidavit that if the suit is not reinstated, the Applicant will suffer irreparable loss as the 2nd Respondent now holds title to disputed land which he illegally acquired, that the Applicant should be offered an opportunity for his matter to be heard on merit and for the case to be heard and determined, that it would be unjust and a defeat to the legal process to punish the Applicant by affirming the dismissal order for a mistake not of its own, that the Applicant has been ailing for some time and it caused him some challenges in following up on the matter, that there had been some challenges in getting consent from his former advocate to his new advocate hence some delay and that the Applicant has always been willing to prosecute this matter and it's only fair and in the interest of justice that the prayers sought be granted as prayed.

8. The counsel for the Defendant/Respondent submitted that the Applicant's delay in filing the suit was because he was not informed immediately when the suit was dismissed by his advocate. The counsel further submitted that there was delay in execution of the requisite documents to enable another counsel to come on record. The other cause for the delay, the counsel submitted, was due to the fact that the Applicant had been unwell for sometimes making it difficult for him to promptly and expeditiously deal with the matter before court.

9. The counsel further submitted that the illness caused the Plaintiff/Applicant great pain and suffering and at times made him disoriented and had occasional memory loss. However, this line of submissions is not backed up by affidavit evidence and therefore it remains evidence from the bar.

10. The counsel further submitted that the Plaintiff/Applicant's claim was that the suit land was being held in trust was later sold by 2nd Defendant/Respondent who later changed it to himself while the matter was still alive in court.

11. In view of the above, the counsel further submitted that the Plaintiff/Applicant stands to suffer irreparably if the suit is not reinstated. The counsel added that the 2nd Defendant/Respondent will not suffer prejudice if the application is allowed and that the Plaintiff/Applicant can be compensated by way of throw away costs of Kshs. 10,000/=.

12. In support of his submissions, the counsel relied on the use of Abdinoor Shurie –Vs- Halima Bundid [2020] eKLR where the court cited the cases of Shah –Vs- Mbogo [1967] EA 117 and Ivita –Vs- Kyumbu [1984] KLR 44 and stated thus: -

“It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the course of justice.”

13. The counsel further cited the case of Gladys Njeri Kirugumi –Vs- Lengata Development Co Ltd & Another [2016] eKLR where the court quoted Shah –Vs- Mbogo case where it was held;

“The exercise of the discretion of the court to set aside ex parte order is to avoid an injustice or hardship resulting accident, inadvertence or excusable mistake or error and not otherwise to delay justice.”

14. The counsel pointed out that since the Defendant/Respondent has not demonstrated the impracticability of holding a fair trial or prejudice likely to be suffered, it was the Plaintiff's/Applicant's view that the interest of justice demands that the suit be reinstated for hearing on merit.

15. Finally, the counsel submitted that the Plaintiff/Applicant has demonstrated the reasons for the delay and the prejudice he and his generation will suffer if the suit is not reinstated.

16. On the other hand, the counsel for the 2nd Defendant/Respondent submitted that the counsel did not attend pretrial fixed on 13th October, 2017. The counsel went on to submit that the counsel did not attend the mention of 20th December, 2017 when the matter was fixed for hearing on 28th February, 2018. That despite a hearing notice being served upon the counsel as per the affidavit of service annexed to the replying affidavit, it is clear that the Plaintiff/Applicant and his counsel never serious in prosecuting this suit as they have never attended court. The counsel submitted that come the hearing date the Plaintiff/Applicant and his advocate did not attend court even though the latter sent his clerk with an ambiguous brief to have the suit adjourned on the basis that there was an application dated 15th December, 2016 in the file and which application did not exist. That the Applicant's application for adjournment was successfully opposed and the suit was dismissed for want of prosecution. The counsel pointed out that it is clear from the record of the court that the Plaintiff/Applicant and his counsel were never serious in prosecuting this suit thus equity aids the vigilant and not the indolent.

17. The counsel went on to submit that there has been inordinate delay in filing this application which delay has not been explained in the supporting affidavit and is inexcusable, unreasonable and devoid logical understanding. The counsel added that whereas the suit was dismissed on 28th February, 2018, the application was filed on 24th July, 2020 which is a period of more than two (2) years.

18. The counsel further submitted that the suit property being Makueni/Kilome/443 and Makueni/Kilome/448 are actually registered in the name of the 2nd Defendant/Respondent and that there are no orders sought in the plaint to impugn the said titles.

19. The counsel pointed out that it is trite law that litigation must come to an end and that the application is a futile attempt to revive a very old suit of 2010 which he failed to prosecute and the appropriate time until when it was dismissed for want of prosecution.

20. The counsel concluded by submitting that if the court is inclined to exercise its discretion in favour of allowing the application, the Plaintiff/Applicant should be ordered to pay the 2nd Defendant/Respondent throw away costs of Kshs. 30,000/= bearing in mind that the Plaintiff/Applicant did not pay 2nd Defendant/Respondent costs of the suit that was dismissed. The counsel relied on the case of **Diamond Trust Bank Kenya Ltd in Nbi HCC No. 1093 of 2000** where a similar application was allowed and the Defendants were ordered to pay throw away costs of Kshs. 15,000/=.

21. I have read the application, the replying affidavit and the rival submissions filed by the counsel on record for the parties herein. The Plaintiff/Applicant has mainly hinged his application on the grounds that he had been unwell for sometime which made it difficult for him to deal with this matter. The Plaintiff/Applicant further blames his then advocate on record for not informing him immediately when his suit was dismissed.

22. In his support of his contention, the Plaintiff/Applicant has annexed a bundle of documents in paragraph 6 of his further affidavit. Those documents are marked as JM1. Those documents are prescription forms for medication and receipts for money paid to his consultants and the pharmacy. The documents which the Plaintiff/Applicant refers to as “medical documents” do not disclose the nature of his illness and nor is there a medical report by his medical consultant to show that between 18th October, 2008 and 6th February, 2020 when the receipts were issued, the Plaintiff/Applicant was disoriented and had occasional memory loss.

23. In the circumstances, those records and the deposition in paragraph 6 of the Plaintiff’s/Applicant’s further affidavit do not provide the reason for the delay by the Plaintiff/Applicant in filing the instant application within reasonable time after his substantive suit was dismissed on 28th February, 2018 for want of prosecution. I would agree with the counsel for the 2nd Defendant/Respondent that the delay in filing the instant application is inordinate and equity cannot aid his indolence for not being vigilant. Whereas I agree with the counsel for the Plaintiff/Applicant that it is a serious matter to shut out a party from being heard, taking into cognizance the fact that this is a land dispute, I would agree with the counsel for the 2nd Defendant/Respondent that from the record herein, it is clear that the Plaintiff/Applicant had no interest in prosecuting this suit to its logical conclusion.

24. Even though the Plaintiff/Applicant blames his then counsel for not informing him immediately when the suit was dismissed on the 28th February, 2018, it should be borne in mind that this suit belongs to the Plaintiff/Applicant and not to his counsel. Whereas a party should not be blamed for the mistake of his advocate, in my view the Plaintiff/Applicant had an obligation to constantly demand for periodical updates of the status of his suit from his then advocate on record as it is doubtful that the Plaintiff/Applicant was disoriented and had occasional memory lapse as he claims.

25. This is one clear case where the court should not exercise its discretion in favour of the Plaintiff/Applicant. If the Plaintiff/Applicant is aggrieved by the conduct of his then advocate on record, he can pursue him for compensation.

26. Corollary to the above, the plaint dated 14th October, 2010 shows that the Plaintiff/Applicant sued two (2) Defendants. The Plaintiff/Applicant did not file any affidavit of service to show if he caused the 1st Defendant/Applicant to be served with summons to enter appearance and to file his defence further demonstrating the casual manner in which the Plaintiff/Applicant treated his own suit.

27. The upshot of the foregoing is that the application herein has no merits and the same must fail.

28. In the circumstances, I hereby proceed to dismiss it with costs to the 2nd Defendant/Respondent.

Signed, dated and delivered via email at Makueni this 26th day of January, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. G. Kwemboi.