**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NUMBER 124B OF 2015**

**HELLEN HILDA OGALO OYOO.....PLAINTIFF**

**VERSUS**

**DIANA OLIECH.....1ST DEFENDANT**

**VICTOR AKETCH.....2ND DEFENDANT**

**RULING**

Hellen Hilda Ogalo Oyoo has come to court to set aside and review the order dismissing the suit for want of prosecution and that the case to be reinstated. The application is based on grounds that an order had been granted by the Honourable Court dismissing this matter since the Plaintiff took too long to prosecute the same. Moreover, that the plaintiff has been unwell for a long time and failed to give instructions and therefore It would be in the interest of justice for the Honourable court to allow case to proceed to the end. Unless this application is allowed, the Plaintiff/Applicant stands to suffer irreparable loss. It is in the interest of justice that this application herein be allowed *ex-debito justitiae*. Lastly that This application has been brought in good faith and without any delay.

In the supporting affidavit of Hellen Hilda Ogallo Oyoo, she states that she never took time to enquire about her case due to a long illness. She called her advocates in June 2018 to find out about the matter and found that the case had been dismissed on 20/12/2017 for want of prosecution. She claims to have taken long to give instructions to her advocate because she was ailing.

She annexed a letter signed by Dr. Feroz Alibhoy, the resident physician of the Aga Khan Hospital Kisumu showing that she was admitted between 19/2/2016 to 18/3/2018.

In the replying affidavit, the respondent states that the suit was filed on 20/05/2015 and was never prosecuted until 20/12/2017 when it was dismissed for want of prosecution notice having been issued to parties.

The allegation by the plaintiff that she was in indisposed for a long period of time hence could not give instructions is challenged by the respondent on grounds that upto 2016 the advocates for the applicant used to take hearing dates and therefore were under instructions to appear for the Applicant.

The respondent contends that the plaintiff's advocates should have brought the issue of the medical condition of the applicant to the court's knowledge.

The applicant became well on 18/7/2018 but waited until 05/12/2018 to file the application to reinstate the suit.

The letter by Dr. Feroz Albhoy is challenged as it does not have the official stamp and does not indicate the ailment suffered by the plaintiff.

The respondents state that they are neighbours with the applicant and that she has never been admitted for any illness. This court has unfettered discretion to grant the orders sought however the discretion ought to be exercised judiciously and not capriciously. The court to consider all factors incuding the delay and the conduct of the applicant.

In the case of **Cecilia Wanja Waweru V Jackson Wainaina Muiruri & another [2014] eKLR** the Court of Appeal in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated: -

> "*There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed……*"

This is a court of justice and in exercise of its discretion it ought to take into account the interests of both parties. The applicants would be locked out of the justice system if the matter stands dismissed. The applicants advocate appears to have been at fault for not taking a date and the applicant should not be punished for the fault of the advocate. In ***Belinda Murai & Others Vs Amoi Wainaina (1978),*** Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

> *"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule…..…"*

In ***Gold Lida Ltd v NIC Bank & Joseph Gikonyo T/A Garam Investment Auctioneers ELC Civil Suit No. 177 of 2017*****,** the learned Judge stated,

> *" In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. If that be case indeed, there would be a basis for a hearing to determine that single issue. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right. In light of this, I am of the view that the inconvenience to be suffered by the defendants as a result of reinstatement of this suit can be adequately remedied through an award of costs."*

In ***Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22***, the court held that,

> *"Under Order 23 Rule 2 (2) of the Civil Procedure Rules, an order for*
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> *dismissal of a case can be set aside for sufficient cause. The circumstances of the case showed that the appellant was prevented by sufficient cause from depositing the money for security of costs within the time allowed because it was under the mistaken belief that a guarantee would suffice as security for costs as per the advice of their counsel. The Supreme Court found that the present case was one where the error by counsel for the appellant should not be visited on the appellant, and that the circumstances amounted to sufficient cause for the purposes of setting aside dismissal of the suit. While the Court's power to dismiss a suit, under Order 23 Rule 2 (1) is automatic upon the plaintiff's failure to comply with an order for security for costs, the Court's power to reinstate such dismissed suit under Rule 2 (2) is discretionary. The Supreme Court found that the trial judge properly exercised her discretion by setting aside the dismissal of the appellant's suit."*

In **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** it was held that:

> *"That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."*

I have considered the application and rival submissions and do find that the applicant filed the suit herein on 20/5/2015. After the filing of the suit, the last court action was on 16/6/2016 when the matter was fixed for hearing on 21/12/2016. On 20/12/2017 notice to show cause having been issued to the parties herein under order 17 Rule 2 and order 42 Rule 35 of Civil Procedure Rules and there being no cause shown the matter was dismissed accordingly and the file closed.

Both parties never appeared before court for the notice to show cause. I have not seen any evidence on court record that the parties were served with the notice to show cause. Though it is not an issue, I am not sure that the parties were aware that the matter was coming for the notice to show cause.

Though the defendants are doubting the letter of Dr. Feroz Alibhoy, nothing has been brought to court to show that it was a forgery. The letter is done on the letter head of the Aga Khan Hospital and therefore I do not doubt that the plaintiff was unwell between 19/2/2016 until the 18/3/2018.

However, the plaintiff does not explain what happened between the 18/3/2018 when she recovered from the illness and 5/12/2018 when the application was made, a lapse of 9 months. In such application every delay should be explained. This delay is not explained.

The notice of motion is dated 2/10/2018. The delay of almost 2 months of filing after instruction is not explained. Discretion ought to be exercised judiciously and not capriciously and therefore without explanation the court is left to treat the delay as unexplained.

However, this being a land matter that appears emotive and likely to explode on the ground if not decided on merit, and the plaintiff being a senior citizen who is sickly and that the respondent can be compensated with costs, the court is inclined to allow the plaintiff approach the seat of Justice.

I do allow the application and I do grant prayers 1 and 2. The suit is re-instated. Costs of this application to be borne by the plaintiff in any event. Orders accordingly.

**DATED AT KISUMU THIS 21st DAY OF JANUARY 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.**

**ANTONY OMBWAYO**

**JUDGE**