



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 115 OF 2017

OMARI WAFULA ASMAN.....PLAINTIFF

VERSUS

JOHN TABALYA MUKITE.....DEFENDANT

RULING

1. The application dated 25/2/2020 and filed in court on the same date has been bought under **Section 3A, 63(e)** of the **Civil Procedure Act** by the plaintiff. He seeks the following orders:-

(1) ...spent

(2) That this honourable court be pleased to set aside and or review the orders dismissing this suit for want of prosecution.

(3) That this suit be reinstated for hearing and determination *inter partes* on merits.

(4) That the honourable court be pleased to extend time for the arbitration to be conducted and concluded.

(5) That costs of this application be provided for.

2. The application is supported by the affidavit of the defendant sworn on **25/2/2020**. The grounds upon which the application is made are that the plaintiff had entered into a lease agreement with the defendant over the suit premises; that the defendant renovated the suit premises but sought to let them to third party and therefore the suit herein was lodged by the plaintiff; that after the court ordered arbitration the defendant and his counsel failed to turn up at the venue of the arbitration proceedings; that the plaintiff's erstwhile advocate never informed the defendant of the dismissal of the suit and subsequently the plaintiff learnt of the dismissal of this suit after he was served with the bill of costs.

3. In response to the application the defendant's counsel filed his replying affidavit sworn on behalf of his client on **26/10/2020**. According to that affidavit, this court granted only a **30 day** injunction to enable the parties institute arbitral proceedings failing which the injunction would lapse; that the injunction lapsed upon failure to commence the arbitral proceedings within the stipulated time; that after that lapse the premises were leased to a third party; that an arbitrator had been agreed upon by the parties but he was dissatisfied by the applicant's failure to file his claim and failure on the part of the two parties to respond to his proposed remuneration proposals and that on **27/6/2018** the arbitrator withdrew from the matter. The respondent blames the applicant for failure to prosecute his case before the arbitrator. However the respondent admits that the order referring the suit to arbitration still subsists.

Submissions

4. The plaintiff filed his written submissions on **17/11/2020**. The defendant filed his submissions on **24/11/2020**.

Determination

5. The two broad issues arising for determination in the instant application are whether the suit should be reinstated for hearing and determination on the merits and whether time should be extended to enable the arbitration to be conducted and concluded.

6. The applicant cites the case of **Ivita vs Kyumbu 1984 eKLR** and **John Nahashon Mwangi Vs Kenya Finance Bank Ltd (In Liquidation) 2015 eKLR** and submits that the test as to whether to dismiss or reinstate a suit is whether the delay is prolonged and inexcusable and if it is, whether justice can still be done despite the delay. He submits that the court is not powerless to grant relief when the ends of justice and equity so demand as the court's powers are wide in scope and that in any event **Section 3A** of the **Civil Procedure Rules** grants the court power to issue orders that would ensure the ends of justice are achieved. He reiterates that the applicant was not aware that

his suit had been dismissed until the bill of costs was served upon him on an undisclosed date, and blames his erstwhile advocate for failure to inform him of the dismissal. He states that he has demonstrated his willingness to prosecute this suit by promptly bringing this application. He cites the case of **Associated Warehouse Co Ltd and Others Vs Trust Bank Ltd HCCC No. 1266 of 1999** (unreported) in support of the proposition that the **Civil Procedure Rules** presuppose service before dismissal, and that dismissal is not mandatory even when the requirements of the law regarding service have been fulfilled. He admits in his submissions that the arbitration was thwarted by the conduct of both parties, his admitted part being that his erstwhile advocate failed to lodge the claim on time and with both parties being blameworthy for failure to respond to remuneration proposals of the arbitrator. He further blames his advocate for failure to fix the matter for hearing despite the applicant's compliance with **Order 11** of the **CPR**. He further submits that the delay is not inexcusable.

7. Citing **Article 159 (2) (d)** of the **Constitution**, he states that it is a fundamental principle of justice that a party should not be condemned unheard. He also relies on **Article 50** of the **Constitution** on the right to be heard before an impartial court or tribunal and maintains that the respondent would suffer no "*injustice*" if the suit was reinstated and in any event he can be adequately compensated by way of costs.

8. The respondent reiterates the contents of his replying affidavit in his submissions. He submits that the decisions cited by the applicant are distinguishable in that the suits that had been dismissed in those cases had been pending hearing and determination by the court. In contrast, he avers, there is nothing pending hearing and determination in this court and the dispute had been referred to arbitration and thus reinstating the suit would not serve any useful purpose.

9. The background of this application is that the suit was filed on **29/6/2017** and the notice of motion for injunction pending arbitration on **29/6/2017**. The application was determined on **28/9/2017**. An injunction pending the institution of arbitration proceedings was granted. The injunction was expressed to lapse after **30 days** if the arbitration proceedings were not commenced.

10. A question therefore arises as to whether the arbitration proceedings were commenced. The order issued by this court on **28th September 2017** did not give the finer details of what would constitute the institution of the arbitral proceedings. However, arbitration begins with the appointment of an arbitrator and then the lodging of a claim before him. Though an arbitrator was appointed and there is no evidence of any objection to his appointment by any party, both parties share the blame for the collapse of the arbitration proceedings. The applicant admits that his advocate never filed the arbitration claim before the appointed arbitrator, while both parties also admit that they never responded to the proposed arbitrator's remuneration proposals and he thus withdrew from the matter.

11. Both parties agree that they were each partly to blame for the failure of the proceedings to kick off despite the appointment of an Arbitrator. It is clear that the applicant could not have lodged the claim before both parties and the arbitrator agreed on the remuneration payable to the arbitrator. It would be only a matter of speculation for now as to what would have been the consequences of filing such a claim on the part of the applicant while the respondent had not agreed to the proposed remuneration perchance it is assumed that was possible. On this point, I find that this court can not fully blame the applicant by attributing the failure of commencement of the arbitration proceedings on the failure to file a claim per se as the filing or lack thereof was inextricably connected to the failure by all the parties and the arbitrator to agree on the remuneration, which remuneration had not been the subject of this court's order made on **28/9/2017**.

12. As to the delay it is evident from the record that the notice to show cause dated **11/9/2019** was served upon Kiarie & Co. the advocates for the respondent on **24/10/2019**. There is however no indication that the same was served on any other firm of advocates and that leaves the court in doubt as to service on the applicant's erstwhile counsel. The suit was dismissed on **1/11/2019** in the absence of the applicant and his counsel and taxation was conducted thereafter. An undisputed affidavit of service in the record sworn by one **George Mumali** shows that service of the notice of taxation was effected on the applicant on **29/11/2019** but he never appeared at the taxation exercise on **9/12/2019**. He subsequently filed a notice of change of advocates on **16/12/2019** and the instant application was filed on **25/2/2020**. Given the occurrence of the Christmas holidays in between those dates I find that the delay in bringing the instant application was not inordinate.

13. It has been argued by the respondent that there is nothing to be heard and determined in this matter and that the suit premises have been let to a third party. In the same breath the respondent admits that the order for arbitration is still in existence.

14. I have reviewed the court record and found that while dismissing this suit this court did not address itself on the issue as to whether or not this was a matter subject to an order of reference to an arbitration and or whether there had been any progress in those arbitration proceedings. I also think that notice to show cause proceedings in which the plaintiff does not attend to show cause have a high risk of erroneous dismissal orders being granted simply because there is no explanation from the plaintiff, whether or not some good cause lies in document among volumes of paper in the record. In this case the court dismissed the suit without noting down that an arbitration had been ordered. It is likely that the terms of the ruling dated **28/9/2017** inadvertently escaped the court's notice as it focused on whether any of the parties had taken any step in the matter in the previous one year. This fact coupled with the admissions of both parties as outlined herein before prompts this court to believe that the applicant has a good ground to seek a setting aside order.

15. Should the issuance of the order setting aside dismissal depend on, as the respondent urges, only whether or not the suit was pending hearing? I do not think so. The respondent admits that the order of reference to arbitration is still alive. The injunction order pending application was issued in this suit and it would be to this court and in this suit that the parties would have to report at the tail end of the arbitration. Perchance the arbitration proceedings had taken off and lasted longer - much longer than the one year period earlier blamed on the parties for not prosecuting this suit - how could the parties report to the court on a dead file? That is not possible. The suit would have to be revived if need arose. Now that the arbitration proceedings never commenced due to fault on the part of the two parties, and this suit appears to have been erroneously dismissed without consideration that there were arbitration proceedings possibly taking place out there, and the plaintiff has expressed his desire to have the arbitration proceedings commenced and time be extended for the purpose of such commencement, there has to be a live suit in which those orders may be granted, and therefore the objects of the arbitration can only be attained by the setting aside of the dismissal order, reinstatement of the instant suit and extension of time to enable the arbitration be conducted.

16. Consequently I find that the applicant's application dated **25/2/2020** has merit and I hereby grant it in terms of **Prayer No. (2), (3) and 4**.

17. For the avoidance of doubt, the final orders issued on the subject application are as follows:

(a) The order of this court made on 7/11/2019 dismissing the applicant's suit for want of prosecution is hereby set aside.

(b) The instant suit is hereby reinstated.

(c) The time within which the arbitration shall be commenced by the parties is extended by a further 60 days.

(d) The costs of this application shall be costs in the cause.

Dated, signed and delivered at Kitale via electronic mail on this 2nd day of February, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.