

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 501 OF 2016

DR. JAMES KAGIA.....PLAINTIFF

VERSUS

TWO RIVERS DEVELOPMENT LIMITED.....DEFENDANT

RULING

The application for determination is dated 13/11/2019 and was brought by the Plaintiff seeking the setting aside of the orders made by this court on 06/11/2018 dismissing the Plaintiff's suit for non-compliance together with all the other consequential orders made by the court including the order of Diana Orago, Deputy Registrar on 08/04/2019. The Plaintiff also sought an order that his suit be reinstated for hearing and determination on merit and for costs to be in the cause.

The application was based on the grounds set out on the face of the application and was supported by the affidavit of Ms. Irene Mburu, an advocate practicing in the firm representing the Plaintiff sworn on 13/11/2019. Ms. Mburu deponed that she was aware from the documents in her possession that the Plaintiff filed suit on 08/05/2016 seeking special damages of Kshs. 80, 000,000/= and general damages for trespass against the Defendant. She stated that the law firm assigned the case to Ms. Vivienne Eyase and that the documents in her possession showed that the matter was listed for pre-trial conference on 06/11/2018 on which occasion the court directed the Plaintiff to file his issues for determination together with the pre-trial questionnaire and fixed the matter for mention on 08/04/2019 to confirm compliance. She deponed that Ms. Vivienne Eyase did not attend court on that day and that she did not prepare documents in compliance with the directions of the court and resigned from the firm. She deponed that on the morning of 08/04/2019, she was engaged in the hearing of a part heard matter being **Mombasa CMCC 292 of 2016** before Hon. E.K. Makori, Chief Magistrate when she received a call from her assistant that the matter was listed on the cause list and since she was away in Mombasa, she was constrained and asked her assistant to ask for more time but the Deputy Registrar declined the request and dismissed the matter. She also deponed that she was unaware of this court's directive of 06/11/2018 of 06/11/2018 which she referred to as "unless orders" until after filing the application dated 11 /04/2019 which was later withdrawn. She deponed that she has since prepared the issues for determination and pre-trial questionnaire and pleaded with the court to allow the application. She annexed a copy of the issues and pre-trial questionnaire to her affidavit.

The Defendant opposed the application through the replying affidavit of Mwangi Mbogo, the Defendant's Company Secretary sworn on 20/01/2020. Mr. Mbogo deponed that the Plaintiff lost interest in this suit and that it should not be reinstated. He deponed that after filing the suit on 11/5/2016, the Plaintiff was yet to comply with the requirements in Order 11 of the Civil Procedure Rules and was yet to set down the suit for hearing. He deponed that all the Plaintiff has been doing is seek mention dates and ask for more time. He cited four occasions when the Plaintiff sought more time to comply being 15/03/2017, 16/10/2017, 28/02/2018, 15/05/2018, 06/11/2018 and 08/04 2019. He further deponed that the hearing of this case was adjourned on 28/02/2018 and 6/11/2018 because of the Plaintiff's failure to comply which clearly demonstrates lack of interest in the suit on the part of the Plaintiff. He maintained that the Plaintiff was aware of the court orders of 6/11/2018 that which he had now christened "unless orders" as the Plaintiff's advocate was in court and asked for 21 days to comply with the pre-trial orders and the court stated that the suit would stand dismissed if they failed to comply. He averred that the Defendant would suffer prejudice if the suit was reinstated as it had already paid its counsel the final fees based on the closure of the file and that re-opening it would occasion it further costs. He annexed a copy of the receipt for payment of the final legal fees and the electronic tax receipt for the payment and urged the court to dismiss the suit.

The matter was canvassed through written submissions. The Plaintiff submitted that the order for the dismissal of his case was not caused by any fault or wrongdoing on his part, but due to the inadvertence of his counsel who was handling the matter. He relied on **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR** on the submission that a party should not be completely locked out of the seat of justice on account of the mistake made by his counsel. He further submitted that the court should consider the larger interest of justice as blunders do occur. He also submitted that a dismissal order would greatly prejudice him for he would be driven from the seat of justice without a hearing while the Defendant could be remedied by an award of costs. He further submitted that reinstatement of the suit would meet this court's overriding objective which enjoins it to ensure that there is just determination of proceedings in a timely and efficient manner.

The Defendant submitted that in **Daniel Nderi Njogu v Lydia Muthoni Kibage [2010] eKLR**, the Plaintiff had adjourned the case in similar fashion and failed to satisfactorily explain the non-compliance with the court directions and the court failed to reinstate that suit. He also submitted that the oxygen principle cannot be used to aid an indolent party since the Plaintiff was in breach of his duty to assist the court to expeditiously conclude the case by complying with the pre-trial directions.

The court has considered the application, the response filed together with the submissions of both parties. Based on the conduct of the Plaintiff and his advocates in these proceedings, the court is not satisfied that this case is suitable for reinstatement. This suit filed five years ago has never taken off and the Plaintiff has derailed the hearing and determination of the suit by seeking adjournments and failing to comply with Order 11 of the Civil Procedure Rules and the directions of the court. On 06/11/2018, the court allowed the Plaintiff 21 days to comply with Order 11 of the Civil Procedure Rules failing which the suit would stand dismissed. The Plaintiff was represented on that day as well as on 08/04/2019 when the matter came up for mention to confirm compliance. On 08/04/2019, which was five months after the court had given the Plaintiff 21 days to comply, the Plaintiff had still not complied. There is no indication that the Plaintiff requested for more time as his

advocate deponed in her affidavit sworn on 13/11/2019. The Plaintiff's conduct in the case proves that he has lost interest in the matter. No satisfactory reason was given as to why the Plaintiff failed to comply with the court's directions so as to set the matter down for hearing.

Article 159 of the Constitution and the overriding objective of the Civil Procedure Act under Section 1A of that Act, read with the duty of the court under Section 1B of the Civil Procedure Act enjoin the court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1A (3) places a duty on parties to civil proceedings or their advocates to give effect to the overriding objective of the Civil Procedure Act and to participate in court processes; and most importantly, to comply with the directions and orders of the court. For only then can the court attain the aims bestowed upon it by Section 1B of the Act of the just determination of proceedings, the efficient and timely disposal of its business and the efficient use of the available judicial resources. The manner in which the Plaintiff has conducted himself in this case by failing to comply with the court's directions certainly runs contrary to Sections 1A and 1B of Civil Procedure Act as well as the principle under Article 159 (2) (b) of the Constitution which requires courts to exercise judicial authority in a manner that ensures that justice is not delayed.

The application dated 13/11/2019 is dismissed with costs to the Defendant.

DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF MARCH 2021.

K. BOR

JUDGE

In the presence of:-

Ms. Brenda Mungai for the Plaintiff

Mr. James Thuku for the Defendant

Mr. V. Owuor- Court Assistant