



**Mokua v Muthigani (Environment & Land Case 902 of 2015)
[2023] KEELC 20545 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 902 OF 2015
OA ANGOTE, J
OCTOBER 5, 2023**

BETWEEN

RICHARD LAUREL MOKUA PLAINTIFF

AND

SYMON NYAMU MUTHIGANI DEFENDANT

RULING

Background

1. Vide a Notice of Motion dated 18th April, 2023, brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, 2010 and Order 12 Rule 7 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following orders:
 - i. That this Honourable Court do issue an order reinstating ELCC 902 of 2015 which was dismissed on 17th March, 2022 for reason of want of prosecution.
 - ii. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Richard Laurel Mokua of an even date. He deponed that he is the Plaintiff in the suit and that he instructed the firm of Omenta and Company Advocates to take conduct of the matter on his behalf.
3. The Plaintiff deposed that the aforesaid Advocates at all times assured him that the suit was on course and they were awaiting the issuance of a hearing date by the Court; that as the matter was taking long, he sought a second opinion from another Advocate; that the aforesaid Advocate informed him that he had traced the Court file in the registry's' archives and that the matter had been dismissed on the 17th March, 2022 for want of prosecution.
4. It is the Plaintiff's deposition that the Respondent has never entered appearance in this matter hence he stands to suffer no prejudice by the reinstatement of the matter; that he has heavily invested in the



suit properties and risks losing both of them due to the inaction of his former Advocates; that he stands condemned unheard due to the inaction by his former Advocates who misinformed him of the true position of the matter and that the dictates of justice and fairness warrant the grant of the orders sought.

5. There was no response to the application. No submissions were filed.

Analysis and Determination

6. Having considered the application, the sole issue that arises for determination is whether there are sufficient reasons to warrant the reinstatement of the suit. Under Order 12 of the Civil Procedure Rules, 2010, the Court has powers to dismiss a suit or an application for non-attendance. Order 12, rule 1 provides as follows;

“If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, neither party attends, the Court may dismiss the suit.”

7. In the same vein, Order 12 Rule 7 of the Civil Procedure Rules, gives this Court discretion to reinstate a suit that has been dismissed. The Rule stipulates as follows;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

8. It is apparent from the above that the decision to reinstate a suit is discretionary. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the Court of Appeal of East Africa held that;

“The discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated that:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

10. In the present case, the Plaintiff seeks an order seeking to have the matter reinstated. By way of brief background, the Plaintiff instituted this suit on 23rd day of September, 2015 seeking inter-alia, general damages, specific performance and an order compelling the Defendant to sign the relevant papers to facilitate registration of the title.

11. It was the Plaintiff’s case that sometime on the 31st January, 2012, he entered into an Agreement with the Defendant for the purchase of parcel number Kajiado/Kisanguli/[particulars withheld] consisting of two plots; that despite having completed payment of the purchase price, the Defendant refused to



execute the relevant transfer papers as well as other completion documents and that the Defendant has sold the properties to a third party.

12. The Defendant never responded to the suit.
13. Considering the proceedings, after the institution of the suit in 2015, the matter was mentioned on several occasions in 2016, where the Plaintiff sought to serve the Defendant by way of substituted service which orders were granted on the 4th July, 2016. On 10th July, 2019, the matter was set down for mention before the Deputy Registrar on 30th January, 2020. On this date, Counsel for the Plaintiff was present. The Deputy Registrar directed that the matter would proceed before Court on 18th May, 2020.
14. On 18th May, 2020, no party was present and the Court gave a further mention date of 9th December, 2020. On this day too, no party was present and the Court directed that the matter be mentioned on 19th April, 2021. On the 19th April, 2021, both parties were absent. The Court set down the matter for mention on 28th September, 2021.
15. On 28th September, 2021, the parties were once again absent and the Court directed that the matter would proceed for hearing on 17th March, 2022. On the aforesaid date, there was no appearance and the matter was dismissed for want of prosecution.
16. The Plaintiff contends that his previous Advocate at all times assured him that everything was on course in the matter and that they were awaiting a date from the Court; that concerned about the delay in getting a date, he sought a second opinion from another advocate who revealed to him that he had traced the file at the Courts archives and that the advocate informed him that the same had been dismissed for want of prosecution.
17. It is trite that mistakes of counsel should not be visited upon clients. The Court of Appeal in *Savings & Loan Kenya Ltd vs Onyancha Bwomote* [2014] eKLR, in affirming this position cited the decision in Philip Chemowolo & Another vs Augustine Kubede (1982-88) KAR 103 at 1040 which stated;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”
18. However, it has also been held that a party who wishes the Court to grant him an order of reinstatement of a suit dismissed for want of prosecution should show the steps that he took in making sure that the suit prosecuted efficiently than just laying blame on his lawyer. The Court in *Edney Adaka Ismail vs Equity Bank Limited* [2014] eKLR persuasively stated thus;

“It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter.”
19. It has been held time without number that a case belongs not to an Advocate but to a Client. As persuasively stated by the court in *Utalii Transport Co. Ltd and 3 Others vs N.I.C. Bank and Another* (2014) eKLR;

“.... the Applicant states and correctly so, it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”



20. The Plaintiff herein places the blame on his previous counsel, Omenta and Co Advocates and contends that he should not be blamed for that mistake. However, the Plaintiff's allegations are mere assertions with no supporting material. Counsel in question has not sworn an Affidavit admitting that she made a mistake by not advising her client on the dates the matter came up in court.
21. Although dismissal of a suit is a draconian order which has the effect of driving away a litigant from the seat of justice, a litigant is equally expected to be vigilant in pursuing and ensuring that their case is prosecuted without undue delay and with all fairness to the other party. As expressed by the Court in *Ecobank Ghana Limited vs Triton Petroleum Company Limited (in receivership) & Others Civil Case No. 24 of 2009 (UR)* ;

“Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as “draconian” the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine.”
22. In any event, a notice of change of the Plaintiffs' counsel was filed on the 28th January, 2020 wherein the firm of Charles Koech and Associates came on record. Mr Koech indeed made one appearance for the Plaintiff and was as far as the record shows, counsel for the Plaintiff at the time of the dismissal of the suit.
23. Not having demonstrated the steps that he took in prosecuting the suit, and indeed not having demonstrated that he took any steps towards following up on his case, it is not enough for the Plaintiff to now shout “lawyer”. This, the Court believes is nothing more than a frail attempt to rescue the situation.
24. Before concluding, the Court notes that there does not appear to be a notice of change of Advocates from the firm of Charles Koech, who were on record at the time of the dismissal to the firm of Kamau Nyaga & Co Advocates who have filed the present Application. Even assuming that there is one, Counsel did not seek leave to come on record pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
25. The Courts having held that a dismissal for non-attendance and/or want of prosecution amounts to a judgement in that suit (see Court of Appeal case of *Njue Njagi vs Ephantus Njiru & Another [2016] eKLR*), the correct procedure to be followed in this instance would have been seeking to come on record, or filing a consent between themselves and the firm of Charles Koech & Associates, and thereafter filing and serving the notice of change of Advocates and then filing the application to set aside the orders of the Court. Having failed to comply with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, it follows that the firm of Kamau Nyaga & Co Advocates is not properly on record.
26. In view of the foregoing, the court finds that the Application dated 18th April, 2023 is unmerited and the same is dismissed with costs. For avoidance of doubt, the suit stands dismissed as ordered on 17th March, 2023.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF OCTOBER,
2023**

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nyaga for Applicant

No appearance for Respondent

