



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 31 OF 2013

(Formerly HCC No. 232 of 2009)

MBAIKA MBITHI (Now Deceased)

DOMINIC MUTHUSI MBITHI

RAPHAEL MUSAU MBITHI.....PLAINTIFFS/APPLICANTS

VERSUS

YATTA DIVISIONAL DISPUTE BOARD.....1ST DEFENDANT/RESPONDENT

RUTH MBEKE KIOKO2ND DEFENDANT/RESPONDENT

RULING

1. Vide a Notice of Motion application dated 24th July 2020 brought under the provisions of Order 17 Rule 2(2), Order 51 Rules 1, 3 and 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiffs/Applicants sought for the following prayers;

1. Spent

2. THAT this honourable court be pleased to review/set aside the judgment entered against the 1st, 2nd and 3rd Applicants on the 21st day of July 2020 and all other consequential orders.

3. THAT costs of this application be provided for.

2. The application is premised on the grounds on its face as well as the supporting affidavit sworn by Mr. Langalanga Chrislero and filed on 24th July 2020, when he deposed that on 21st July 2020 when this matter came up for hearing, Mr. F. M. Mulwa advocate who appears for the Plaintiffs/Applicants had been hospitalized and therefore Mr. Langalanga advocate who held his brief, informed Miss Mutinda Naomi Counsel for the 2nd Defendant of Mr. F. M. Mulwa's predicament; that the Court Assistant informed both counsels that if they intended to adjourn the matter, they ought to inform her so that she informs the court as much, for the matter to be mentioned through video conferencing which they did; that counsels were informed that the session would begin at 10.00 a.m by video conferencing; that Mr. Langalanga proceeded to his office and when he could not access his email to access the court, he called the ICT Office of the court and spoke to Mr. Erick Otieno who sent him the link to his email at 10.11 a.m; that when he tried to log in he failed.

3. Counsel further stated that this prompted him to proceed to court but unfortunately found that the matter had already been called out and the same had been dismissed for want of prosecution; that the Plaintiff is desirous to prosecute this matter to its logical conclusion as demonstrated by the counsel's efforts.

4. The application is opposed. Ms. Naomi M. Mutinda, counsel for the 2nd defendant swore a replying affidavit dated 17th September 2020 where she deposed that the Plaintiffs' application was brought in bad faith, is an abuse of the court process, lacks merit and it ought to be dismissed. Counsel further averred that indeed on 21st July 2020, Mr. Langalanga called her and informed her of his intention to seek for an adjournment and sought for her indulgence which she declined as her client was in court and she was under strict instructions to proceed with the matter for hearing; that she advised Mr. Langalanga to make his application for adjournment in court, which she intended to oppose to allow the court determine whether to adjourn or not.

5. Counsel also contended that as the Plaintiff was not ready to proceed with the hearing, the court clerk advised them that the suit would be

mention at 10.00 a.m; that a few minutes to 10 a.m, counsel reminded Mr. Langalanga that the court was about to begin and the latter informed her that he will log in using his phone; that when the matter was called out, Mr. Langalanga did not log in and counsel informed court of the conversation they had had that morning with Mr. Langalanga; that the suit has been pending for 7 years; a fact that counsel brought to the court's attention and sought for dismissal of the Plaintiff's suit for want of prosecution, which prayer was allowed.

6. Further counsel deposed that the off duty letter annexed to the Plaintiff's application was for 15 days with effect from 29th January 2020, yet the suit came up for hearing six months later; that the email extract shows that Mr. Langalanga logged in 10 minutes after the court had started; that the Plaintiff's excuses are not sufficient reasons to warrant reinstatement of the suit; that reinstating the suit would be efforts in futility as the pleadings are not clear, the 1st defendant is not in existence and the court has not been moved appropriately and therefore the suit is incompetent; that litigation must come to an end; that the Plaintiff have been indolent and have lost interest in this matter and that dragging the Defendant in court for 7 years has prejudiced his interests.

7. The application was canvassed by written submissions. The Plaintiffs/Applicants filed their submissions on the 4th November 2020 while the 2nd Defendant/Respondent filed their submissions on 11th March 2021.

THE APPLICANTS' SUBMISSIONS

8. The Plaintiff submitted that Order 12 Rule 7 of the Civil Procedure Rules grants this court the power to set aside or vary the judgment or order on such terms that are just. Counsel for the Plaintiff relied on the case of *Joseph Gichuru Mararo & Another vs. Grace Wambui Kiruthi [2014] eKLR ELC SUIT NO. 2103 OF 2007*, where the court cited with approval the decision in the case of *Shah vs. Mbogo & Another [1967] EA 116* where it was held as follows;

“The discretion to set aside a judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error but not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. Counsel also placed reliance on the case of *Philip Kimutai Langat vs. Job Kibet Maina [2007] eKLR*, which decision has been considered by this court. Counsel contended that the documents on record showed that Mr. F. M. Mulwa was admitted to Coptic Hospital between 14th and 28th January 2020 and that due to the nature of his illness was advised to have bed rest and that is why he was not able to attend court on 21st July 2020. Counsel contended that failure to attend court was not deliberate but was due to reasons beyond the Plaintiff advocate's control. Counsel concluded that the Plaintiffs have shown their willingness to prosecute their suit and therefore in the interest of justice, they ought to be given opportunity to do so.

10. The 1st Defendant did not file any submissions.

2ND DEFENDANT/RESPONDENT'S SUBMISSIONS

11. The 2nd Defendant submitted that the dismissal of the Plaintiffs' suit was justified. Counsel relied on the case of *Esther Wandia Njuguna & 2 Others vs. James Ngandu Muthiogani & Others [2008] eKLR*, where the court stated that the court may dismiss the Plaintiff's suit where the delay is inordinate, the inordinate delay is inexcusable and where the Defendant is likely to be prejudiced by the delay.

12. It was the 2nd Defendant's contention that this suit had been in court for the past 12 years since 2009 and the same has never proceeded which means that the delay is inordinate and inexcusable. Counsel argued that the explanation advanced by the Plaintiffs' counsel was not plausible as the court's link was working on the material date, which was why counsel for the Defendant was able to log in. Counsel further contended that the firm of F. M. Mulwa has several associates and counsel for the Plaintiff should have prepared to proceed with this matter.

13. In addition, counsel averred that the 12 year delay of the case had occasioned prejudice on the 2nd Defendant who had incurred a lot of expenses in litigation fees and court attendance, time wastage, emotional distress and has been denied her exclusive right of possession of her property. Counsel pointed out that on 9th October 2019 the court magnanimously advised the Plaintiffs' counsel of the defective nature of their pleadings, but that to date, the Plaintiffs have not considered amending the said pleadings.

14. Counsel concluded by submitting that it would be an exercise in futility to reinstate the suit.

ANALYSIS AND DETERMINATION

15. I have considered the application, the affidavit in support, the replying affidavit and the rival submissions. In my considered view, the sole issue that arise for determination is whether the Plaintiff has met the threshold for review/setting aside the orders dismissing this suit for non attendance of the Plaintiff.

16. The law for reinstating a suit dismissed for want of prosecution is provided for under Order 12 Rule 7 of the Civil Procedure Rules, which provides 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.”

17. Therefore under Order 12 Rule 7, this court has made discretion in determining an application for setting aside an order dismissing the suit due to non attendance of the Plaintiff. In the case of *Yamko Yadpaz Industries Limited vs. Kalka Flowers Limited Nairobi HCCC No. 591 of 2012*, the court stated as follows;

“That there are no limits or restriction on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the court of justice. Shah vs. Mbogo [1967] EA 116 at page 123(b) Shabir Din – vs. Ram Perakash Anand [1955] 22 EACA 45.”

18. I have considered the Plaintiffs counsel’s explanation on the reasons why he was unable to attend court on 21st July 2020 at 10 a.m. Counsel has stated that the hearing was scheduled to be attended by Mr. F. M. Mulwa, who was indisposed on the said date. From the email extract marked as LC-2, it appears counsel logged into the court’s virtual platform on 21st July 2020 at 10.11 a.m. In addition, when counsel realized that the Plaintiffs’ suit had been dismissed, he filed this application with prompt on 24th July 2020. In my considered view, I find that counsel for the Plaintiff has been honest and the explanation given is excusable in the circumstances of this case. Consequently, this is a proper case for the court to exercise its discretion in favour of the applicant.

19. In the premises I hereby set aside the orders of this court made on 21st July 2020 and order that the suit be set down for hearing interpartes. As this is an old matter, I order that a hearing date be fixed within 21 days of this ruling within which period both parties should have complied with Order 11 of the Civil Procedure Rules.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 7TH DAY OF

FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Langanaga for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Ms Josephine Misigo – Court Assistant