



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 9 OF 2019

ERDEMANN PROPERTY LIMITED.....PLAINTIFF

VERSUS

SAFARICOM STAFF PENSION

SCHEME REGISTERED TRUSTEES.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 11th February, 2022 brought pursuant to Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act; Order 12 Rules 7, 40(1) of the Civil Procedure Rules; Sections 3, 13(7) of the Environment and Land Court Act and Articles 25(c) and 50(1) of the Constitution. The Plaintiff seeks for the following orders:

a. Spent

b. That pending the inter-partes hearing and determination of this Application, this Honourable Court be and is hereby pleased to reinstate the injunction issued on 5th June, 2020 restraining the Defendant/Respondent whether by themselves, contractors, subcontractors, servants, agents, representatives, employees and/or anyone claiming under their name or title howsoever from excavating and or demolishing, destroying whether temporary or permanent or otherwise thereon and/or in any manner howsoever interfering with the Plaintiff/Applicant's sewer line constructed a long Quarry Road and the old Mombasa Road for its Great Wall Gardens Estate project, situate in Mavoko Municipality.

c. Spent.

d. That pending the hearing and determination of this Application, this Honourable Court be and is hereby pleased to reinstate the injunction issued on 5th June, 2020 restraining the Defendant/ Respondent whether by themselves, contractors, subcontractors, servants, agents, representatives, employees and/or anyone claiming under their name or title howsoever from excavating and or demolishing, destroying whether temporary or permanent or otherwise thereon and/or in any manner howsoever interfering with the Plaintiff/Applicant's sewer line constructed a long Quarry Road and the old Mombasa Road for its Great Wall Gardens Estate project, situate in Mavoko Municipality.

e. That this Honourable Court be pleased to review and or set aside the orders issued on 10th February, 2022 and proceedings thereto dismissing the Plaintiff's suit with costs.

f. That this Honourable Court be and is hereby pleased to reinstate the Plaintiff's suit vide the Complaint dated 31st January, 2019 to be heard on merit between the parties.

g. That this Honourable Court be and is hereby pleased to reinstate the order of injunction previously issued by the Honourable Justice O. Angote on 5th June, 2020 to its fullest extent.

h. That cost of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavits of BEATRICE MUMO, JAMES GITHUI and AMBROSE WAIGWA. In the said affidavits, they highlight the proceedings herein; admit that they were served with a Hearing Notice for the hearing scheduled on 10th February, 2022 but failed to attend Court due to misdiarization. They contend that mistake to Counsel cannot be visited upon the client and they are ready to proceed with the suit. They reiterate that the Court should restore the orders of injunction granted by Justice Angote on 5th June, 2020 as the Plaintiff is exposed to irredeemable damage and losses.

The Defendant opposed the application by filing three replying affidavits sworn by JOMO NYARIBO and RICHARD GITAHU respectively. In the three affidavits, the Defendant insists the Plaintiff's Counsel was duly served but failed to attend Court with the Plaintiff's witnesses. It contends that no proper reason has been canvassed to warrant the setting aside of the orders granted on 10th February, 2022. Further, that injunctive orders should not issue because the Plaintiff has abandoned the subject sewer line and embraced three alternatives. It denies destroying the subject sewer line.

The application was canvassed by way of oral submissions, where the Plaintiff's and Defendant's Counsels both reiterated their averments as per the respective affidavits.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated 11th February, 2022 including the respective affidavits, annexures thereon and oral submissions, the following are the issues for determination:

- ***Whether the Court should review and or set aside the orders issued on 10th February, 2022, reinstate the Plaintiff's suit and determine it on merit.***
- ***Whether the Court should reinstate the orders of injunction granted on 5th June, 2020 by Justice Angote.***
- ***Who should bear the costs of these proceedings.***

As to whether the Court should review and or set aside the orders issued on 10th February, 2022, reinstate the Plaintiff's suit and determine it on merit.

I wish to make reference to various legal provisions governing dismissal for non-attendance and want of prosecution. Order 17 Rule 2 of the Civil Procedure Rules provides that:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

While Order 12, Rule 3(1) of the Civil Procedure Rules stipulates thus:

“(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

Further, Order 12, Rule 7 of the Civil Procedure Rules states thus:

“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.”

In the current scenario, the Plaintiff avers that it was not aware of the Hearing date as the Counsel had misdiarized it. Further, the Counsel contended that the said hearing date was not indicated in the Cause list, hence it failed to call witnesses as well as attend court. The Defendant insists the Plaintiff's Counsel was duly served, but failed to attend Court with its witnesses. Further, on the date of the hearing, the Defense Counsel even called the Plaintiff's Counsel's offices and spoke to a Mr. Waigwa who promised to revert to him but failed to do so. The Plaintiff's Counsel admits that they were indeed served, misdiarized the hearing and indicated 10th March, 2022 instead of 10th February, 2022. It is as a result of their failure to attend court that the Court proceeded to dismiss the suit for non attendance and want of prosecution. I have had a chance to peruse the respective affidavits and Court record and note this is the first time the suit was scheduled for hearing. I note the Defendant has vehemently opposed the reinstatement of this suit but not demonstrated what prejudice it stands to suffer if the suit was reinstated and heard on merit.

In the case of *Esther Nyambura Ngotho V Harbans Singh Birdi & 2 Others (2014) eKLR* the Judge while reinstating a suit which had been dismissed for want of prosecution held that:

“There is now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of the Constitution and not to pay undue regard to procedural technicalities, and in light of the above reasons I find that there is sufficient ground to set aside the orders of dismissal of this suit given on made on 25th November 2011. In determining the issue whether the suit herein should be reinstated, I am also guided by the ruling of this Court in Ivita vs Kyumbu (1984) KLR 441 that even if there are good reasons for the delay in prosecuting a suit, the court must also be satisfied that justice will still be done to the parties despite the delay. The Defendants and Third Party have not demonstrated any prejudice they will suffer in having the suit herein reinstated, and on the contrary it is in the interests of justice that the issue of which of the two titles in existence with respect to the suit property is the valid title be determined. In addition, the Defendants have filed a petition seeking a determination of their rights in this respect, and it is prudent that all issues arising from the dispute between the parties herein be determined on merit and with finality.”

While in the case of in *Shah v Mbogo and Another [1967] EA 116* the Court of Appeal of East Africa held that:

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

Further, in the case of *Wachira Karani v Bildad Wachira [2016] eKLR* Mativo J held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

Based on the facts as presented while associating myself with the decisions cited above and relying on the legal provisions I have quoted, I note reinstatement of a suit is at the discretion of a Court, and I find that the reasons advanced by the Plaintiff seeking to set aside the orders dismissing its suit are credible. It is trite that mistake to Counsel cannot be visited upon the client and since the Plaintiff’s Counsel has been candid and admitted misdiarizing the hearing date, I opine that the Plaintiff has a constitutional right to be heard as enshrined in Article 50 of the Constitution and will proceed to reinstate this suit.

As to whether the Court should reinstate the orders of injunction granted on 5th June, 2020 by Justice Angote.

I note on 5th June, 2020, Justice Angote had issued orders of temporary injunction restraining the Defendant or its agents from interfering with the sewer line pending the outcome of this suit. Further, these orders were vacated on 10th February, 2022 and the Plaintiff claims the Defendant has now proceeded to interfere with the said sewer line which fact is denied. As to whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the reinstated suit. In line with the principles established in the case of *Giella Vs Cassman Brown (1973) EA 358*, I will proceed to decipher whether the Plaintiff has established a prima facie case to warrant the orders sought for temporary injunction I will further rely on the definition of a prima facie case as stated in the case *Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125* that intimated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicant’s rights.

The fulcrum of this suit revolves around a sewer line constructed by the Plaintiff. From the averments, in the respective affidavits, it has emerged that the sewer line was also subject of Machakos Petition No. 4 of 2017 wherein Justice Angote had quashed the approvals the Plaintiff had obtained from relevant authorities to construct the said sewer line and the said decision is subject to an appeal which is still pending at the Court of Appeal. The Defendant claims the Plaintiff had abandoned the use of the said sewer line and resorted to three other alternatives including connecting to a public sewer line and treating the waste. The Plaintiff’s counsel explained that since the matter was subject to appeal, the Plaintiff was compelled to use an expensive alternative until the dispute is resolved. From the court record, I note from 5th June, 2020 after the Plaintiff obtained the orders of injunction, it never proceeded to set the suit down for hearing but only filed three applications for contempt which were all dismissed. From the averments in the respective affidavits and submissions and since the Plaintiff has not denied that the sewer line in dispute has been constructed over public land and there are other parties affected. Further, that the same is abandoned. I further note that the orders of injunction issued on 5th June, 2020 subsisted for almost three years and noting that the provisions of Order 40, Rule 6 provides that:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

I am of the considered view that the orders of injunction issued earlier ought to have lapsed.

Based on the facts as presented while associating myself with the above cited judicial authorities, I find that the Plaintiff has failed to establish a prima facie case with a probability of success to warrant the orders sought. In relying on the parameters set in the case of *Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012*, where it was held that if a party fails to establish a *prima facie* case, the court need not proceed to deal with the other two limbs and I will decline to do so.

On who should bear the costs of these proceedings, I opine that since the Defendant is actually the inconvenienced party, it is entitled to costs.

It is against the foregoing that I find the application dated the 11th February, 2022 partially successful and will allow it in the following terms:

- a. That this Honourable Court be and is hereby pleased to review and or set aside the orders issued on 10th February, 2022.***
- b. That this Honourable Court be and is hereby pleased to reinstate the Plaintiff’s suit vide the Complaint dated 31st January, 2019 and direct that the same to be heard on merit between the parties.***
- c. The Plaintiff is directed to set down the suit for hearing on its merits within 90 days from the date hereof, failure of which the suit stands dismissed for want of prosecution.***
- d. The Costs of this application is awarded to the Defendant including the attendant costs of 10th February, 2022 for the Counsel and the three witnesses.***

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE