



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 515 of 2008**

**JOSEPH BONGEL.....1<sup>st</sup> PLAINTIFF**

**VICTOR LIYAI KHADAKA.....2<sup>nd</sup> PLAINTIFF**

**CARLOS IKE LIBOI.....3<sup>rd</sup> PLAINTIFF**

**BRUNO EDU AMUNGA AYAYA.....4<sup>th</sup> PLAINTIFF**

**(3<sup>rd</sup> & 4<sup>th</sup> Plaintiffs suing as the beneficiaries of the Estate of Philip Ayaya(deceased))**

**VERSUS**

**NUCLEAR INVESTMENTS LIMITED..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 12<sup>th</sup> January, 2021, the Plaintiffs/Applicants have sought for the following orders:

**a) That the court reviews, discharges and/or vacates the orders issued on 8<sup>th</sup> December, 2020 dismissing the Plaintiffs suit for non-attendance and consequently re-instate the Plaintiffs suit.**

**b) That costs be provided for.**

2. The Application is based on the grounds on the face of the motion and is supported by the Affidavits of Carlos Ike Liboi, the 3<sup>rd</sup> Plaintiff and Solomon Wamwayi, counsel for the Plaintiffs.

3. The Plaintiffs' advocate deponed that his failure to attend court when the matter came up for hearing on 8<sup>th</sup> December 2020 was occasioned by the belief that he did not have instructions from the Plaintiffs and that the Plaintiffs had indicated to him that they were contemplating a change of counsel.

4. Counsel deponed that the Plaintiffs had requested for their fee note and had not communicated thereafter; that together with the fee note, he had indicated to them that the matter would proceed for hearing on 8<sup>th</sup> December, 2020 and that on the date of the hearing, he was in a criminal trial which was proceeding physically and was unable to log into the court.

5. On his part, the 3<sup>rd</sup> Plaintiff deponed that the Plaintiffs had indeed indicated to counsel that they were considering a change in representation and had in that regard requested for the fee note; that he was given the fee note and further informed that the matter would come up for hearing on 8<sup>th</sup> December, 2020 and that he did not attend court because he was under the impression that the advocate would inform them of the date. According to the 3<sup>rd</sup> Plaintiff, they have retained the same counsel and are ready to proceed with the matter and that the Defendant will suffer no prejudice if the suit is reinstated.

6. In response to the Application, the Defendant filed Grounds of Opposition as well as a Replying Affidavit both dated 25<sup>th</sup> May, 2021. In the Grounds of Opposition, the Defendant averred that the suit was dismissed for want of prosecution; that no plausible explanation has been given to vacate the dismissal orders of 8<sup>th</sup> December, 2020; that the Plaintiffs have completely lost interest in the suit; that there is no substance in reinstating the suit; that litigation must come to an end and that no prejudice will be occasioned to the Plaintiffs if the orders are declined.

7. In the Replying Affidavit, the Defendant's Secretary deponed that the suit is essentially a boundary dispute in which the Plaintiffs

contend that the Defendant's parking lot is trespassing on their suit property; that the Defendant on their part asserts that the space occupied by the parking lot being adjacent to its property is unoccupied and unutilized land and that it received requisite authority from the City Council of Nairobi to temporarily use it as parking space for its members Matatus.

8. According to the Defendant's secretary, the Plaintiffs have never been keen on prosecuting their suit as evidenced by the fact that the matter was up for dismissal on 26<sup>th</sup> May, 2015 after which the Plaintiff were granted the last chance to prosecute the suit; that the Plaintiff's Advocate has severally failed to attend court; that there is no Notice of Change of Advocates on record and that the Plaintiffs and their counsel's reasons for non-attendance are not feasible.

9. The Plaintiffs filed a response to the Grounds of Opposition on 24<sup>th</sup> June, 2021 stating that the suit was dismissed for non-attendance and not for want of prosecution; that whether or not the Application has merit will be determined at its hearing; that the Defendant has never raised an objection to the merits of the suit; that it is a legal principle that parties must be heard and cases determined on their merits and that the Plaintiffs stand to suffer prejudice as the Defendant's members have trespassed on their plot and continue to do so.

10. The 3<sup>rd</sup> Plaintiff and their counsel also filed Supplementary Affidavits in response to the Replying Affidavit on 24<sup>th</sup> June 2021. The Plaintiff's counsel reiterated that he had sufficiently explained the reasons for his non-attendance and that the 3<sup>rd</sup> Plaintiff having collected the fee note, he believed he would be served with a Notice of Change of Advocates or a letter of acting in person.

11. The 3<sup>rd</sup> Plaintiff deponed that there is no order showing that they were granted the last chance on 26<sup>th</sup> May, 2015; that they have never been served with a dismissal notice; that the matter was only set for hearing once being the 8<sup>th</sup> of December, 2020 and that the Defendant has not demonstrated the loss it will suffer if the suit is reinstated.

### **Submissions**

12. The Plaintiffs filed submissions on 22<sup>nd</sup> of November, 2021. Counsel submitted that his failure to attend court on 8<sup>th</sup> December, 2020 was occasioned by uncertainty as to whether or not he still represented the Plaintiffs and that he was equally engaged in HCCR No 61 of 2012-Republic vs Dwight Saragay and 4 others on the day the matter came up for hearing.

13. The Plaintiffs' advocate deponed that the question of setting aside ex-parte orders is a matter of the court's discretion as was held in the case of Wachira Karani vs Bildad Wachira [2016] eKLR citing the case of Esther Wamaita Njihia & 2 others vs Safaricom Limited [2014] eKLR and that the Defendant has not shown how it will be prejudiced if the suit is reinstated. Reliance was placed on the case of Jim Rodgers Gitonga Njeru vs Al-Husnain Motors Limited & 2 others [2018] eKLR which cited the Court of Appeal case of Philip Chemwolo & Another vs Augustine Kubende 1982-83 1 KAR.

14. The Defendant's counsel filed submissions on 12<sup>th</sup> November, 2021 in which he submitted that the test to be applied in applications for setting aside ex-parte orders are whether there is a reasonable explanation for the delay; whether there is a meritorious case and whether the other party will suffer prejudice that cannot be cured by costs.

15. Counsel submitted that no reasonable explanation has been tendered by the Plaintiffs with respect to their non-attendance; that the explanations by the Plaintiff's Advocate are equally untenable and that the conduct of the Plaintiffs in the suit points to latent disinterest. It was submitted that in any event, the suit is unmerited as the Plaintiff's allegations of trespass are unfounded because the Defendant was granted permission to erect a fence on the suit property to temporarily utilize the same for parking.

16. It was submitted that if the suit is reinstated, the Defendant will be greatly prejudiced as the Plaintiffs' continuous delay in prosecuting the suit infringes on its members' rights to a fair and expeditious trial and that time wasted and resources spent by the Defendant in defending the suit cannot be compensated as was held in the case of Bilha Ngonyo Isaac vs Kembu Farm & Another [2018] eKLR.

### **Analysis and Determination**

17. Having read and considered the application, the rival affidavits as well as the submissions filed by the respective parties, the sole issue that arises for determination is whether there are sufficient reasons to warrant the reinstatement of the suit.

18. **Order 12 Rule 7 of the Civil Procedure Rules, 2010** gives this court discretion to reinstate a suit that has been dismissed and 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.”***

19. The exercise of this discretion to reinstate a suit 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 as follows:

***“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”.***

20. 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...”***

21. The Plaintiff is seeking for an order setting aside the orders made in this court on 8<sup>th</sup> December, 2020. When the matter came up for hearing on the said date, neither counsel for the Plaintiffs nor the Plaintiffs were present in court. The Defendant’s advocate sought to have the suit dismissed for non-attendance which dismissal was duly granted.

22. The Plaintiffs’ advocate has stated that his failure to attend court was occasioned first by the fact that he was unsure whether he still had instructions and secondly due to the fact that he was attending to a criminal case that was proceeding physically. With respect to the question of instructions, counsel submitted that the Plaintiffs requested for the fee note which he gave them and informed them of the date when the matter was to be heard, and that there was no further communication from them.

23. That may be so. However, his services having not been expressly terminated and having not received a Notice of Change of Advocates nor indeed a letter from the Plaintiffs indicating their intent to represent themselves, it behooved the Advocate to be diligent and in this respect attend court.

24. The fact that counsel was involved in another matter is not a sufficient reason for non-attendance of court. Nothing would have stopped him from asking a colleague to hold his brief and seek an appropriate time allocation or even communicate about his unavailability.

25. The above notwithstanding, it is trite that a case belongs not to an advocate but to his 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.”***

26. The 3<sup>rd</sup> Plaintiff, despite admitting of being aware of the date the matter was scheduled for hearing, did not attend court. According to him, he thought the Advocate would inform him of the date, the same advocate he had informed that they would possibly be withdrawing instructions from. Although the Plaintiffs have admitted that they were made aware of the date the matter was coming up for hearing by their counsel, no explanation has been tendered for their non-attendance.

27. The court has keenly analyzed the court record. On 26<sup>th</sup> May, 2015, the suit came up for Notice to show cause as to why it should not be dismissed. The court granted the Plaintiff the last chance to prosecute his claim. On 1<sup>st</sup> July, 2015, the matter was certified ready for hearing and was slated for hearing on 22<sup>nd</sup> September, 2016 but was adjourned at the behest of the Plaintiffs.

28. When the matter next came up for hearing on 29<sup>th</sup> March, 2017, the court was informed that the 1<sup>st</sup> Plaintiff was deceased and counsel sought to substitute him. The court granted the Plaintiff 45 days within which to do so. At the time the matter came up for mention on 26<sup>th</sup> April, 2017, counsel for the Plaintiff was absent. Counsel was equally absent on several occasions when the matter was mentioned, being 3<sup>rd</sup> April, 2017, 9<sup>th</sup> October, 2017, 17<sup>th</sup> September, 2019, 6<sup>th</sup> November, 2019, 4<sup>th</sup> December, 2019 and 8<sup>th</sup> May, 2020.

29. The aforesaid chronology of events points to a lax attitude towards the prosecution of this suit by both the Plaintiffs and their counsel. That a matter filed in 2008, has never been prosecuted despite having been set down on several occasions is a cause for great concern. The court is not persuaded that the overriding objective of the court would come to the aid of the Plaintiffs in this instance.

30. 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. 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.”***

31. In view of the foregoing, the court finds that the Application dated 12<sup>th</sup> January, 2021 is unmerited and the same is dismissed with costs. For avoidance of doubt, the suit stands dismissed as ordered on 8<sup>th</sup> December, 2020.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF MARCH, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Ms Watitu for Mahinda for Defendant

Ms Chite h/b Wamwayi for Plaintiff

Court Assistant - Okumu