



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 28 OF 2015**

**WINNIE NYAMBURA MURIMI.....1<sup>ST</sup> PLAINTIFF**

**NAHASHON MUNGAL.....2<sup>ND</sup> PLAINTIFF**

**EPHANTUS MWANGL.....3<sup>RD</sup> PLAINTIFF**

**PRISCILLAH NYAMBURA MWAURA.....4<sup>TH</sup> PLAINTIFF**

**JACKTONE NYENDE OBUYU....INTENDED 5<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**PENINA MBITHE MBITHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MBUKONI HOLDINGS LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This Ruling relates to a Notice of Motion Application dated 7<sup>th</sup> October 2020 where the Applicant seeks the following orders;

- 1. That the Honourable Court do exercise its discretion in favour of the Applicant and set aside or review its orders issued on the 21<sup>st</sup> September, 2018 dismissing this case and all consequential orders thereto and thereby reinstate the case and set it down for hearing on merit inter partes.***
- 2. That upon reinstating the case, the Applicant herein be granted leave to amend the Plaint to be enjoined as the 5<sup>th</sup> Plaintiff herein.***
- 3. That costs of the Application be in the cause.***

The Application is based on the grounds on the face of it and supported by the affidavit of JACKTONE NYENDE OBUYU where he deposes that this suit was dismissed for want of prosecution on 21<sup>st</sup> February, 2018. He explains that his name was indicated in a List attached to the Plaint as one of the persons on whose behalf the case was being brought in a representative capacity. He denies knowledge of inclusion of his name in the list nor signing any document. He confirms that two of the cases he has filed in respect to a plot he purchased from the 2<sup>nd</sup> Defendant have been struck out on the basis that he has been part of this case. Further, the existence of the instant suit was brought to fore during the pendency of the Nairobi ELC No. 1079 of 2016 and upon searching for the file, his advocates discovered the suit had been dismissed for want of prosecution on 21<sup>st</sup> February, 2018. Further, that he opted to file Machakos ELC 15 of 2019 which was objected to and dismissed as his name was in the previous suit, thus rendering him unable to pursue his claim. He denies being notified nor being served with a notice to the effect that the case was due for dismissal.

The 1<sup>st</sup> Defendant opposed the instant application by filing a replying affidavit sworn by PENINAH MBITHE MBITHI where she confirms this suit was dismissed for want of prosecution. She avers that she is the sole proprietor of the suit premises being MAVOKO TOWN BLOCK 3/6091. She contends that the Applicant has misled the court that he is a Plaintiff, yet he is not. Further, that the application to reinstate a suit for hearing can only be made by a person who was a party to the said suit. She avers that since this suit was dismissed more than two years ago, there is no Plaint to be amended. Further, there has been undue, unreasonable and unexplained delay in making this application. She reiterates that the Plaintiffs have for the last two years not shown willingness or interest in applying to set aside the dismissal orders. Further, the Applicant lacks capacity to file the instant application.

The application was canvassed by way of written submissions.

## Analysis and Determination

Upon consideration of the Notice of Motion Application dated the 7<sup>th</sup> October, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether this suit should be reinstated to enable the Applicant be joined as a 5<sup>th</sup> Plaintiff.

The Applicant in his submissions reiterated his claim and craved the court's indulgence to exercise its discretion to reinstate the suit. He insisted the mistake of counsel for the Plaintiffs, should not be visited upon him. He further relied on the rules of natural justice and Article 50 of the Constitution of Kenya which provides for rights to fair hearing. He argued that leave to amend pleadings is provided for under the provisions of Order 1, Rules 9 and 10, Order 24 Rules 3, 4, 5 and 6 the Civil Procedure Rules. To buttress his averments, he relied on the following decisions: *Mbogo & Another V Shah EALR 1908*; *John Nahashon Mwangi V Kenya Finance Bank Limited (in liquidation) (2015) eKLR*; *Philip Chemwolo & Another Vs Augustine Kubede (1982 – 88) KAR 103*; *Tana & Athi Rivers Development Authority V Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR*; *Central Bank Limited V Trust Bank Limite (2000) 2 EA*; *Corner Holiday Inn Limited & Another Vs Andrew Kuria Wangunyu (2008) eKLR* and *Martha Wangari Karua Vs IEBC Nyeri Civil Appeal No. 1 of 2017*.

The 1<sup>st</sup> Respondent in her submissions argued that there was no mention of the Applicant anywhere in the original nor the Amended Plaintiff. Further, that since the suit was dismissed on 21<sup>st</sup> September 2018, the Applicant has come to court three years later, yet he was not a party nor an Interested party rendering the instant Application incompetent and an abuse of the court's process. She stated that the Applicant lacks capacity to either set aside the judgment or apply for amendment of the Pleadings, since in his own admission he confirmed to have had knowledge of the dismissal of the suit.

From a perusal of the proceedings herein, I note this suit was dismissed for want of prosecution on 21<sup>st</sup> September, 2018. Further, that the Applicant was not a party to the dismissed suit which he now seeks to revive. A cursory look at the proceedings indicates that when the Plaintiffs therein were instituting the suit in 2015, the Applicant did not sign the consent that is attached to the Plaintiff. Further, the verifying Affidavit attached to the Plaintiff contained a list of seventy four members with the Applicant being listed as number sixty five, having not appended his signature in consent unlike the other members. In the case of *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...”***

While in the case of *CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173* it was held that:

***“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”***

In the instant case, I note the Applicant has sought for joinder for a dismissed suit more than two years later. He has not explained why he never sought to join the suit at the point his previous suit had been struck out on the basis of the instant suit. I opine that seeking joinder to a suit which was dismissed more than two years ago appears to be unreasonable, coupled with indolence. Further, since there is no suit yet, I find the application for joinder and leave to amend Plaintiff premature as these can only be done in a subsisting suit. Further, the Applicant has not explained what occasioned the delay.

Based on the facts before me while associating myself with the decisions cited, I find that the Applicant has brought this application after an inordinate delay. Further, he has not demonstrated sufficient cause why this suit should be reinstated. In the circumstance, I find that the instant application unreasonable and amounts to an abuse of the court process.

It is against the foregoing that I find the Notice of Motion Application dated 7<sup>th</sup> October 2020 unmerited and will dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**