



REPUBLIC OF KENYA



KENYA LAW
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**Harun (Trading as Nelson Harun & Company Advocates) v Kaluworks Limited & another
(Environment & Land Case 181 of 2019) [2022] KEELC 2423 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2423 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 181 OF 2019
JG KEMEI, J
MAY 5, 2022
IN THE MATTER OF THE JUDGMENT IN ELC SUIT
NO. 937 OF 2013 NAIROBI
BETWEEN
BOOTH EXTRUSIONS LIMITED PLAINTIFF
VERSUS
DUMBEYIA NELSON MUTURI HARUNDEFENDANT
AND
IN THE MATTER OF THE JUDGMENT IN THE COURT
OF APPEAL CIVIL APPEAL NO. 249 OF 2015 NAIROBI
BETWEEN
BOOTH EXTRUSIONS LIMITEDAPPELLANT
VERSUS
DUMBEYIA NELSON MUTURI HARUNRESPONDENT
AND
IN THE MATTER OF ORDER 37 RULE 11 OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF SECTIONS 3 & 19 OF THE
ENVIRONMENT AND LAND COURT ACT
AND
IN THE MATTER OF SECTIONS 1A, 1B, 1C & 3A OF
THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA
AND
IN THE MATTER OF L.R. NO. 4953/1421 (I.R 37819) THIKA TOWN, KIAMBU COUNTY



BETWEEN

**NELSON MUTURI DEMBEYIA HARUN PLAINTIFF
TRADING AS NELSON HARUN & COMPANY ADVOCATES)**

AND

**KALUWORKS LIMITED 1ST DEFENDANT
BOOTH EXTRUSIONS LIMITED 2ND DEFENDANT**

RULING

1. Before court is the plaintiff's Notice of Motion Application dated July 28, 2021 seeking Orders That;
 - a. Spent.
 - b. The order of dismissal made by the court on April 7, 2021 be set aside.
 - c. The Originating Summons be determined on the basis of the uncontested affidavit of the plaintiff and the suit property be vested in the plaintiff in view of the Court of Appeal Judgement in Court of Civil Appeal No. 249 of 2015 Nairobi affirming the judgment of the High Court in ELC No. 937 of 2013, Nairobi, Milimani.
 - d. Costs be provided for.
2. The Application is based on the grounds thereat and the affidavit of even date of Nelson Muturi Dumbeyia Harun, the plaintiff and also an Advocate of this court. He avowed that his last query over the matter via an un-responded email was on 12/7/2021. That there were other previous emails requesting for a hearing date annexed thereto as NMDH2. That when he failed to get any response he followed up with the Court Registry only to learn that the suit was dismissed on 7/4/2021. That the court did not extract and serve a notice to show cause upon the plaintiff's Advocates hence the Application.
3. The Application is unopposed despite service upon the defendants as evidenced by Returns of Service dated 22/10/2021 and 26/10/2021.
4. On 23/11/2021, directions were taken to canvass the Application by way of written submissions. Learned Counsel Ondari holding brief Mr. Gathaiya for the 2nd defendant informed the court that Mr. Gathaiya wished to cease acting for the 2nd defendant.
5. Thus only the plaintiff filed his submissions dated 4th February 2022. He affirmed that his application is unopposed in light of the defendants failure to object. That his suit was unprocedurally dismissed as the Deputy Registrar did not issue a notice to show cause to either of the parties as contemplated under Order 17 rule 2 of the Civil procedure Rules. That the revised Civil Procedure Rules require that a suit stands dismissed after two years of inactivity and in this case the dismissal was premature. This is because the suit was filed on 11/12/2019; set down for hearing on 30/4/2020 but due to Covid-19 pandemic the hearing did not proceed as scheduled. That from the said date 30/4/2020 to 7/4/2021, one year had not lapsed for the court to invoke provisions of Order 17 rule 2(1) Civil Procedure Rules neither had two years lapsed as provided for under Order 17 Rule 2(5) Civil Procedure Rules.



6. Regarding Prayer 3 in the Application, it was submitted that the 2nd defendant herein sued the plaintiff in Nairobi ELC case No. 937 of 2013 seeking an order that the Plaintiff delivers the original title and Deed plan No. xxxxx in respect of L.R No. 4953/1424 (L.R 37819) held by the Plaintiff on account of Advocate/ Client relationship. That the trial Court dismissed the 2nd Defendant's claim and on appeal, the Court of Appeal in Nbi C.A No. 249 of 2015 upheld the trial court decision on 1/12/2017 hence the Originating Summons herein dated 10/12/2019. Last but not least the plaintiff alluded to a failed amicable out of court settlement between him and the 2nd defendant that contributed to the non-prosecution of his suit.
7. The main issue for determination is whether the Application is merited.
8. The plaintiff contends that his suit was unprocedurally and prematurely dismissed on 7/4/2021 for want of prosecution. Indeed the court record shows that this matter proceeded before the Hon. Deputy Registrar of the court on 24/11/2020 in the absence of parties. The court directed that the matter be listed for Notice to show cause why the suit should not be dismissed on 7/4/2021 and a notice to that effect was to be issued by the Registry. My perusal of the file confirms the plaintiff's contention that no such notice was served upon either of the parties herein. Further the Application as already indicated is not opposed.
9. The relevant provisions for dismissal of a suit for want of prosecution is stipulated under Order 17 rule 2 *Civil Procedure Rules* that;
 - “2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
 - (1) 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.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order.”
10. It is important to point that under Order 17 rule 2(1) above, it is not obligatory for the court to issue notices as argued by the plaintiff herein. The rules uses ‘may’ and so the language is not couched in mandatory terms because in an adversarial system like ours, it is expected that a litigant is responsible for prosecution of his/her case once it is filed in court. Further the plaintiff's position that the matter was initially slated for hearing on 30/4/2020 is not true because the record shows upon filing his suit, the matter was slated for mention before the Deputy Registrar on 23/4/2020. Irrefutably that date fell at a time when court operations had been downscaled due to Covid-19 pandemic, a judicially noted



endemic. There was no appearance by parties in the subsequent dates namely 17/9/2020, 24/11/2020 and 7/4/2021.

11. The plaintiff deponed that he made numerous attempts to follow up on the position of his matter in vain. The email annexures 'NMDH1 & 2' were all for the year 2021 and none for the year 2020. Conversely, the electronic Court correspondences were sent to mutinda.associates@gmail.com, a distinct email address from the one indicated by the plaintiff in his Originating summons.
12. The plaintiff inter alia relied on sections 1A, 1B, 1C (sic) and 3A of the Civil Procedure Act also known as the oxygen principles. They provide for Objectives of the Act, Duty of the court and inherent powers of the court to ensure ends of justice are met. The court is also enjoined to safeguard the just determination of the proceedings as further amplified by article 48 and 50 of the Constitution on access to justice and fair hearing respectively.
13. In addition to that, when a matter is dismissed under Order 17 Rule 2 above, an aggrieved party may apply for reinstatement of his suit under Order 12 rule 6 Civil Procedure Rules.
14. Reinstatement of a suit is an exercise of discretionary powers of the court. In the case of *Shah v Mbogo & another* (1967) EA 116, the court stated on the matter of court's discretion, that such discretion is intended to be exercised to avoid injustice or hardship resulting from 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.
15. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons for the court to grant the Orders sought. In this case and absent any objection, it is the finding of the court that the plaintiff has established a just cause for the court to exercise its discretion in his favor and allow the Application as prayed.
16. Final orders & disposal;
 - a. The application is allowed in terms of prayer (b).
 - b. Costs shall be in the cause.
 - c. Thereafter the applicant is directed to prosecute the suit expeditiously.
17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Ms. Cherotich holding brief for Muturi

Defendant 1 – absent

Defendant 2 - absent

Court Assistant - Phyllis

