REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 379 OF 2017

BETH WAITHERA MWANGI.....PLAINTIFF

VS

JOHN MAINA CHEGE.....DEFENDANT

RULING

1. The Applicant brought this application dated the 12/2/2021 against the Respondent seeking the following orders;

    a. That this Honorable be pleased to set-aside the ex-parte orders issued on 20/06/2019 and reinstate the matter.

    b. That the firm of Mumbi Muritu Advocates be granted leave to come on record and have the conduct of the matter in place of Njau Kayai & Co. Advocates.

    c. That costs hereof be in the cause.

2. The application is based on four grounds and averments contained in the Affidavit of BETH WAITHERA MWANGI. The Applicant contends that the suit was dismissed without the knowledge of her previous Counsel and that she only got to know about the dismissal when she instructed a different Counsel. It is her contention that her previous Counsel's inadvertent error caused the failure not to prosecute the matter hence the dismissal.

3. It is further her contention that she had during the pendency of the matter followed up the same with her then Counsel but when communication could not ensue she instructed the present Counsel. She also attributes the delay to her parents' ailment which forced her to take care of them and had to prioritize them over the instant suit.

4. The Respondent in opposing the application deponds that there was inordinate and inexcusable delay in bringing the application noting that notices for dismissal were issued and also that the Applicant instituted a fresh suit in Kigumo in light of the dismissal thus an abuse of the Court process. The Applicant avers that this Court lacks jurisdiction to entertain the application since the matter revolves around issues of Matrimonial property.

5. Parties argued the application before me on 02/03/2021 affirming the contents of their pleadings. A perusal of the file and upon hearing the arguments by both Counsel the issues for determination are;

    a. Whether the firm of Mumbi Muritu Advocates should be granted leave to come on record.

    b. Whether the Applicant was served with a Notice to Show Cause.

    c. Whether the orders issued on 20/06/2019 should be set-aside.

    d. Who should bear the costs.

6. Order 9 Rule 5 of the Civil Procedure Rules provides for the procedure for change of Advocate during the pendency of a matter and an Advocate is expected to file a Notice of Change which must be duly filed and served upon all parties to the suit including the former Advocate as mandated by Rule 6 of the said provision.

7. Order 9 Rule 9 of Civil Procedure Rules on the other hand makes provision for change when judgment has been entered as is in the

present case. Rule 10 requires of this Court to handle the issue of representation before delving into other prayers sought in the application.

8. The Applicant filed a Notice of Change of Advocate dated 8/12/2020, after the suit had been dismissed. As to whether dismissal for want of prosecution is a judgment was settled in the case of **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR,** where the Court of Appeal found dismissal for want of prosecution amounts to a judgment. That being the case the notice of change was not properly on record, the notice therefore was defective.

9. The Applicant as if to solve the matter filed the instant application seeking leave to come on record though not the substantive prayer of the application. Order 9 Rule 10 provides of the Civil Procedure Rues that "An application under Rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first" The order allows the Applicant to put together the prayers though it does not state which prayer should be substantive but by dint of practice it ought to be the first prayer.

10. It is clear that the Applicant did not comply with Order 9 Rule 9 of the Civil Procedure Rules.

11. As to whether the Applicant was served with the notice to show cause, the Applicant asserts that she was not aware of the notice of dismissal nor was she served with any Notice to Show Cause. That she only became aware of the dismissal upon appointing a new Counsel. The Respondent on the other hand contends that they were issued with notices of the intended dismissal and while arguing the application, Counsel for the Respondent argued that the Notice to show cause was served upon both Advocates and the details of the former Counsel of the Applicant were indicated in the NTSC hence the Applicant cannot now be heard to say they were not served.

12. The record indicates that parties last appeared before Court on 8/03/2018 when a ruling was delivered and there being no attempts to list down the matter for hearing, the matter was fixed for a show cause.

13. There is a Notice to Show Cause dated 8/5/2019 which was served on both parties and it indicates that Counsel for the Applicant received the same on 28/05/2019 under no protest. Counsel had the power to receive documents on behalf of the Applicant, having been properly on record. However, he neither appeared on 20/06/2019 nor was there any communication hence dismissal of the suit.

14. The Applicant filed a Notice of Change on 19/11/2017 appointing the firm of Njau Kayai & Company Advocates whose physical address indicated Mercantile House 1st Floor, RM 130 of postal address 37207-00100 Nairobi. These details are well captured in the NTSC as drafted by Court and the postal address is well indicated in the receiving stamp. There is an Affidavit of Service by CHARITY WAIRIMU MAINA which Affidavit demonstrates how service was effected, which service has not been challenged this far.

15. The Applicant has remained silent on this issue and maintains that she was not served; the record in itself is so clear as to the service. Based on the uncontroverted Affidavit of Service and looking at the NTSC on the face of it I am satisfied that the notice was adequately served. (**See Nairobi HCC No. 418 of 2018 Pasico Eastern Africa Ltd v Ecobank Kenya Limited [2020] eKLR)**

16. The power to dismiss a suit for want of prosecution is well captured in Order 17 Rule 2 of the Civil Procedure Rules where the Court finds that no sufficient reason has been given it can proceed to dismiss a suit. For a suit to be dismissed parties must have failed to undertake any action within one year. See Order 17 Rule 2(1) of the Civil Procedure Rules

17. The principles for setting aside ex-parte orders were well settled in the case of **Mbogo & Another v Shah [1968] EA 93,** the Court held that: -

> a. Firstly, there are no limits or restrictions 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 to the parties.
>
> b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
>
> c. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically.

18. From the proceedings, parties were last in Court on the 8/03/2018 where the Court pronounced itself on issues of jurisdiction. The Plaintiff who is the Applicant herein then took a date at the registry on the 25/05/2018 but failed to appear on the 3/07/2018. A Notice to show cause was taken out and the same was fixed for 20/06/ 2019.

19. The Applicant having been duly served failed to appear and there being no cause given to Court as to why the suit could not be dismissed the Court dismissed the matter. The Applicant has now come to Court almost two years after the dismissal seeking to set aside the order alluding to mistake of her Advocate as well as taking care of her ailing parents.

20. The Applicant must give sufficient reasons why the order should be set-aside, he/ she must demonstrate why she failed to appear in Court. Justice Mativo in Nyeri Civ No. 101 of 2011 **Wachira Karani v Bildad Wachira [2016] eKLR** quoted the Supreme Court of India in the case of **Parimal vs Veena** where the Court observed that: - "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive."

21. This therefore means Courts must look into the facts giving rise to the action and the conduct of the party towards it. The Applicant alleges that she made several communications to her former Advocates. However, this allegation was not supported by evidence.

22. It has been settled in many cases that a litigant must not always blame his/ her Counsel when wrongs occur, they are required to at all times be hands on with respect to their cases. The Court associates itself with the sentiments of Justice Kimaru as has been quoted by many Courts in **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** where the learned judge expressed himself as follows:

> "Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant."

23. Having so stated, the Court finds that the Applicants argument that the mistake was occasioned by her former Counsel is not sufficient. The Applicant has attached a number of receipts showing that her parents were sick causing her to shift all the attention to them. The Court empathizes with the Applicant for the loss, the Court however notes that the receipts attached by the Applicant only shows the various medications issued to her parents, the Court is no expert to determine that the drugs were meant to treat severe illness. Also no evidence shows that the parents were solely in her custody over her eleven siblings. Even if the Court was to be lenient to the Applicant, the delay in bringing the application is so long. The father passed on in 2019 the application is filed in 2021 notwithstanding the dismissal was in mid-2019. Equity aids the vigilant not the indolent.

24. The Applicant filed a suit in Kigumo despite there being pendency of the present suit, against any shadow of doubt the Applicant instituted the Kigumo suit after knowledge that the instant suit had been dismissed. She must seek equity with clean hands. The Applicant is misusing the process of Court in an attempt to salvage her mistake.

25. The mere fact that she instructed a new Counsel does not mean that the previous one failed to communicate as a matter of fact it is said that the firm took the date on 25/05/2018. The Court notes that the Applicant failed to disclose to this Court the pendency of Kigumo CMCC No. 168 of 2020 which was filed sometime in November, 2020.

26. There has been adduced no sufficient reason why the Applicant had to wait for close to two years before bringing the application. Time starts to run immediately after judgment has been issued.

27. The Court fully agrees with the sentiments of the Court in **Hamis Hamadi Mwadende & 15 Others v Mama Hasina Mohamed & 4 others [2020] eKLR** when determining an application for reinstatement where the learned judge held that "A Notice to show cause is not the sort of matter that any Counsel worth his salt (or should I say fees) would take casually. It is one of those issues that would call for immediate and urgent attention to any keen Counsel".

28. That being the case there has been no sufficient reason why the ex-parte orders should be set aside, litigation must come to an end.

29. The application is unmerited. It is dismissed with costs to the Respondent.

30. **It is so ordered.**

DATED, SIGNED & DELIVERED ONLINE THIS 26th DAY OF MAY, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms Murito for the Plaintiff/Applicant

Defendant/Respondent: Absent

Court Assistants: Kuiyaki/Alex