



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

ELC CASE NO. 18 OF 2018

MOHAMED ALI ISSAK.....PLAINTIFF/APPLICANT

-VERSUS-

GARISSA MAIZE MILLERS.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant vide a Notice of Motion dated 12th April, 2021 sought the following orders;

(1) Spent.

(2) That the orders given on 22nd February, 2021 striking out the suit for want of prosecution be set aside.

(3) This Honourable Court be pleased to give orders for the reinstatement of this case.

(4) Costs.

THE GROUNDS IN SUPPORT

2. That the court gave an order dated 22nd February, 2021 which struck off the Plaintiff/Applicants case for want of prosecution.

3. That all this while the Plaintiff/Applicant was not aware of the progress of the case and what was needed by court since the Advocate did not inform him of it and the striking only came to this knowledge later without knowing why.

4. That the delay in prosecution of the case was inadvertent and due to an error by the previous Plaintiff's Advocates and such as the same mistake should not be visited upon the Plaintiff who was a layman wholly dependent on his Advocate.

5. That the Plaintiff/Applicant was not able to attend court on a notice to show cause and therefore was not aware of the striking out of the case.

6. That the Plaintiff/Applicant is not conversant with the digital court processes and therefore without clear directions by his Advocate he was not aware of the motion of striking out of the case, neither was he aware of any notice to show cause.

7. That the Plaintiff/Applicant has an arguable case with high chances of success and it is in the interest of justice that they are heard.

8. That the Plaintiff/Applicant has been exposed to unnecessary hardship and legal liability and will continue to suffer irreparable harm if suit is not reinstated and heard on merit.

9. That the Plaintiff/Applicant was not personally present in court to show cause why case should not be dismissed and was only dismayed by the dismissal for non-compliance.

10. That the court should not pay undue regard to technicalities as provided in the Constitution and thus should give the Plaintiff/Applicant a right to be heard.

11. That these orders sought herein will not prejudice the rights of the Defendant/Respondent.

APPLICANT'S SUMMARY OF FACTS

12. The Plaintiff/Applicant through an affidavit in support of the application sworn on 12th April, 2021 by **Abdulahi Bare**, and supplementary affidavit filed on 16th June 2021 sworn by **Mohamed Ali Isaak**. They both deponed as follows;

13. That the court gave an order dated 10th April, 2019 which gave the Plaintiff a chance to file and serve compliance document pursuant to Order 3, 7 and 11 CPR a response within 21 days.

14. That it is the advocates finding that the Advocate never complied with this order and for a longtime failed to prosecute the case.

15. That because of the digital hearings brought about by the Covid-19 scourge, the Plaintiff/Applicant was unable to physically keep track of the progress of the case.

16. That by an order dated 22nd February, 2021 the court struck out the case for want of prosecution.

17. That it is instructive to note that the Plaintiff/Applicant did not personally attend court on the said date to show cause why this suit should be dismissed because as expected, he reasonably believed that his Advocate in record had done so.

18. That the previous advocate on record in the matter has since demised due to Covid-19 related complications.

19. That it is trite law that an Advocate's mistake should not be visited upon the client and that the Applicant cannot be condemned unheard.

20. That the Plaintiff/Applicant was utterly dismayed by the apparent turn of events when he was informed that the matter had been dismissed for want of prosecution.

21. That if the said suit is not reinstated the Plaintiff/Applicant will be exposed to unnecessary hardships and legal liability to the Defendant on a matter that the Plaintiff/Applicant did not have a chance to state his view or position.

22. That there are reasonable grounds for reinstatement of the suit upon consideration of the prejudice the Defendant/Respondent would suffer vis a the prejudice the Plaintiff/Applicant will suffer if the same is not reinstated.

23. That the matters in this suit herein will squarely and truly be considered by the court if the case is heard on merit in order to avoid miscarriage of justice.

24. That because of the foregoing reasons, they pray that this Honourable court be pleased to reinstate the suit dismissed on 22nd February, 2021 in the interest of justice.

25. That what is stated herein is true to the best of my knowledge, information and belief save and except where the source is otherwise expressly stated.

DEFENDANTS/RESPONDENTS SUMMARY OF FACT

26. That on or about 28/10/2015 the applicants suit was dismissed for want of prosecution after he failed to appear in court twice after service upon him to show cause why the suit should not be dismissed.

27. That the applicant was condemned to pay costs which he has not paid till today.

28. That on 2/3/2018 nearly three years after dismissal of the applicants suit he moved the court through notice of motion dated 1/3/2018 claiming that he was not aware that the suit was dismissed and advanced similar reasons as the instant suit.

29. That the court extended leniency, allowed the application and reinstated the suit.

30. That the applicant ought to have exploited that leniency and speedily prosecute the case. That due diligence also demands that the applicant should keep tab of the progress of his case.

31. That the case has been in court for eight (8) years and the Respondent has never missed an opportunity to appear in court when called upon and has been spending resources to attend court.

32. That the applicant has not account of his whereabouts five months since the suit was dismissed and why he never took steps one (1) year after the court issued the directions.

33. That equity demands fairness and the court should find that the applicant has been accorded the opportunity to ventilate his case which he has abused and should not be granted another time.

SUBMISSIONS

34. The Court directed the parties to canvass the application through written submissions.

35. The plaintiff filed its written submissions. He submitted that the circumstances were unfortunate due to the demise of the previous advocate on record and the advent of covid-19. He cited the cases of **John Nahashon Mwangi versus Kenya Finance Bank Ltd [2015] e KLR**, **Ivita vs Kyumbu [1984] KLR 441**, **CMC Holdings Ltd v Nzioki [2004]** . **Phillip Chemwolo & Anor vs Augustine Kudebe (1982-88) KAR 103**.

ANALYSIS AND DETERMINATION

36. I have looked at the history of the matter. The suit herein is a fairly old matter having being commenced in the year 2010. It has been equally muddled by Court to court transfer processes and joinder of suits.

37. Of recent times is the dismissal of the suit on 28/10/2015. The Court dismissed the suit for want of prosecution as the suit had not been prosecuted for three (3) years. The plaintiff moved to reinstate the suit on 1st March 2018. By a consent Order dated 9th May 2018 the suit was reinstated and transferred to this Honourable Court. Parties filed their respective documents between the years 2018-2019. The matter proceeded for hearing on 31/7/2019 and on 26/2/2020 when both parties closed their cases. The court directed the parties to file their respective submissions on or before 26/3/2020.

38. The matter was further listed for Notice to show cause why suit should not be dismissed on 25/11/2020. Plausible reasons were afforded and the matter was listed for further hearing on 22/2/2021. On this date both parties did not attend to the court session (virtually). The suit was dismissed for non- attendance and for want of prosecution.

39. The legal framework on dismissal of suit for want of prosecution is found in Order 17 Rule 2 which provides as follows:-

“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.”

40. In **Ivita -vs- Kyumbu (1984) KLR 441** the Court summarized that the test to be considered whether a suit ought to be dismissed for want of prosecution as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

41. It is without a doubt that significant delay has been occasioned in this suit. A period of six years (2012-2018) saw there being no considerable action in this suit. But the act is equally specific. The same provides that ***no application has been made or step taken by either party for one year***. Considerable steps were taken in this case in the year 2020. The last time the matter was in court was on 25/11/2020. The matter was dismissed on 22/2/2021. Between the last time the matter was in court and the subsequent mention on 22/2/2021 the period of one year had not lapsed. Even if the court were to consider the period as commencing on 26/2/2020 the period was shy of four days to come to the dictate of Order 17 Rule 2 of the Civil Procedure Rules.

42. The next reason afforded for dismissal of the suit was due to non-attendance on the part of the plaintiff when the matter was listed for mention. **Order 12 Rule 7 of the Civil Procedure Rules** provides that 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. The power to set aside **ex parte orders** are discretionary, and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. (See **Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another [2021] e KLR**).

43. The plaintiff herein lays blame to his former advocate on record. He also seeks to sail on the premise that he is not tech savvy and could not comprehend the online hearings.

44. I have considered the reasons afforded by the plaintiff and the stage of the proceedings. The demise of his former advocate countered by the inexperience of the plaintiff in both legal and technological advances are credible reasons afforded for his non-attendance.

45. I'm further guided by the provisions set out by the Court of Appeal in **D.T. Dobie & Co (K) Ltd – Vs – Joseph Mbaria Muchina CA 37 of 1978** where the court stated that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

46. From the foregoing I find the application dated 12th April 202 being meritorious. The dismissal Orders issued on 22/2/2021 are hereby set aside.

47. For the further progress of this case the Court directs the parties to comply with the Orders issued on 26/3/2020.

48. The matter shall be further mentioned on a date to be agreed by the parties. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 1ST DAY OCTOBER, 2021.

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E.C. CHERONO (MR.)

ELC JUDGE

In the presence of:-

(1) Applicant/Advocate – absent

(2) Respondent/Advocate – absent

(3) Fardowsa, Court clerk –present.