



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 325 OF 2010

MORARO ONDIEKI.....PLAINTIFF

VERSUS

ISAAC KERANDI KIRIAMA.....DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated the 22nd day of April 2021, the Plaintiff/Applicant filed an application seeking a stay of execution of the judgment and decree following the dismissal of his suit on the 19th November 2018. He also seeks that the order of dismissal issued on 19th November 2018 be set aside. Even though the application is said to be supported by the affidavit of Bernard Nyagaka Ogari, it is actually supported by the affidavit of Moraro Ondieki, the Plaintiff/Applicant herein sworn on the 27th April 2021.

2. In his Supporting Affidavit, the Applicant gives the main reason for his failure to prosecute his suit as his long period of sickness and inability to communicate with his advocate owing to lack of a mobile phone and finances. He has annexed treatment records to his affidavit showing that he was admitted in hospital sometime in November 2018.

3. The application is opposed by the Defendant through his Replying Affidavit filed on the 27th May 2021. In the said affidavit the Defendant points out that the Plaintiff has not been keen on prosecuting his case as this is the second time that he is seeking to have the suit reinstated after it was dismissed for non-attendance on 19th November 2018. He contends that the Applicant has not explained why he failed to set the suit for hearing between 2015 and 2018 after it was reinstated in 2015. He argues that this case has been in court since 2010 and if the same is reinstated, the Defendant will be prejudiced as he has been denied the full use and occupation of his land.

4. In his submissions, learned counsel relied on the case of **Kestem Company Limited v Ndala Shop and 2 Others (2018) eKLR** where the court held that the delay of 10 years had not been satisfactorily explained and that such delay was a clear infringement of Article 159 of the Constitution of Kenya 2010.

5. The application was disposed of by way of written submissions and both parties filed their submissions.

ISSUES FOR DETERMINATION

6. Having considered the Notice of Motion, rival affidavits and the submissions filed by counsel for both parties, the singular issue for determination is whether the order of dismissal made on 19th November 2018 should be set aside so that the suit is reinstated for hearing.

ANALYSIS AND DETERMINATION

7. In considering the application, I am guided by the case of **Utalii Transport Company Limited & 3 others V NIC Bank Ltd & Another (2014) eKLR** which laid down the principles that the court ought to apply in applications for dismissal of a suit for want of prosecution as follows:

- i. "Whether there has been inordinate delay on the part of the Plaintiff in prosecuting the matter.
- ii. Whether the delay by the Plaintiff is intentional, contumelious and therefore inexcusable.
- iii. Whether the delay is an abuse of the court process.
- iv. Whether the delay will occasion substantial risk to a fair trial to the Defendant.

v. Whether the dismissal of the suit would occasion substantial prejudice to the Plaintiff.

vi. Who bears the costs of the application?"

8. The above principles boil down to the reasons for the non-attendance and whether there has been inordinate delay in applying for reinstatement of the suit. The question as to whether or not there has been inordinate delay will normally depend on the circumstances of the case. The court in the Utalii Transport case cited above held as follows:

“It must be noted that dismissal of a case without hearing it on the merits is a draconian act which drives the plaintiff from the judgment seat. It is therefore a matter of the courts discretion which should be exercised judiciously. Looking at the plaintiff’s conduct in totality and applying the above principles I find that his explanation for his failure to attend court is reasonable.”

9. It has not been stated that the delay herein has given rise to substantial risk to a fair trial or caused serious prejudice to the Defendant. In the above cited case the court observed as follows:

“For reinstatement of a suit to give rise to substantial risk to a fair trial or result into grave injustice to the defendant, the defendant must show that he suffered some additional prejudice which is substantial and results to i) impeding justice; ii) aggravated costs; iii) specific hardship to the defendant; iv) It must also show that the delay has worsened the defendant’s position in the suit.

It will not be sufficient to make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out hereinabove. This thought derives legitimacy as a principle of law drawing upon the Constitution of Kenya with regard to promoting access to justice; enforcing the principles of justice especially on substantive justice in Article 159 of the Constitution and achieving the just resolution of disputes filed in court through a fair and public hearing in accordance with Article 50”

10. Applying the above principles to the instant case and taking into account the material placed before the court, I am persuaded that the Applicant has sufficiently explained why he was unable to attend court on 19th November 2018.

11. Accordingly, I find merit in the application. I hereby set aside the order issued on 19th November 2018 dismissing the suit and direct that the suit be set down for hearing without further delay. The costs of this application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE.