



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 205 OF 2015

JACOB H. SALERI.....PLAINTIFF

VERSUS

TOWN COUNCIL OF KILIFI.....DEFENDANT

RULING

1. By this Notice of Motion application dated 12th November 2019, Jacob H.M Saleri (the Plaintiff) urges the Court to set aside the order made herein on 14th October 2019 dismissing the Plaintiff's application dated the same day for want of prosecution and/or non-attendance.

2. The application which is supported by an affidavit sworn by the Plaintiff's Advocate on record Samuel Odhiambo Eliakim is based on the grounds:-

i) That the Counsel did not attend Court on 14th October 2019 as the Matatu he boarded from Mombasa to Malindi broke down and he had to wait for another.

ii) That the said Counsel had other matters in the High Court but forgot to instruct another Counsel to hold brief in this matter.

iii) That the Application is merited and the Plaintiff stands to be prejudiced if the application is not reinstated as he shall be denied an opportunity to have this matter determined on merit.

3. The application is opposed. In a Replying Affidavit sworn on its behalf by its Advocate on record Farida K. Jadi, the Town Council of Kilifi (the Defendant) avers that the application lacks merit and is aimed at wasting the Court's time as the Plaintiff has never been keen to prosecute this case.

4. The Defendant avers that this matter stalled from the year 2012 when it was adjourned generally in the absence of the Plaintiff. Thereafter, the Plaintiff never took any steps to prosecute the matter until the Court on its motion served him with a Notice to Show Cause why the matter should not be dismissed. It is further the Defendant's case that following the transfer of the matter from Mombasa to this Court in 2015, the Plaintiff has never taken any steps to prosecute them.

5. I have perused and considered the application as well as the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the Parties.

6. This suit was initially filed as ***Mombasa High Court Civil Case No. 46 of 2007***. After a number of years in the Mombasa High Court it was transferred to this Court on 4th May 2015 pursuant to a consent order by the parties. Thereafter, it would appear that neither party took any action to prosecute the same.

7. Subsequently on or about 20th February 2019, this Court issued a Notice to Show Cause to the parties why the suit should not be dismissed pursuant to Order 17 Rule 2 (1) of the Civil Procedure Rules. When the Notice to Show Cause came up for hearing in Court on 28th March 2019, both parties were absent and the Court proceeded accordingly to dismiss the suit for want of prosecution.

8. Consequently, by an application dated 18th April 2019 (and not 14th October 2019 as erroneously stated in this present application), the Plaintiff sought an order to set aside the dismissal of the suit and to have it reinstated for hearing. On 24th May 2019 when that application came up for hearing Mr. Odhiambo, Learned Counsel for the Plaintiff did not have any proof of service of the same on the Defendant and the application was adjourned generally.

9. Thereafter, the Plaintiff's Advocates fixed the matter for hearing on 14th October 2019. On that hearing date, there was again no appearance by the Plaintiff and this Court proceeded to dismiss the application for reinstatement of the suit, for want of prosecution. It is that application that the Plaintiff now urges this Court to reinstate for hearing.

10. The Court's power in considering an application to set aside an order such as this is discretionary. As was held in the case of **Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75:-**

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

11. In the same vein, the Court in **Shah –vs- Mbogo (1967) EA 166** held that:-

“...this discretion to set aside... 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

12. As I have stated hereinabove, this suit was instituted at the High Court at Mombasa on 9th March 2007. From the record, it was stood over generally on 6th October 2010 by the consent of the parties to enable the Plaintiff to undertake a survey of the suitland. It is not clear from the record whether any such survey was done.

13. Some five (5) years later on 4th November 2015, the parties appeared before the Honourable Angote J sitting at Mombasa whereupon Mr. Odhiambo Advocate for the Plaintiff informed the Court that the parties had been negotiating. He also urged the Court to transfer the matter to this Court in Malindi on the basis that there was a related matter. As the Defendants did not object to the transfer, the matter was accordingly transferred to this Court.

14. Thereafter it took another four years without any action being taken in the matter. By its Notice to Show Cause issued on 20th February 2019 pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules, this Court required the parties to appear before it to show cause why the same ought not to be dismissed. Neither party appeared and the suit was accordingly dismissed for want of prosecution.

15. I have in the circumstances considered the application before me seeking to reinstate the suit. The Plaintiff's Advocate contends that he was travelling to Malindi on the scheduled date and that the Matatu he was using broke down. He then purports to have called a clerk of this Court to request for him an Advocate to hold his brief.

16. There is no accompanying affidavit from the said clerk or any other evidence to show that Counsel made any such call. At any rate, it was not clear to me why Counsel did not directly call an Advocate to place the matter aside if indeed the motor vehicle he was travelling in had broken down. While he claims to have arrived in Court later on at 11.00 a.m., to find his application dismissed, Counsel did not take any action until one (1) month later when he filed the application before me.

17. In the premises herein, I am not persuaded that the Plaintiff has been keen to prosecute this matter and/or that there is any merit in the application before me. I decline to exercise my discretion in his favour and dismiss the application dated 12th November 2019 with no order as to costs.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE