



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO 106 OF 2007

GLADYS NJERI KIRUGUMI.....PLAINTIFF

=VERSUS=

LANGATA DEVELOPMENT

COMPANY LIMITED.....1ST DEFENDANT

MOSES WAITHANJE MWIHURI.....2ND DEFENDANT

RULING

1. Before me for determination are two applications brought by the plaintiff. The first application is a notice of motion dated 13/12/2018 seeking reinstatement of this suit. The second application is the notice of motion dated 23/1/2019 which seeks temporary injunctive orders pending the hearing and determination of the two applications (sic). It is clear from the wording of the second application that the order sought therein stand spent upon hearing and disposal of the two applications. I will therefore say no more by way of analysis of the notice of motion dated 23/1/2019.

2. The notice of motion dated 13/12/2018 which seeks reinstatement of this suit was supported by an affidavit sworn on 13/12/2018 by the plaintiff's advocate, Tabitha Nyamuya Gathua. She deposed that failure to comply with the court's order requiring the plaintiff to file pre-trial documents and pay the defendants costs of Kshs 30,000 as ordered by Gacheru J on 16/12/2016 was not intentional but was due to an unfortunate lapse on her part. She stated that she made a requisition which was unfortunately misplaced and the matter escaped her attention thereafter. She added that the plaintiff had since complied with the pre-trial directions and had paid the costs. She pleaded with the court to grant the plaintiff the opportunity to prosecute her case and have the dispute determined on merits.

3. The application dated 13/12/2018 was opposed by the 1st defendant through grounds of opposition dated 18/2/2019. The 2nd defendant opposed the application through a replying affidavit sworn on 30/2/2019 by Moses Waitheje Mwihuri. The two defendants' case was that this suit was dismissed on 29/9/2015 for non-attendance and Hon Lady Justice Gacheru subsequently reinstated the suit and ordered the plaintiff to pay the defendants costs of Kshs 30,000 way back on 16/12/2016. The plaintiff did not pay the said costs. Subsequently, on 24/7/2018, the court ordered the plaintiff to pay the said costs and file pre-trial documents within 30 days, an order which the plaintiff had ignored, leading to the coming into effect of the default provision of the order. They contended that the plaintiff did not have respect for the court and was underserving of a reinstatement order. They urged the court to dismiss the application.

4. I have considered the two applications. I have also considered the responses thereto and the rival submissions. As indicated earlier in this ruling, wittingly or unwittingly, the plaintiff's advocate drafted the notice of motion dated 23/1/2019 in such a way that there is no prayer for any interim relief beyond the date of delivery of this ruling. It will therefore be moot for me to engage in any analysis of the merits of the application. My finding on the notice of motion dated 23/1/2019 therefore is that the prayers sought therein are spent.

5. The notice of motion dated 13/12/2018 seeks reinstatement of this suit. This court's jurisdiction to reinstate a dismissed suit is discretionary and that discretion is exercised judiciously and on well settled principles. The criteria to be adopted when dealing with the question of whether or not to lock a litigant out of the seat of justice was summed up by **Madan JA** in the case of **Belinda Murai & 9 others v Amos Wainaina (1979) eKLR** as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

6. **Apaloo JA** summed up the following approach to a similar question in **Philip Keipto Chemwolo & another v Augustine Kubende (1986) eKLR**:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

7. The learned judge added thus:

“I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

8. In the application under consideration, the order requiring the plaintiff to pay the defendants costs of Kshs 30,000 was made by Gacheru J way back on 16/12/2016. The costs were awarded as a way of indemnifying the defendants following the court’s reinstatement of this suit which had been dismissed on 29/9/2015 for non-attendance. The plaintiff did not pay the costs. On 24/7/2018, the defendants raised concern about the plaintiff’s failure to pay the costs and file pre-trial documents. For the second time, the court ordered the plaintiff to pay those costs and file pre-trial documents within 30 days to facilitate disposal of this suit. There was no compliance.

9. The court record shows that the plaintiff subsequently filed a bundle of trial documents on 18/9/2018, clearly after the dismissal order had come into effect. Similarly, there is common ground that costs were subsequently paid after the expiry of the 30 days.

10. I have deeply reflected on the legal ramifications of locking the plaintiff out of the seat of justice on account of her failure to pay the costs and file pre-trial documents promptly. I note that the dispute before court relates to land. In my view, the equity approach to take in this application would be to have the suit reinstated and indemnify the defendants by an award of reasonable costs. I will in the circumstances reinstate this suit on condition that the plaintiff indemnifies each defendant by paying each of them costs of Kshs 20,000 within 60 days from today. In default, the reinstatement order shall stand vacated.

Disposal Orders

11. Consequently, the plaintiff’s two applications dated 13/12/2018 and 23/1/2019 respectively are disposed as follows:

a) The suit herein is reinstated on condition that the plaintiff shall pay each defendant throw-away costs of Kshs 20,000 within 60 days.

b) In default of payment of the costs, the reinstatement order herein shall stand vacated.

c) In light of the wording of the prayers in the notice of motion dated 23/1/2019, the said application is marked as spent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Gathua for the plaintiff

Mr Kiura for the 1st defendant

June Nafula - Court Clerk