



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 403 OF 2017

(FORMERLY NAKURU 71 OF 2013)

JOHN KIMANI WAWERU.....PLAINTIFF/APPLICANT

VERSUS

DR CHRISTOPHER WAITHKA KARITU.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 20th August 2018 brought under Section 3A of the Civil Procedure Act and Order 12 Rule 7 of the *Civil Procedure Rules* and all enabling provisions of the law where the Applicant seeks for orders to set aside the orders of 11th July 2018 that dismissed the Applicant's suit with costs for want of prosecution.
2. Directions were issued to the effect that the said application be conversed through viva voice evidence where Counsel sought to rely on their respective sworn affidavits.
3. According to the Applicant Counsel's sworn affidavit of the 20th August 2018, this matter had been filed at the Nakuru High Court wherein on the 2nd November 2016 when the same came up for hearing, he had realized that the matter had been transferred to the Nakuru Environment and Land Court where they had tried locating the file in vain.
4. That on the 25th April 2018, when they traced the file, it had already been transferred and was before the Nyahururu Environment and Land Court wherein it had been issued with a new number and parties were required to Show Cause why their matter should not be dismissed for want prosecution.
5. On the day in question, Counsel had fixed other matters before the Nakuru High Court and therefore was not present for the mention. The Applicant was however present wherein another mention date had been issued which date had not been communicated to him with the result that there was no response to the said NTSC and the matter was dismissed
6. That the Applicant has been desirous of prosecuting the matter and it was only fair and in the interest of justice to re-instate the same so that it could be adjudicated and determined on merit.
7. That prior to its dismissal, the court's record could bail them out as they had been attending court sessions hence a clear indication of the Applicant's interest in prosecuting his case.
8. In response and in opposition of the Applicant's application, the Respondent herein deponed that this matter was filed way back in the year 2011 and that it revolved around a controlled tenancy which was a matter within the jurisdiction of the Business Tribunal, where the Applicant had filed several cases therein and as such this matter ought not to have been filed in this court.
9. That the Applicant had been accorded an opportunity to show cause why the matter should not be dismissed but spurned that opportunity. That from his action, the Applicant was not desirous of prosecuting this matter. That the application was prompted by the Respondent's action of filing a bill of costs. The Respondent asked that the application be dismissed with costs.
10. In rejoinder, the Applicant confirmed that indeed, initially the matter had been before the Business Premises Rent Tribunal where the Respondent had failed to file a reference to oppose the notice to terminate tenancy dated the 19th August 2010 and that the numerous adjournments had indeed been caused by the Respondent herein. That he was desirous of prosecuting the mater and sought that his application be allowed as prayed.

Determination.

11. I have considered the proceedings on the court's record as well as the submission by both Counsel for and against the application to reinstate the suit for hearing and determination.

12. I note that indeed this is a matter that had been filed way back on the 21st July 2011 wherein the Applicant sought to have the Respondent evicted from his premises having served him with a Notice of Termination of Tenancy which notice was not responded to and neither did the Respondent vacate the premises.

13. That pursuant to a ruling delivered on the 26th April 2013 dismissing the Applicant's application to seeking that the Respondent's defence be struck out, the matter was next in court on the 10th March 2014, wherein the Applicant's Counsel sought for an adjournment which was granted and the matter was taken out of the cause list where it lay dormant up to the 24th February 2015 wherein the Court was informed that parties were negotiating so as to record a consent.

14. I note that parties again went to sleep up to the 2nd November 2016 when by consent, parties agreed that the matter be transferred to the Environment and Land Court for hearing and determination.

15. The matter was subsequently transferred to the Nyahururu Environment and Land Court where it was placed before me on the 23rd November 2017. There was no appearance for both parties and a mention date was scheduled for the 15th February 2018 on which date there was yet no appearance by the parties. The court thus issued a Notice to Show cause (NTSC) for the 25th April 2018.

16. Come the 25th April 2018, only the Applicant was present wherein he had informed the court that his counsel was held up in the High Court. The court gave the Plaintiff a chance to redeem himself by giving him another date for the hearing of the NTSC.

17. The matter as slated for the hearing of the NTSC for the 11th July 2018 wherein the Plaintiff's Counsel was absent yet again wherein Counsel holding his brief sought for leave or a further 14 days to enable counsel on record to file his replying affidavit to the NTSC. The court having noted that the Plaintiff was not serious in prosecuting his matter, dismissed the suit giving rise to the present application.

18. From the court record, it is clear that despite the matter having been filed in the year 2011, the record speaks for itself that the Applicant had not been keen to prosecute the same. This may be attributed to the lack of diligence by his Counsel, but it is nevertheless a mistake for which the Applicant should not be blamed. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

“Blunders 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 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 for the purpose of imposing discipline.”

19. The foregoing being my view of the matter, I will allow the application dated 20th August 2018 and set aside the dismissal order of 11th July 2018 with no costs. The suit shall and is hereby reinstated for hearing and determination on the merit. The same is herein transferred to the Chief Magistrate's court for further directions.

Dated and delivered at Nyahururu this 2nd day of July 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE