



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT & LAND DIVISION

CIVIL SUIT NO. 326 OF 2013

DANIEL MOGAKA PAUL ANYONA.....PLAINTIFF/APPLICANT

-VERSUS-

SAMSON CHOI KAYAGA..... DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant filed a Notice of Motion dated 26th May 2020 seeking to set aside an order of this court dated 27th March 2017 dismissing the suit for want of prosecution.
2. In support of his application, the Applicant denied that he was aware of the date when the suit was fixed for dismissal. He also averred that prior to the suit being dismissed, the court file went missing and his advocate's efforts to trace it were futile. To buttress his argument, he averred that he had filed an application seeking the reconstruction of the file only to be informed that the file had been found and that his suit had been dismissed. It was also his averment that he was not informed by the registry about the availability of the file. He contended that since the claim is a land matter, the same should be heard on its merits. It is his contention that if the suit is not reinstated, he will suffer irreparable damage.
3. In response to the application the Respondent filed Grounds of Opposition dated 3rd August 2020. In the said Grounds of Opposition the Respondent states that the application is mischievous and legally untenable as the Plaintiff has not demonstrated any steps he has taken to fix the suit for hearing prior to the dismissal, hence he is guilty of laches. Additionally, he contends that the Plaintiff/Applicant has come to court several years after the suit was dismissed and therefore the inordinate delay has not been explained.
4. With the consent of the parties the court directed that the said application be canvassed by way of written submission. The Plaintiff/Applicant filed his submissions on 23rd September, 2020 while the Respondent filed his on 14th October, 2020.

PLAINTIFF'S SUBMISSIONS

5. Learned counsel for the Plaintiff submitted that the claim before the court is a land matter which was filed in person on 23rd July 2013. He argued that the file went missing and the Applicant made efforts to trace it for several years up to the point where he decided to engage an advocate to follow up on the same.
6. Counsel submitted that he filed an application for reconstruction of the file but luckily the file was traced. It is only when he perused the file that he discovered that the suit had been dismissed for want of prosecution on 27th of March 2017.
7. Counsel submitted that the Applicant's failure to attend court was not intentional but was brought about by the fact that the Applicant was not aware of the date when the matter was fixed for Notice to Show Cause why the suit should not be dismissed.
8. Counsel further submitted that the mandatory provisions of law requiring that a notice be issued to the parties prior to the dismissal of the suit was not complied with since the Plaintiff was never served with such notice. It was also his submission that it is trite law that a party to a suit should be given an opportunity to be heard on merit.
9. He concluded by urging the court to give the Applicant an opportunity to be heard, so that the court can arrive at a just decision.

THE RESPONDENT'S SUBMISSIONS

10. Learned Counsel for the Respondent on his part submitted that the Applicant in his application did indicate the reasons why he wanted the suit reinstated nor did he indicate where he had been since the year 2017 when the suit was dismissed. Counsel argued that a period of 3 years was such inordinate and thus he urged the court to disallow the application.

11. Counsel further submitted that it was clear that the Plaintiff/Applicant after filing the now dismissed suit did not take any steps to have it fixed for hearing and that there was no evidence placed before court showing any steps he had taken to fix the matter for hearing.

12. Counsel also submitted that the Plaintiff/Applicant did not present any evidence of any letter that he had written to the registry seeking that they trace the file, nor did he tender any evidence from the court registry indicating that the file was being looked for.

13. Further learned counsel contended that there was no letter from the Plaintiff/Applicant requesting the court to have the matter fixed for hearing. It was counsel's contention that the Applicant simply filed the suit and went on to sleep and thus the suit should be dismissed.

14. Counsel also brought to the attention of the court that the Plaintiff/Applicant did not invoke any provision of the law that gives the court capacity to reinstate the suit and that he only invoked sections 1A,1B & 3A of the Civil Procedure Act which provisions are meant to expedite the hearing of the main suit.

15. In conclusion he urged the court to dismiss the Notice of Motion with costs.

ISSUES FOR DETERMINATION

16. From my analysis of the application, the response by the Respondent and the submissions filed by both parties, the sole issue for determination is whether the Applicant is entitled to setting aside of the order dated 27th March, 2017 dismissing the suit for want of prosecution and whether the suit should be reinstated for hearing.

ANALYSIS AND DETERMINATION

17. *In order to effectively determine the issue as to whether the suit should be reinstated by setting aside the dismissal order it will be of essence to answer the following questions:-*

a) *Was there proper notice served upon the Plaintiff before the suit was dismissed for want of prosecution?*

b) *Was there delay in making this application and is it excusable?*

c) *Will setting aside be prejudicial to the Defendants?*

Whether the Plaintiff was served with a Notice to Show Cause why the suit should not be dismissed.

18. Learned counsel submitted that the mandatory provisions of the Civil Procedure Rules requiring issuance of a notice to the parties prior to the dismissal of a suit was not complied with since the Plaintiff was never served with such notice.

19. The provision of the law that counsel was alluding to is Order 17 Rule 2 (1) of the Civil Procedure Rules, 2010 which grants this court power to dismiss a suit in which no step has been taken for one year. The said order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. In emphasizing the importance of this section, the court in ***Fran Investments Limited v G4S Security Services Limited [2015] eKLR*** held that;

“this order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ‘sword of the Damocles’. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.”

20. However contrary to the argument of the Applicant that his client was not served with a notice, Order 17 Rule 2 (1) of the Civil Procedure Rules **does not require service of notice; it uses the word “give notice”**. **The court may give notice of dismissal through its official website or through the Cause-list and it is not mandatory that it serves the Defendants with the said notices as submitted by counsel for the Applicant.**

Was the delay inordinate and is there a justification for the delay?

21. In ***James Yanga Yeswa v Bob Morgan Services Limited [2019] eKLR*** the Court cited the case of ***Birket v James [1978] AC 297*** the court set out the principles that ought to guide the Court when considering an application for reinstatement of a suit dismissed for want of prosecution. The principles include whether there was **inordinate delay on the Plaintiff's part and whether the delay is intentional and**

inexcusable and whether the delay is an abuse of the court process.

22. An examination of the file shows that the suit was filed on 23rd July 2013 and dismissed on 27th March, 2017. This application was filed on 26th May 2020 which is 3 years after dismissal of the suit. The application for reconstruction of the file which the Applicant has alluded to was filed on 13th May, 2020 which is 7 years after the suit was filed. I find a delay of 7 years to be inordinate. Moreover, a delay of 3 years in making the application to set aside is equally inordinate.

23. In the case of **Ivita vs. Kyumbu [1984] KLR 441** the court held that when an inordinate delay is established it is inexcusable until a credible excuse is made. The Applicant in his efforts to justify the delay in prosecuting the case prior and after it was dismissed, averred that he was not aware when the suit was fixed for dismissal since no notice was ever served upon. He also averred that prior to the suit being dismissed, his file went missing and efforts of tracing it even through his former Advocate became futile. He also averred that he had filed an application seeking for the reconstruction of the file, only to be informed that the file had been found and that his suit had been dismissed and thus he abandoned the application. It was also his averment that he was never informed by the registry about the availability of the file prior to it being dismissed and even at the time he was making an application for it to reinstated.

24. I find the explanation given by the Applicant that the inordinate delay was occasioned by the missing file is equally unsupported. This is because from the record I see no single letter to the Deputy Registrar, complaining of the missing file. The Applicant has also not explained at what point within the 7 year period he discovered that the file was missing. It is interesting that the Plaintiff only thought of applying for reconstruction of the file 7 years after he filed a suit. If he was serious about pursuing his proprietary interests that he now urges me to consider by allowing his application, he ought to have filed the application for reconstruction of the file immediately the file went missing. Surprisingly, at paragraph 5 of his Supporting Affidavit he tries to shift blame to an unnamed advocate whom he accuses of not communicating to him regarding the status of the missing file. From the record before me the Applicant filed the suit in person and there is no evidence of another advocate other than the current advocate who represented the Applicant.

25. From the record before me it is clear that after filing suit the Applicant took no step to fix the matter for hearing. There is no letter requesting for a hearing date nor is there evidence that he ever served the Defendant with Summons to enter Appearance. From the record, it can only be observed that the Applicant woke up on 13th May, 2020 after the suit had been dismissed in 2017 seeking to have the file reconstructed and later filed this application seeking to have the suit reinstated.

26. In the circumstances, I am not persuaded that there is a good excuse for the inordinate delay.

Will setting aside be prejudicial to the Defendants?

27. On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that **the delay of 7 years has not been satisfactorily explained and therefore setting aside the *ex parte* judgment would prejudice the Respondent. Article 159 of the Constitution of Kenya, 2010 provides that justice shall not be delayed. Failure to set down the suit for hearing for 7 years is a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the said failure delayed justice in this matter.**

28. In conclusion, I do not find merit in the application and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Kisii this 5th day of May, 2021.

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J.M ONYANGO

JUDGE