



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 44 OF 2015**

**DANIEL KALOKI MULE.....PLAINTIFF/APPLICANT**

**VERSUS**

**ALICE NGINA MUTISYA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KYULE MALUKI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DISTRICT LAND REGISTRAR,**

**MACHAKOS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 12<sup>th</sup> March, 2020 filed under Certificate of Urgency, the Plaintiff/Applicant is seeking for the following orders:-

***a. Spent.***

***b. That this Honourable Court be pleased to re-instate the suit herein filed on 18<sup>th</sup> February, 2015 which was dismissed on 4<sup>th</sup> March, 2020 for want of prosecution and non-attendance.***

***c. That costs of this Application be provided for.***

2. The Application was supported by the Affidavits of the Applicant's advocate filed on different dates. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on 7<sup>th</sup> October, 2020 in response to the Application.

3. On 4<sup>th</sup> March, 2020, this court dismissed this suit for want of prosecution and non-attendance. The Applicant and 2<sup>nd</sup> Respondent have canvassed the Application by way of written submissions. The 1<sup>st</sup> Defendant/ Respondent did not file submissions.

4. The Applicant's advocate deponed that on 4<sup>th</sup> March, 2020, he arrived late in court at around 10:30am; that his lateness was as a result of the traffic jam at Mlolongo, along Nairobi-Mombasa road; that his absence in court on that day was not a deliberate act and that non-attendance of court and mistake of counsel should not be visited upon the Applicant.

5. The advocate deponed that after the dismissal of the suit for non-attendance, the court file could not be traced at the court registry when he wanted to file the Application for reinstatement of this suit and that the government measures to curb the spread of coronavirus by cessation of movement from Nairobi to Machakos County hampered his effort to trace and access the court file.

6. The Applicant's advocate further deponed that he was ready to proceed with three (3) witnesses who were present in court but since they are elderly and not well versed in English, they did not know if the case had been called out in court. It was deponed by counsel that the 2<sup>nd</sup> Respondent will not suffer prejudice having filed a Counter-claim.

7. In response to the Application, the 2<sup>nd</sup> Respondent deponed that the Applicant has not diligently prosecuted this suit since 2015 when it was filed; that the Applicant's advocate lateness in court is not a reasonable ground to explain the non-attendance of court by a litigant and that the advocate has not disclosed any evidence to demonstrate that his non-attendance was due to reasons beyond his control.

8. The 2<sup>nd</sup> Respondent deponed that the Applicant has not demonstrated the prejudice he stands to suffer as a result of the dismissal of suit.

According to the 2<sup>nd</sup> Respondent, the Applicant was not present in court hence the Application does not demonstrate whether the Applicant was ready to proceed with the hearing of the case or not and that the Applicant has occasioned delay in prosecuting this suit.

9. The Applicant's advocate submitted that he travelled from Nairobi to attend court ready to proceed with the hearing; that his three (3) witnesses were present in court and that due to the traffic jam at Mlolongo, he arrived late when the case had already been dismissed. The advocate placed reliance on the case of **Regina Njeri Njoroge vs. Lilian Wangui Ndichu & 20 Others [2020] eKLR**.

10. In response, the 2<sup>nd</sup> Respondent's advocate submitted that the normal practice by advocates is that advocates anticipating to arrive late in court ought to reach the client to pass instructions to court or the advocate instructs another advocate to hold his brief; that the Applicant's advocate failed to exercise that right and that the Applicant and his advocate are guilty of inaction. The advocate placed reliance on the case of **Peter Kiplagat Rono vs Family Bank Ltd (2018) eKLR**.

11. The advocate for the Respondents further placed reliance on the case of **Bains Construction Co. Limited vs. John Mzare Ogowe (2011) eKLR** where the court held that:-

*“It is to some extent true to say mistake of counsel as is the present case should not be visited upon a party but it is equally true when counsel as an agent is vested with authority to perform some duties as principal and does not perform it, surely that principal should bear the consequences...”*

12. I have read and considered the Application, the rival affidavits as well as the submissions filed by the respective parties. The only issue for determination is *whether there are sufficient reasons to warrant the reinstatement of the suit.*

13. Reinstatement of a suit dismissed for want of prosecution and nonattendance is discretionary. The discretion is couched under *Order 12 Rule 7 of the Civil Procedure Rules 2010* that provides:-

*“Setting aside judgment or dismissal.*

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”*

14. The record shows that when this suit came up for hearing on 2<sup>nd</sup> July, 2019, the Plaintiff was ready to prosecute the suit. However, the 2<sup>nd</sup> Defendant's advocate applied for adjournment. The court allowed the Application for adjournment. When the matter came up for hearing on 4<sup>th</sup> March, 2020, neither the Plaintiff nor her advocate were in court. The court proceeded to dismiss the suit for want of prosecution and non-attendance. This Application was filed on 28<sup>th</sup> May, 2020.

15. The advocate for the Plaintiff has stated that he was ready to proceed with the hearing of the suit on the day the suit was dismissed but was held up in traffic along Nairobi Mombasa Highway. As was held in the case of **Peter Kiplagat Rono (supra)** *“...an advocate is an agent of the litigant, and where the advocate is guilty of inaction, as the agent of the litigant, the litigant will bear the consequences of his advocate's inaction.”*

16. However, there are instances where mistakes of counsel should not be visited on a litigant, and especially where a good plausible reason is given for non-attendance of court by the Applicant. In **Gideon Mose Onchwati vs Kenya Oil Co. Limited & Another (2017) eKLR**, the court held that although it is an elementary principle that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in the course of representation, in applying that principle, courts must exercise care to avoid unjust and ridiculous results.

17. The record shows that the Plaintiff has always been ready to prosecute his suit. Counsel has explained that due to traffic along Nairobi Mombasa Road, he was unable to arrive in Machakos in good time to prosecute the Plaintiff's claim. Considering that most of the time one cannot do much once held in traffic, and the fact that on the previous occasions, the Plaintiff and his advocate have been willing and ready to prosecute the claim, I shall grant the Plaintiff another chance to prosecute his claim so that justice cannot only be done, but be seen to have been done.

18. For those reasons, I allow the Plaintiff's Application dated 12<sup>th</sup> March, 2020 as follows:

- a) **The order of this court dated 4<sup>th</sup> March, 2020 dismissing the suit for want of prosecution and non-attendance is set aside.**
- b) **Each Party to bear his own costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25<sup>TH</sup> DAY OF JUNE, 2021.**

**O. A. ANGOTE**

**JUDGE**