



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 222 OF 2013

HAMISI MASHA MKWEHA

(Suing as the Attorney of NYEVU MBITA KAEMBENI).....PLAINTIFF

VERSUS

1. BEATRICE MORAA GICHANA

2. LAND REGISTRAR MOMBASA

3. CHIEF LAND SURVEYOR.....RESPONDENTS

RULING

1. The application before the court is the Notice of Motion dated 31st October 2019 brought under Art. 159 of the Constitution of Kenya Sections 3A, 63(e), 80 & 100 of the Civil Procedure Act, Order 45 & 51 Rule 3, 5 & 15 of the Civil Procedure Rules, 2010 and all other Enabling Provisions of the Law).

2. The application seeks orders to set aside the court's dismissal orders issued on the 7th May 2019 and to relist the matter for hearing and prosecute the case to final determination.

3. The application is supported by the Affidavit of Joyce Chesaro Advocate sworn on the 31st October 2019, and filed in court on the same date on the following main grounds:-

1) The Plaintiff's file was not availed to the court on the date of the hearing by the firm's court clerk who was unwell and who had also not diarized the same.

2) The dismissal orders made on 7th May 2019 will cause serious prejudice to the Plaintiff since the delay in producing the file above was not the Plaintiff's mistake and was not intentional.

3) If the Orders are not set aside the Plaintiff will suffer irreparable loss and damage as she stands to lose her land.

4. Ms Chesaro depones *inter alia* in addition to 3(1) herein that:-

1) The case is part heard on the part of the Plaintiff.

2) She was on her way from upcountry when she was informed by a court clerk from another law firm that the matter was being dismissed.

3) She pleads with the court to allow the application and not visit her law firm's actions arising from the court clerk's sickness which was unforeseen, on the Plaintiff client. That the Plaintiff was interested to prosecute the case to the end as he had even given evidence.

5. The Application is opposed by the Defendant Beatrice Moraa Mochache through her Replying Affidavit sworn on 4th February 2019 on the following grounds among others :-

1) The history of the case speaks for itself which is clear that the Plaintiff had no interest in the case.

2) The suit was filed 7 years ago and had dragged due to the plaintiff's indolence.

3) The suit was dismissed for want of prosecution and the Plaintiff despite having been served with the Notice to Show Cause why the suit should not be dismissed did not attend court to defend the said notice.

4) The Plaintiff's application dated 23rd November 2018 for reinstatement of the suit was dismissed by the court on 7th May 2019 for want of prosecution.

5) She is the duly registered proprietor of the suit land on which she has undertaken substantial development and to turn back the clock to 7 years ago when the suit was commenced would be unjust to her.

6. The Plaintiff filed a Notice to Act in Person on 16th March 2020 dated 13th March 2020. The Plaintiff also filed a Supplementary Affidavit sworn on the 13th March 2020 in support of the application.

7. On 4th March 2021 the Plaintiff appeared in person and both parties agreed to canvass the application by way of written submissions. The Plaintiff/applicant submissions dated 15th February 2021 were filed on 18th June 2021 and the Defendants/Respondent submissions dated 21st April 2021 were filed on 23rd April 2021.

8. The Plaintiff in his submissions pleads with the court to reinstate the suit, reiterating that the mistake or error of his advocate should not be visited upon the Plaintiff. That he has a good case as his mother Nyevu Mbita Kaembeni the legal owner of the suit property having paid for it and duly issued with a title. The plaintiff notes that the Court has authority to reinstate the case. He further depones in the supplementary affidavit to the effect that his advocate had been away from office on grounds of ill health.

9. The Defendant/ Respondent in their submission content that the reasons canvassed by Counsel for the Plaintiff were neither here nor there as clerks do not prosecute suits and further that there were no reasons presented to the court for failure on the part of the Plaintiff's Counsel for not attending court to defend the Notice to Show Cause. In addition the application before the court only seeks to set aside the orders of 7th May 2019 which dismissed an application to reinstate the suit and therefore the suit herein would still stand dismissed even if the application is allowed. The defendant being the registered proprietor of the suit property has made substantial developments- a two storey building thereon.

10. I have considered the application and the documents filed in support thereof as well as the submissions by both the Plaintiff/ applicant and the Defendant/Respondent. The court is also privy of the ruling dated 7th May 2019 it has delivered. The history of the suit and reasons for dismissing the Plaintiffs application dated 23rd November 2018 are extensively enumerated therein and the ruling is available to the parties in the record of the court on this matter.

11. It is the Defendants/Respondents contention that the present application before the court - Notice of Motion dated 31st October 2019 even if allowed, the suit would still stand dismissed. In considering this argument I have looked at the prayers sought in both the applications dated 23/11/2018 and 31/10/209 respectively.

12. The application dated 23/11/2018 revolved around orders granted by this court to the Plaintiff to file an amended Plaintiff which amended plaintiff it was contended was not filed as the Plaintiff did not avail the requisite filing fees to the law firm representing him owing to certain difficulties, culminating into dismissal of the suit. I have perused the record once again and I have not come across any record supporting the contention that the suit was dismissed for failure to file the amended plaintiff. The record is very clear that the suit was dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules on 7th November 2018 and for the reasons stated in the said ruling and orders of 7/05/2019.

13. The application dated 31/10/2019 seeks to set aside the orders above issued on 7/05/2019 the grounds in support which I have already set out in paragraph 3 and 4 herein. The Plaintiffs Notice of motion seeks the following:-

.'...this honorable court to set aside its dismissal Orders issued on the 7th of May 2019 and to relist the matter for hearing and prosecute the case for final determination'

‘..In the alternative and completely without prejudice to prayer (1) above, the Hon court be pleased to set aside its dismissal orders issued on 7th May 2019'

14. The question that begs an answer is, What did the court dismiss on 7th May 2019? It is clear from the ruling that the court dismissed the Plaintiffs application dated 7th November 2018 and therefore the order of the Court dismissing the suit for want of prosecution were rendered alive. I agree with Counsel for the defendant that even if the present application were allowed the suit herein would stand dismissed for want of prosecution. However this court is cognizant of the fact if this position was to be strictly applied then this court had no business sitting to consider an application which did not seek to reinstate the suit first following its dismissal under Order 17 since there would be no foundation upon which the application to set aside the orders of 7th May 2019 would be grounded except for an appeal before a superior court.

15. Did the Plaintiff intend in the alternative prayer to substitute the date 7/05/2019 with 7/11/2018 when the suit was dismissed for want of prosecution? This is not for the court to second guess neither did the Plaintiff seek to amend the same. However this court notes the first

prayer of the application ends with the words ‘...and to relist the matter for hearing and prosecute the case for final determination’. It could therefore be argued that there was an intention that the suit be reinstated.

16. The Plaintiff in his Supplementary Affidavit further depones that the his advocate was ill but does not disclose the source of this information. This court cannot comprehend why Ms. Chesaro did not depone to this in her affidavit filed herein. The Court finds no reason to consider this as a mitigation.

17. I have perused the court file and have not come across any record of a part hearing of the Plaintiffs case as deponed by Ms. Chesaro.

18. The application dated 31st October 2019 is also brought under the provisions of Art. 159 of the Constitution of Kenya and Sections 3A of the Civil Procedure Act and the court is inclined to address itself on this limb. In my view the application before this court does not involve any technicality except for the Defendants contention set out in paragraph 11 herein to the effect that even if the present application were allowed the suit would stand dismissed. This I have disregarded as justified in paragraph 14 herein.

19. The Court is therefore only left with the plaintiffs plea that the mistakes of his advocate should not be visited upon him as a client. The Court of Appeal in **Tana and Athi Rivers Development Authority Versus Jeremiah Kimigho Mwakio & 3 Others Civil appeal No. 41 of 2014 (2015) eKLR** pointed that;-

From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.

20. This court associates itself with and is indeed bound by the learned Court of Appeal Judges observations while quoting **Viscount Maughan** in **Myers v. Elman [1939] 4ALL E.R 484** “That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent. (see **Ahmed v. Highway Carriers [1986] LLR 258 (CAK)**;-

“...the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable.... My conclusion is that Elman (the solicitor) cannot dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal.”

It is this courts view that the actions of the law firm’s clerk became the actions of counsel on record then for the Plaintiff.

21. I’m further guided by the Court of appeal decision in **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

22. Looking at the conduct of the Plaintiff herein he took no steps to immediately come on record in person even when he could not find his lawyer in the office from around 2015 and could also not see her around her home the advocate being his neighbor as deponed in his supplementary affidavit.

23. Having considered the foregoing the upshot of this matter is that the application dated 31st October 2019 is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF JULY 2021.

C.K. YANO

JUDGE

In the presence of:

Court Assistant – Yumna

C. K. YANO

JUDGE