

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 23 OF 2013 (OS)

LOISE NKATHA MUTHURI.....PLAINTIFF/APPLICANT

VERSUS

SILAS KIOGORA MBURUGU.....1ST RESPONDENT/DEFENDANT

JOSEPH MUTHOMI NGARUTHI.....2ND RESPONDENT/DEFENDANT

RULING

1. The plaintiff's application dated 22/9/2020 was dismissed with costs on 14/04/2021 and the applicant being aggrieved by the said order filed the current application dated 21/4/2021 seeking a review thereof. It is averred by the applicant through his advocate that on 18/11/2020 at 3:30pm he emailed to the court the 2 documents, plaintiff's submissions and supplementary affidavit for assessment and payment which was 8 days before the set deadline and they served the same on the same date upon the defendants counsel.

2. That the registry sent an invoice the next day 19/11/2020 which he paid and was issued with a receipt for Kshs. 150. Due to the covid-19 pandemic fears, the registry did not accept physical documents at that time, the documents were only stamped when the situation improved.

3. The applicant therefore contends that there is an error apparent on the face of the record and there is sufficient reason for review in the interest of justice, further the application has been filed in a timely manner.

4. The respondents have opposed the application averring that there is no new evidence that has been discovered by the applicant to warrant a review. That the applicant should focus on prosecuting the appeal expeditiously instead of filing vexatious applications to waste the court's time and resources.

5. Having carefully considered the application and the affidavits herein, both in support and opposition of the application, the issue for determination is ***Whether the ruling of 14.4.2021 should be set aside, reinstate the application dated 22/09/2020 and determine it on merit.***

6. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary power should be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

7. In the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR**, it was stated that;

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

8. I find that annexure CM1 is an email where the applicant's documents were transmitted to the court on 18.11.2020. Annexure CM 3 & 4 indicates that the supporting affidavits and submissions were assessed and paid for on 19.11.2020. The documents were supposed to have been filed by 26.11.2020, but were only stamped on 28.1.2021. The explanation given by the applicant regarding the Covid 19 pandemic are plausible. The court takes judicial notice that the court premises were even closed at some point due to the aforementioned pandemic. It is also quite evident that the current application was filed in a timely manner.

9. I am therefore inclined to find that the application dated 21.4.2021 is merited, the same is allowed with no orders as to costs. The application dated 22.9.2020 to be heard on 23.9.2021.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE