



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 125 OF 2015**

**MUSEE RAP BARCHOK.....PLAINTIFF**

**VERSUS**

**THE COUNTY SURVEYOR, BARINGO COUNTY.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**KETRACO COMPNAY LIMITED.....3<sup>RD</sup> DEFENDANT**

**DANIEL NGETICH (sued as the legal representative**

**of the estate of the late Hezekia Kipsiman).....4<sup>th</sup> DEFENDANT**

**FREDRICK CHEPKUTO.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. On 3<sup>rd</sup> March 2020 the plaintiff's suit was dismissed by the court for want of prosecution pursuant to an application by the 4<sup>th</sup> and 5<sup>th</sup> Defendants dated 24<sup>th</sup> January 2020 seeking the dismissal of the suit for want of prosecution. At the hearing of the application on 3<sup>rd</sup> March 2020 the plaintiff was not present and/or represented and the hearing proceeded in his absence. The court in its ruling held there was unexplained delay in prosecuting the suit and proceeded to order the dismissal of the suit for want of prosecution.

2. The plaintiff by a Notice of Motion dated 9<sup>th</sup> November 2020 filed on the same date has applied to have the order dismissing the suit set aside and the suit reinstated on the ground that he was not served with the 4<sup>th</sup> and 5<sup>th</sup> defendants application dated 24<sup>th</sup> January 2020 and was not aware of the hearing date of the application of 3<sup>rd</sup> March 2020. The plaintiff stated he had not been aware that his previous advocates were allowed to cease to act for him as he had not been served with an application to cease to act by the said firm. He averred he was still desirous of having the suit heard and determined on merit. He stated the respondents stood to suffer no prejudice if the application was allowed as they could be compensated by way of damages. The application was supported on the grounds set out on the plaintiff applicant's affidavit sworn on 9<sup>th</sup> November 2020.

3. The 4<sup>th</sup> and 5<sup>th</sup> defendants through a replying affidavit by the 4<sup>th</sup> defendant dated 23<sup>rd</sup> January 2021 opposed the application by the plaintiff to have the suit reinstated. The 4<sup>th</sup> defendant averred that the plaintiff's application was an afterthought, that the plaintiff was indolent and failed to act diligently in prosecuting his case. The 4<sup>th</sup> defendant further faulted the application as being incurably bad for being grounded on defective provisions of the law. He further averred that the application was not brought without unreasonable delay and that there was no sufficient reasons to warrant the reinstatement of the suit.

4. As per the court record the plaintiff instituted the suit through the firm of Nancy W Njoroge & Co. Advocates vide a plaint dated 5<sup>th</sup> May 2015 filed in court on 17<sup>th</sup> May 2015. The 4<sup>th</sup> and 5<sup>th</sup> defendants filed their joint defence on 26<sup>th</sup> August 2015. The firm of Oyugi & Company Advocates came on record for the 3<sup>rd</sup> defendant on 18<sup>th</sup> June 2015. The Honourable Attorney General entered appearance for the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 6<sup>th</sup> October 2015. The record shows nothing happened in the matter during 2016 and 2017. On 19<sup>th</sup> February 2018 the firm of Nancy W Njoroge & Co. Advocates filed an application to be allowed to cease from acting for the plaintiff ostensibly because they had failed to get any instructions from the plaintiff.

5. On 22<sup>nd</sup> February 2018 Munyao, J directed that the application to cease to act be served on all the parties including the plaintiff and to be

heard on 12<sup>th</sup> April 2018. As per the record and the affidavit of service by Nancy W Njoroge advocates made on 9<sup>th</sup> April 2018 the plaintiff was served by way of registered post. On 12<sup>th</sup> April 2018 the defendants who were all represented and indicated they did not oppose the application. Munyao, J granted the firm of Nancy W Njoroge leave to cease to act for the plaintiff.

6. On 27<sup>th</sup> January 2020 the 4<sup>th</sup> and 5<sup>th</sup> defendants filed the application dated 24<sup>th</sup> January 2020 seeking the dismissal of the suit for want of prosecution. The application was listed before me for hearing on 3<sup>rd</sup> March 2020 and on the day the plaintiff did not attend. A process server, Jacob SA Obulemire had sworn an affidavit of service dated 20<sup>th</sup> February 2020 explaining how he effected service of the application on the plaintiff. Being satisfied that the plaintiff had been served with the application and there being no response and/or opposition to the application I allowed the application as the delay in prosecuting the suit was evident and was not explained.

7. It is against the foregoing background that the plaintiff's present application has to be considered. The plaintiff and the 4<sup>th</sup> and 5<sup>th</sup> defendants have filed their submissions to canvass the application as directed by the court. The plaintiff in his submission stated that he had not known that his suit had been dismissed until his advocates who filed the present application had perused the court file. It was his position that his previous advocates M/s Nancy W Njoroge & Company Advocates never notified him they had ceased to act for him and that they never served him with the application to cease to act. He also submitted he was not served with the 4<sup>th</sup> and 5<sup>th</sup> defendants application for dismissal of the suit for want of prosecution. He claimed he did not know Jacob Obulemire who filed the affidavit of service stating he had served him.

The plaintiff submitted that he was desirous of prosecuting the suit and that unless the suit was reinstated he will have been denied of the opportunity of being heard. He placed reliance on the case ***Mina Achendi -vs- National Bank of Kenya Ltd (2020) eKLR*** where the court cited with approval the case of ***Nahason Mwangi -vs- Kenya finance Bank Ltd (in liquidation) 2015*** in which it was held thus:-

*“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 – 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. The plaintiff also placed reliance on the cases of ***Ivita -vs-Kyumbu (1984) KLR 441 and Barnabas Maritim -vs- Manywele Korgoren & Another (2016) eKLR*** where the courts emphasized that in the exercise of discretion the court must consider the dictates of doing justice and at the same time the prejudice that may result if the court decides one way or the other.

9. The 4<sup>th</sup> and 5<sup>th</sup> defendants in their submissions submitted that the firm of Gordon Ogola, Kipkoech & Company advocates who filed the application on behalf of the plaintiff were not properly on record and thus the firm of Geoffrey Otieno & Company advocates who purportedly filed a Notice of change of advocates from the said firm could not take over the brief from someone who was not properly on record. The 4<sup>th</sup> and 5<sup>th</sup> defendants argued M/s Nancy Njoroge & company advocates who were on record for the plaintiff had ceased to act for the plaintiff and the plaintiff was therefore deemed to be acting in person. In the circumstances prayer 2 of the plaintiff's application where the firm of Gordon Ogola Kipkoech & Co Advocates sought to be granted leave to come on record for the plaintiff was misconceived as it was only where judgment had been entered and there was an advocate on record at the time the judgment was passed was leave required for a new advocate to come on record or a party to act in person when he had previously been represented by an advocate. There is no bar for a party who hitherto was acting in person to appoint an advocate at any stage of the proceedings. That is my understanding of the provisions of Order 9 of the Civil Procedure Rules and in particular the provisions of Order 9 rules 7,8 and 9 of the Civil Procedure Rules, 2010.

10. The firm of M/s Gordon Ogola, Kipkoech & Company advocates perhaps realizing there was a mishap on their part in filing an application seeking to be granted leave to come on record for the plaintiff instead filing a notice of appointment of advocate on 2<sup>nd</sup> February 2021 filed a notice of appointment of advocates dated 28<sup>th</sup> January 2021. However, while they could file a notice of appointment as advocates by the plaintiff, would such appointment after they had filed the application two months earlier cure the defect? I do not think so, the application was filed by a stranger and the subsequent regularization of the appointment could not act retrospectively. The notice of appointment takes effect from the date it is made. From the affidavit sworn by the plaintiff in support of the application dated 9<sup>th</sup> November 2020 it is evident that at the time of filing the same, the plaintiff was aware that his previous advocates M/s Nancy Njoroge & co. Advocates had been granted leave to cease from acting for him and hence it was necessary for him to appoint a new advocate if he wished to be represented by an advocate. The firm of Gordon Ogola, Kipkoech Co. Advocates lacked the capacity to file the application and consequently the application was incompetent and an abuse of the court process.

11. Although what I have discussed above is sufficient to dispose of the plaintiff's application I wish to observe that even if the application had been regularly made, the plaintiff having regard to all the circumstances has not proffered any sufficient reason to explain the delay in prosecuting the suit. On the material before the court, the plaintiff is shown to have been indolent in pursuing his case. When a plaintiff instructs counsel to file a suit on his behalf, the case belongs to the plaintiff and not the advocate he has appointed. The advocate is but an agent of the party who has instructed him and acts and executes the instructions given to him by the client.

12. In the present case, even though the plaintiff filed the suit together with an interlocutory application seeking restraining orders, the record does not show that the interlocutory application was ever heard and/or determined. The same is still pending from 2015. The application by the firm of M/s Nancy Njoroge & Co. advocates was made in 2018 and their complaint was that they had failed to get instructions from the plaintiff from the date the suit commenced and they had lost contact with the plaintiff who was neither calling in their office nor picking their calls.

13. It is indeed the duty and obligation of the client and in particular in the case of a plaintiff, to follow up on their matter with their advocate to ensure their instructions are being followed and being given effect. It is not sufficient to hand over your matter to an advocate and wash off your hands and hope and expect the matter will move to your satisfaction. A party needs to exercise due diligence

in the pursuit of their case once the same has been registered in the court and failure to do so if you are the plaintiff you risk the matter being dismissed for want of prosecution at the instance of the court and/or the opposing party.

14. In the present matter although the plaintiff says he was not served with the 4<sup>th</sup> and 5<sup>th</sup> defendants application for dismissal of the suit, the affidavit of service by Jacob SA Obulemire has detailed how the service was effected on the plaintiff. The process server indicated he first attempted to serve the plaintiff on 30<sup>th</sup> January 2020 when he travelled to Timboroa and was given the plaintiff's telephone No.072xxxxxxx by AP Koskey and when he called him, the plaintiff was at Elburgon and was not to be home until 18<sup>th</sup> February 2020. On 18<sup>th</sup> February 2020 the process server indicated he travelled to the plaintiff's home where he found the plaintiff and served him. The plaintiff denied that he knew the process server or that he had met him. I have given due consideration to the process server's affidavit of service and I see no reason to disbelieve him and hence my view is that the plaintiff was duly served and his denial is but an attempt to wind back the clock.

15. Having carefully considered the material placed before me. I find no basis upon which I can exercise my discretion in favour of the plaintiff to reinstate the suit. The plaintiff was not diligent and was indolent and is not deserving of the court's discretion. I find no merit in the plaintiff's Notice of Motion application dated 9<sup>th</sup> November 2020. The same is ordered dismissed with costs to the 4<sup>th</sup> and 5<sup>th</sup> defendants.

16. Orders accordingly.

**RULING DATES SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15<sup>TH</sup> DAY JULY 2021.**

**J M MUTUNGI**

**JUDGE**