



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 855 OF 2012**

**NIXON MWAI MUCHIRI.....PLAINTIFF**

**=VERSUS=**

**LYDIA WAITHERA MUCHIRI.....1ST DEFENDANT**

**JUSTUS MWAI KAHUKI MUCHIRI.....2ND DEFENDANT**

**RULING**

1. The plaintiff initiated this suit on 21/11/2012 through a plant dated 10/11/2012. His case was that he was the lawful and/or registered owner/allottee of **Plot Nos 218** and **219** situated along Mutarakwa Road, Jua Kali, Kariobangi South, Nairobi. On 25/10/2012 and 26/10/2012, the defendants trespassed on the aid plots. Consequently, he sought a permanent injunction restraining the defendants against further trespass on the plots. He also sought costs of the suit.

2. On 30/8/2013, Gacheru J rendered a ruling in which she granted the plaintiff interlocutory injunctive orders, pending the hearing and determination of the suit. She directed the plaintiff to set down the suit for hearing within 12 months. Nothing happened between 30/8/2013 and 12/1/2018. On 19/6/2019, the suit was listed for notice to show cause under **Order 17** of the Civil Procedure Rules and the suit was dismissed on the same day, for want of prosecution. Subsequently, the plaintiff brought a notice of motion dated 16/7/2019, seeking reinstatement of the suit.

3. The suit was subsequently reinstated on 25/11/2019 and the plaintiff was ordered to file a single, bound, paginated and indexed trial bundle containing pleadings, witness statements, and documentary evidence within 60 days. In default, the suit was to stand dismissed. There was no compliance by the plaintiff. On 17/6/2020, the court granted the plaintiff an extension of 30 days within which to comply. In default of compliance, the suit was to stand dismissed. The court listed the matter for mention before the Deputy Registrar on 30/9/2020 to confirm compliance by the plaintiff. The plaintiff did not comply. Consequently, when the matter came up before the Deputy Registrar on 30/9/2020, the Deputy Registrar noted that the suit stood dismissed for non-compliance pursuant to the order of 17/6/2020. She directed closure and archiving of the file.

4. Subsequent to that, the plaintiff brought a notice of motion dated 21/10/2020, seeking reinstatement of the suit in terms of the following verbatim orders:-

***a) That the honourable judge be pleased to review the orders of the honourable Deputy Registrar issued on 30/9/2020.***

***b) That the honourable court be pleased to review and set aside the orders of the honourable court of 30/9/2020.***

***c) That the suit be reinstated for hearing.***

5. The said application is the subject of this ruling. It was supported by the affidavit of Maina Kimaru, counsel for the plaintiff, sworn on 21/10/2020. He deposed that he had, on numerous occasions, made futile attempts to get the case file from the plaintiff's previous advocates, *M/s Mutisya Ngala & Company Advocates*. He was constrained to obtain copies of documents from the court file long after expiry of the 30 days extended period. He added that upon preparing the trial bundle, he was unable to file it because the e-portal had not been completely set up and mapped. He eventually filed the trial bundle which was a replica of the documents which had been filed in November 2021 at the time of initiating the suit. He urged the court to set aside the dismissal order. The defendants did not file a formal response to the application but their counsel opposed the application through oral submissions.

6. In his oral submissions in the virtual court, counsel for the plaintiff reiterated the explanation made in the supporting affidavit and emphasized that non-compliance was attributable to challenges encountered in getting mapped onto the e-portal of the court. He added that the plaintiff had since complied with the order of the court.

7. In response, counsel for the defendants submitted that the plaintiff had failed to explain the delay in bringing and prosecuting the application under consideration. Secondly, the plaintiff had failed to address the issue of abatement owing to the death of “the 3rd defendant”. He added that there was no evidence of service upon the estate of the deceased defendant. Counsel further contended that the plaintiff had not bothered to confirm the status of the substratum of the subject matter of the suit, contending that it was uncertain if the suit property still existed. Lastly, counsel submitted that the conduct of the plaintiff was not deserving of exercise of discretion by the court.

8. I have considered the application together with the parties’ respective submissions. I have also considered the relevant legal framework and jurisprudential principles. The factual position is that, the relevant dismissal order was made on 17/6/2020 and was to take effect upon expiry of 30 days if the plaintiff did not comply with the order of the court within the extended period of 30 days. The dismissal order was not made by the Deputy Registrar as contended by counsel for the plaintiff. I would have struck out this application on that ground. On reflection, the court takes the view that striking out the application on that ground may not be the appropriate decision to take in the circumstances of this application. This view is informed by the fact that the tenor and import of the application is clear and is understood by the parties; the application seeks reinstatement of the suit. Secondly, due to COVID – 19 protocols and guidelines that prevailed at the time of making the application, litigants did not have access to physical files for proper perusal. I will in the circumstances, treat the errors in the prayers in the notice of motion as clerical and focus on the substance of the application.

9. The single question falling for determination in the application is whether the applicant has satisfied the criteria upon which trial courts exercise jurisdiction to reinstate a dismissed suit.

10. The jurisdiction to reinstate a dismissed suit is a discretionary one. Gikonyo J in **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** aptly summarized the following principles that guide our courts when exercising that jurisdiction.

*“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.”*

11. In the present application, the applicant has attributed his non-compliance and delay to failure by his previous advocates to surrender the case file to the current advocates. He has also attributed them to challenges in accessing the court’s e-portal. The first explanation is not bonafide because the applicant’s current advocates came on record in July 2019 and prosecuted a preceding application for reinstatement of the suit. They had access to the physical court file at that point in time. Absence of the previous advocates cannot therefore be a proper explanation for the non-compliance that happened one year later.

12. The only explanation that would attract the benefit of doubt relates to the challenges attributed to the e-filing system which was introduced in mid - 2020. There were indeed challenges at the initial stage.

13. The defendant did not file any response to the application. In his oral submissions, counsel largely focused on factual matters that required evidence in form of a replying affidavit. I will not give consideration to the factual aspects of those submissions. Counsel alluded to a “3rd defendant” who had died. I doubt if there is a “3rd defendant” in this suit.

14. Having considered the application together with the parties’ submissions, the court takes the view that it is probable that challenges related to the e-filing system may have contributed to the plaintiff’s non-compliance. It would therefore be appropriate to exercise discretion to reinstate the suit. The plaintiff will pay costs of counsel for the defendants, assessed at Kshs 15,000, payable within 30 days.

15. In the end, the plaintiff’s notice of motion dated 21/10/2020 is disposed in the following terms:-

**a) The suit herein is reinstated.**

**b) The plaintiff shall pay the defendants’ current advocates indemnifying costs of Kshs 15,000 within 30 days from today. In default, the order reinstating the suit shall stand vacated and the suit shall stand dismissed.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF OCTOBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Obuo for the Applicant

Court Assistant: Lucy Muthoni

**NOTE:**

*This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.*

**B M EBOSO**

**JUDGE**