REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 2332 OF 2007

PHOEBE WANGUI GAKUI .....PLAINTIFF

VERSUS

MOHAMED AHMED GABARYE..... DEFENDANT

RULING

1. The Plaintiff has filed a Notice of Motion application dated 4th August 2020 through which she is seeking orders that the court do set aside its decision of 16th January 2019 where the suit was dismissed, and that the draft amended plaint be deemed as duly filed. The application is based on the grounds listed on the face of it and on the supporting and supplementary affidavits of the plaintiff who averred that upon a change of advocates on record, the plaintiff sought leave to amend her plaint which orders the Court granted and the said orders were further extended for 30 days from 26th November 2018. The Plaintiff deponed that she was unable to comply with court's orders as she fell ill and due to her advanced age, was unable to issue proper instructions to her advocate on record.

2. In January 2019, she was able to issue instructions to her advocates regarding the filing of an amended plaint and duly executed the same, but at the presentation for filing on 14th January 2019, the court registry failed to accept payment based on the rule that filing would not be accepted within three days of the court mention date. Then when the matter came up for mention on 16th January 2019, the court erroneously held that the matter stood dismissed despite the courts previous orders for a 30-day extension lapsing on 18th January 2019. The plaintiff contends that the dismissed suit and the amended plaint raise triable issues, hence the suit ought to be reinstated in the interest of justice.

3. The Defendant has opposed the application vide his Replying Affidavit dated 10th September 2020 where he deponed that since 2007 when this suit was instituted, the Plaintiff has changed advocates five times, with the final advocates, Chege Kariuki Advocates, taking up this suit on 15th September 2016 to date.

4. He deponed that between institution of this suit and 2009, the Plaintiff failed to take steps to prosecute her suit, prompting the court to act *suo moto* and dismissed the suit on 2nd February 2012 for want of prosecution. That the Plaintiff thereafter did not prosecute her suit for four (4) years, and only sought leave to amend pleadings when the court listed this matter on 1st February 2017 for clearing backlog.

5. The Defendant further deponed that the suit was mentioned for compliance six times till 26th November 2018, when the court granted the Plaintiff the final chance to comply with **Order 11** within thirty (30) days, failure to which the suit would stand dismissed. When the matter was mentioned on 16th January 2019, the Plaintiff had not yet complied with the court orders and upon failure to give a reason for non-compliance, the suit was dismissed a second time. The Plaintiff has waited for almost two years to file this application making the application time barred, hence the same ought to be dismissed as the suit was properly dismissed for want of prosecution.

Submissions

6. Parties canvassed their arguments by way of written submissions. The Plaintiff's advocate filed Submissions dated 20th April 2021. Counsel submitted that the case of **Mbogo vs Another and Shah EALR 1968** laid down the principles guiding reinstatement of a suit, wherein the court held that it is the court's discretion to set aside an *ex-parte* order of the nature of a dismissal order, and is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. It was further submitted that the Plaintiff should not be visited by the actions of their previous advocates.

7. The Plaintiff relied on the case of **Philip Chemwolo & another vs Augustine Kubede (1982-1988) KAR 103** where Apaloo J.A. held that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is***

***often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline**."*

8. Counsel also relied on the case of **Belinda Murai & 9 others vs Amos Wainaina (1979) eKLR** where the court pronounced itself on the impact of a mistake:

> ***"The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."***

9. It was submitted that the Plaintiff was ready to file the amended plaint on 14th January 2019, two (2) days before the court's next mention date but was prevented from doing so at the registry due to a restriction from filing any document 72 hours to the date a matter would be in court. He submitted that this information had not been brought to the plaintiff's advocate's attention.

10. Counsel submitted that the Plaintiff was unwell and that the Covid-19 Pandemic hampered her efforts to prosecute this suit. The Plaintiff's attempt to file the amended plaint per the court's orders issued on 28th November 2018 showed that she was keen to comply with court's orders and prosecute the suit.

11. To this end, reference was made to the case of **D. Chantulal K. Vora & Co. Limited vs Kenya Revenue Authority (2017) eKLR,** where the court held that:

> ***"No doubt the appellant or its representatives should have been more prudent or keen in the prosecution of its suit. However, as at 3rd February 2012, the appellant was still inviting the respondent to fix a hearing date and showing attempts to prosecute the suit. This was before the suit's dismissal on 10th February 2012. In our view, there cannot be said to be an inordinate delay in the scenario as such. The attempts to set the suit down for hearing ought to count for something and it was wrong for the High Court to brush them off as inconsequential. To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behooves this Court to allow this appeal."***

12. Counsel also submitted that based on **Order 50 Rule 2** and **4** of the **Civil Procedure Rules** which prescribes the computation of time, the courts 30-day extension order issued on 28th November 2018 ought to have lapsed on 18th January 2019 and not 16th January 2019, which the court failed to consider.

13. Counsel also relied on **Mwangi S. Kimenyi vs Attorney General and Another [2014] eKLR** wherein the court stated that;

> ***"The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case, See Ivita V Kyumbu [1984] KLR 441, Chesoni, J. (as he then was). "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

14. Counsel also submitted that the Defendant would not suffer any prejudice if the suit was allowed. He relied on the case of **Gold Lida Limited vs NIC Bank Ltd & 2 other (2018) eKLR** where it was held that:

> ***"In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. If that be case indeed, there would be a basis for a hearing to determine that single issue. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right. In light of this, I am of the view that the inconvenience to be suffered by the defendants as a result of reinstatement of this suit can be adequately remedied through an award of costs."***

15. Further reference was made to the case of **Nahashon Mwangi vs Kenya Finance Bank (in liquidation) (2015) eKLR,** where the court stated 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…"***

16. The Defendant's advocate filed written submissions dated 5th September 2020 contending that this matter had not been heard since its institution, and the Defendant has been burdened with legal fees since 2008 when the advocate on record entered appearance. The Plaintiff's case has dragged and has been dismissed twice and the actions of the Plaintiff have caused the Defendant prejudice. It was submitted that Plaintiff is not a vigilant litigant and she should not be allowed to reap from her indolence. That it took more than one and a half years to make an application for reinstatement, without explanation for the delay and without regard for the sensitivity of the matter which relates to land.

17. It was further submitted that the suit was properly dismissed, and it had not been shown that the court's discretion, was not exercised properly. Defendant too relied on the case of **Ivita vs Kyumbu [1984] KLR 441** as quoted by the Plaintiff above. He also relied on the case of **James Kiplimo Rotich v Taprandich Chumo [2017] eKLR** where the court considered that a delay of one and a half years is a long time before reinstating a suit, particularly where it relates to a land matter. Reference was also made to the case of **Peter Kinyari Kihumba v Gladys Wanjiru Migwi & another [2006] eKLR**, Justice Waki considered a delay of four months in filing an application for extension of time to file a Notice of Appeal inordinate.

18. Further, the case of **Fran Investments Limited vs G4S Security Services Limited [2015] eKLR**, was cited where the court held that:

> ***"The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter."***

19. Further reliance was made to the case of **James Yanga Yeswa v Bob Morgan Services Limited [2019] eKLR** where the Court cited the case of **Birket v James [1978] AC 297** in which the court set out the principles that ought to guide a Court when considering an application for reinstatement of a suit which has been dismissed for want of prosecution. The principles include whether there was inordinate delay on the Plaintiff's part and whether the delay is intentional and inexcusable and whether the delay is an abuse of the court process.

20. The defendant further relied on the case of **Kestem Company Ltd vs Ndala Shop Limited & 2 others [2018] eKLR**, where the court held that: -

> ***"On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that the delay of 10 years has not been satisfactorily explained and is and do further find that delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of the constitution of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter."***

21. Similarly, the case of **Mugwe v Kamau [2004] eKLR,** was cited to buttress the arguments of the defendant.

Analysis and Determination

22. The issue for determination is whether this suit should be reinstated. The court's dismissal orders dated 16th January 2019 were given in the presence of the advocates of both parties.

23. It is prudent to consider the history of this suit. This matter was instituted in December 2007. The Plaintiff filed an application dated 20th May 2008 which sought to strike out the defense. This application was however not heard, and the suit was eventually dismissed on 2nd February 2012 for non-prosecution.

24. The Plaintiff filed an application to reinstate the suit dated 15th November 2012, which the court allowed by a ruling dated 13th November 2013. The court directed the plaintiff to comply with the provisions of **Order 11** of the **Civil Procedure Rules** within thirty (30) days and set the suit down for hearing within three (3) months, **failure to which the suit would stand dismissed**. The Plaintiff failed to comply with these orders.

25. The Plaintiff filed an application to amend the plaint dated 30th March 2017 which the court granted by consent on 15th May 2017. The Plaintiff however failed to file the amended Plaint and antecedent documents leading to the court's orders on **26th November 2018**, where the court granted a final 30-day extension **in default of which the suit would stand dismissed**. On **16th January 2019**, the court dismissed the suit for non-compliance. These orders are the subject of the current application.

26. A consideration of the proceedings in this suit consistently indicate that the Plaintiff herein has not been a vigilant litigant. Even in filing this application to revive this suit a second time, the Plaintiff delayed for more than one and a half years, a period which the court in **James Kiplimo Rotich v Taprandich Chumo [2017] eKLR** found to be a long time, particularly considering the sensitivity of land matters, and accordingly dismissed an application to reinstate a suit.

27. The question is whether the delay was prolonged and inexcusable, and, if it was, can justice be done despite such delay, See (**Ivita vs Kyumbu [1984] KLR**). The facts of this case indicate that the Plaintiff's laxity dates back to when the matter was instituted in 2007, leading to the first instance in which this matter was dismissed in the year 2012. Despite repeated warnings by this court, the Plaintiff failed to comply with court orders in filing the amended Plaint and compliance with **Order 11** of the **Civil Procedure Rules**.

28. While the Plaintiff's counsel has submitted that the mistake of the Plaintiff's former advocates' ought not to be visited upon the Plaintiff, it is trite law that the responsibility to prosecute a suit, rests on the shoulders of a litigant and not her counsel. This was clearly articulated by Angote J. in **Mwangi Gachiengu & 2 Others –Vs- Mwaura Githuku & Another–(2019)eKLR** in the following words:

> ***"it is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter, or when the matter is dismissed because it has not been prosecuted or fixed for prosecution within one year."***

29. The foregoing sentiments were clearly expressed by Judge Gacheru in her ruling of 13.11.2023 when she was reinstating this suit after its dismissal on 2.2.2012. I do find that Plaintiff's indolence has caused the Defendant prejudice as he has had to contend with a legal tussle dating year 2007, which is 21 years and counting! This is an inordinate delay that has affected the fair administration of justice through compromising the memories of witnesses and visiting hefty litigation costs on the Defendant.

30. The Plaintiff argues that the court erroneously dismissed the matter as the 30-day extension was to expire on 18th January 2019 rather than 16th January 2019. The Plaintiff's calculations were however wrongly based on the assumption that the court's orders were issued on 28th November 2018. The court's record are clear that these orders were issued on **26th November 2018**. The Plaintiff's argument of miscalculation thus fails.

31. The applicant also tends to blame the Covid-19 pandemic as a factor in the delay to push forth her case. However, the case was last dismissed on 16.1.2019 in the presence of the counsel for the plaintiff. The Covid-19 pandemic visited the Nation in March 2020. Thus the explanation that the pandemic could have hampered plaintiff's efforts to file the current application is unfounded.

32. It is also apparent that both the plaintiff and his advocate are not candid regarding the attempts to amend the pleadings. They have advanced an argument that the amended plaint was ready and had been presented to the registry for filing 2 days before the mention date of 16.1.2019, but was rejected due to the 72 hours period set forth by the registry. However, when counsel for the applicant appeared in court on 16.1.2019, his explanation as to none compliance was as follows;

"I do agree we have not complied. We were not able to get instructions. We recently discovered that the plaintiff was ill".

33. If indeed the plaintiff had duly signed the amended plaint before 16.1.2019, why then did her advocate advance the version for none compliance as lack of instructions?

34. One of the cardinal principles in our constitution is "**the expeditious delivery of justice" –see Article 159 (2) (b) of the Constitution of Kenya,** which in effect codifies the 17th century maxim of **"Justice delayed is justice denied**". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in **Law** and in **Equity,** delayed justice is abhorred.

35. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its 2017 blue print **"Sustaining Judiciary Transformation - (SJT)"** where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for years. I believe this is one of the cases that formed the backlog of cases at the time of its dismissal in year 2019.

36. Even going by the ruling of Judge Gacheru of **13.11.2013**, there was no suit by March 2014, as the said ruling contained a **self executing order** that the suit was to stand as dismissed in the event of failure to fix a hearing date in 3 months' time.

37. The facts of this case do not warrant this court to exercise its discretion in favour of the plaintiffs. In the circumstances, the current application is hereby dismissed with costs to defendant. This file is marked as **CLOSED**.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Kihara holding brief for Mr. Chege for the Plaintiff

Mary Wanjiku holding brief for Hassan Lakicho for the Defendant

Court Assistant: Edel Barasa