REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1310 OF 2014

BONIFACE KAMAU NJOROGE.....PLAINTIFF

VERSUS

JOHN WAWERU WANJOHI .....DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion dated 8th March 2021 in which he sought for the following orders;

> **a. That the Honourable Court be pleased to review, vary and/ or set aside the orders made on 14th January 2021 dismissing the suit filed herein together with all other consequential orders.**
>
> **b. That the Honourable Court be pleased to reinstate the Plaintiff's case.**
>
> **c. That the Honourable Court be pleased to allow the Applicant's application for substitution filed on 13th September 2019.**
>
> **d. That the costs of this application be provided for.**

2. The Application was premised on the grounds on the face of it and the supporting affidavit sworn by the Plaintiff, Boniface Kamau Njoroge on 8th March 2021. The Plaintiff deponed that this suit was dismissed on 14th January 2021 for want of prosecution, through no wrongdoing on his part. The Plaintiff deponed that no notice to show cause was issued to his advocates or to himself prior to the dismissal order.

3. The Plaintiff deponed that prior to the Defendant's demise, his advocates had attempted to fix the suit for mention but the Defendant sought time to comply with pre-trial directions; that the subject matter of the suit survived the Defendant; that he wishes to prosecute the suit to its conclusion and that the suit relates to his land which was fraudulently obtained by the deceased.

4. The Plaintiff deponed that upon the Defendant's demise, his advocate filed an application to substitute the deceased with his wife, Eunice Muthoni Waweru on 13th September 2019, which was served upon her and her advocate; that on several occasions, he sought for a hearing date for the application for substitution in vain and that thereafter, he discovered that the suit had been dismissed on 14th January 2021 for want of prosecution.

5. The Plaintiff deponed that this suit is in respect to land; that land is an emotive issue; that the application for reinstatement of the suit and substitution of the deceased Defendant should be allowed and that it is neither his fault nor that of his advocate that this suit has remained unprosecuted. It is the Plaintiff's case that since the Defendant died, it has been impossible to trace the deceased's wife who changed her place of residence and that the Defendant's advocate has offered no assistance.

6. The Plaintiff deponed that it is not his fault that the application dated 13th September 2019 remained unprosecuted; that further, Covid 19 had stalled court operations in the year 2020; that the delay in prosecuting the matter is not so inordinate as to be considered inexcusable and that it is in the interest of justice that the application be allowed.

7. The Plaintiff filed a further affidavit dated 26th October 2021 with the leave of the court. He deponed that he was in the process of filing citation proceedings in the Senior Principal Magistrates Court, Ruiru, to compel Eunice Waweru, the deceased's widow to petition for letters of administration in respect of the Defendant's estate. The application was not opposed.

Analysis and determination

8. The only issue for determination is whether this suit should be reinstated. This suit was dismissed on 14th January 2021 by an order of the court for want of prosecution. The dismissal was pursuant to the provisions of **Order 17 Rule 2 of the Civil Procedure Rules**, which provides that:

> ***2.***
>
> **1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
>
> **2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
>
> **3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
>
> **4. The court may dismiss the suit for non-compliance with any direction given under this Order.**

9. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In ***Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR***, the court stated as follows:

> **"11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused that:**
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> > **"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the *court."***

10. As to what constitutes notice under Order 17 rule 2, the court in ***Kestem Company Ltd v Ndala Shop Limited & 2 others [2018] eKLR*** was of the view that it did not require service of notice:

> **"Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ''give notice''. The court may give notice of dismissal through its official website or through the cause-list.**
>
> **I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties."**

11. This matter was initiated via a Plaint dated 22nd August 2014. In the Plaint, the Plaintiff averred that the Defendant had fraudulently registered two parcels of land, Ruiru/Kiu Block /13211 and 13212, in his favor. The Defendant entered appearance and filed a Defence and Counterclaim dated 9th March 2015, to which the Plaintiff replied to on 1st April 2015.

12. On 11th December 2015, the court directed the Plaintiff to fix a date for pre-trial conference, which they did on 4th February, 2016. Despite fixing the matter for mention on 14th April, 2016, neither the Plaintiff nor his advocate attended court. The file was returned to the registry without any order or date.

13. The matter was mentioned on 8th October, 2019 in the presence of the Plaintiff's advocate. On the said date, the court fixed the matter for mention on 5th December, 2019. On 5th December 2019, there were no appearances for either party. The Deputy Registrar thus directed the registry to issue to the parties a notice to show cause why the suit should not be dismissed for want of prosecution, which notice was to be canvassed on 16th April 2020.

14. The matter was not listed for the notice to show cause on 16th April, 2020. However, the matter was listed for dismissal on 5th February, 2019; 20th May, 2020 and 14th January, 2021 when it was eventually dismissed for want of prosecution.

15. Although the record shows that the Plaintiff filed an application for the substitution of the deceased Defendant on 13th September, 2019, he has not explained why he did not take a date for the said application between the date the application was filed and 14th January, 2021 when the suit was dismissed.

16. Indeed, there is no explanation from the Plaintiff or his previous advocate why he did not attend court on 5th December, 2019 and yet the date was fixed in the presence of the advocate. Indeed, having filed an application for substitution of the Defendant on 13th September, 2019, the Plaintiff or his advocate should have fixed a date for the hearing of the said application immediately thereafter.

17. The Court of Appeal in ***Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR*** considered the duty that advocates owe to the court:

> **"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. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:**
>
> > **'… I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards al*l those against whom they are concerned*…"**

18. Should this error or blunder by the advocate be visited upon the client? The courts have adopted an equitable approach in addressing this issue. In the case of ***Philip Chemwolo & another vs Augustine Kubede (1982-1988) KAR 103*****,** Apaloo posited as follows:

> **"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."**

19. In ***Belinda Murai & 9 others vs Amos Wainaina (1979) eKLR*****,** the court pronounced itself on the consequences of a mistake of an advocate as follows:

> **"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."**

20. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.

21. In this case, the delay in prosecuting the suit and the Notice of Motion dated 13th September, 2019 for substitution of the Defendant is long and inexcusable. While the delay in prosecuting the application may have been occasioned by the reluctance by the deceased Defendant's widow in pursuing letters of administration, the Plaintiff failed to pursue the remedies available to him within reasonable time, including filing citation proceedings.

22. Order 24 Rule 4 provides that it is only the legal representative of the deceased who can be made a party to a suit. **Section 2 of the Civil Procedure Act** defines legal representative as follows;

> **"means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".**

23. One can only represent an estate of the deceased when a grant of representation has been made under the Law of Succession Act. This can either be a limited grant or a full grant of letters of administration.

24. In this matter, the Plaintiff has not given evidence to show that Eunice Muthoni Waweru, who they seek to enjoin in the suit to substitute the deceased Defendant, is the legal representative of the deceased's estate. In fact, the Plaintiff has not filed citation proceedings against Ms. Waweru to compel her to take out letters of administration in respect of the estate of the deceased's estate.

25. Even if this court was to exercise its discretion in allowing the matter to be reinstated, the suit would be without a defendant on record. This will result in the wastage of the court's time and resources, with no assurance that Ms. Waweru will indeed be awarded letters of administration over the deceased's estate.

26. In the circumstance, this court will exercise its discretion by disallowing the Plaintiff's application for reinstatement of the suit. The Application dated 8th March 2021 is dismissed with no order as to costs.

27. For avoidance of doubt, this suit stands dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

O. A. ANGOTE

JUDGE

In the presence of;

Kimani h/b for Musyoka for the Plaintiff

No appearance for the Defendant

Court Assistant: John Okumu