



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 41 OF 2020

WELLINGTON NJOMO GICHANGA.....APPELLANT/APPLICANT

VERSUS

SAMUEL KIARIE (for and on behalf of the estate of ONESMUS MWENJE &

PHYLIS NYAMBURA KINYANJUI.....1ST RESPONDENT

FAITH MUTHONI CHURU

JOSEPH NDUNGU NJOROGI

LUCY WAMBUI WAWERU

(suing as Trustees of PCEA Thindigua Church).....2ND RESPONDENT

RULING

1. The Applicant moved the Court with this application dated the 12/10/2020 as thus

a. Spent.

b. Spent.

c. **The Honorable Court be pleased to set aside or vary its orders made on 29th September 2020 to dismiss this cause pending the hearing and determination of this appeal**

d. **This Honorable Court be pleased to reinstate the plaintiff's suit for hearing and determination of this appeal.**

e. **Costs of this application be in the cause.**

2. Supporting the said application, the Applicant swore an affidavit dated the 12/10/2020 and averred that the case in the lower Court to wit MCLE No 57 of 2018 was dismissed on the 29/9/2020 by the Hon P Gichohi consequent upon which he has lodged an appeal in this Court. That the said case was fixed for hearing on the 29/9/2020 via virtual hearing. That the said online hearing was hampered and therefore were unable to follow the proceedings. That later his advocates learned that the matter had been dismissed.

3. That previously the matter had been adjourned at the instance of the Court due to the COVID 19 pandemic and therefore the prior non prosecution of the matter cannot be blamed on him. That it was not correct for the honorable Court to say that he is not interested in prosecuting the case. He urged the Court to reinstate the suit as no prejudice will be visited on the Respondents.

4. The application was opposed by the 2nd Respondent while the 1st Respondent did not file any response.

5. Vide the replying affidavit sworn by **Faith Muthoni Churu** dated the 26/2/2021 the deponent stated that Wellington Njomo Gichana died on the 27/6/2018 as seen in the death certificate and the letters of grant of administration annexed to the said affidavit. That it is dubious that a dead man would file pleadings in Court in form of an application and an appeal as is the scenario in this case. That the 1st Respondent too died in 2014. Other infractions revealed by the deponent is that Vincent Makori was not licensed to practice law at the time he filed the instant application. Lastly that this Court made no orders on the 29/9/2020 and therefore there are no orders to set aside.

6. She contends that the MCEL No 57 of 2018 was dismissed for want of prosecution.
7. Parties filed written submissions which I have read and considered.
8. The Applicant through the firm of **Onyango Oyieko & Associates** filed submissions dated 28/6/2021. He recounted the summary of facts leading to his suit dismissal. That on the 29/9/2020 the trial Court dismissed the suit on ground that the Applicant had lost interest in prosecuting his case. That this was despite his counsel's explanation that the Applicant was in the United States of America and needed time to rebook his ticket to Kenya. That the Applicant had made prior booking for an earlier hearing date of 26/5/2020 which was cancelled by the Court due to Covid 19 restrictions. That thereafter the matter was listed for mention on 15/9/2020 and due to logging in constraints, the Respondents proceeded to fix the hearing date of 29/9/2020 in their absence. That they learnt of the hearing date on 22/9/2020 and with the short notice, the Applicant could not make it to Court on 29/9/2020.
9. The Applicant denied any lack of interest to prosecute his case and submitted that his advocates have always attended Court without fail. He cited the case of **John Nahashon Mwangi v Kenya Finance Bank Ltd** that set out the principles for reinstating a suit. He maintained that the defendant shall not be prejudiced in any way if his application is allowed.
10. In opposition, the firm of **Kariuki Muigua & Co. Advocates** filed submissions dated 20/8/2021 on behalf of the 2nd Respondent. They termed the appeal and application before this Court as incompetent and null for want of locus standi. That the Applicant died on 27/6/2018 and a death certificate was annexed to their Replying Affidavit. Reliance was placed on the case of **Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR** on the proposition that a deceased person cannot purport to instruct counsel to file any pleadings.
11. Further, that Mr. Vincent Makori was not licensed to practice law at the time of filing the instant application. Lastly, they submitted that this Court cannot be moved to reinstate a cause that was not before it because the parties in the trial Court are distinct from the parties herein. They implored the Court to dismiss the application with costs to be borne by the Applicant's advocates

Analysis and Determination

12. The singular issue for determination is whether the instant application is merited.
13. Order 12 rule 7 states as follows;

“Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

14. Setting aside dismissal orders under the above provision is subject to the discretion of the Court. Such discretion is exercised in accordance to the principles set out in the case of **Mbogo & Another v Shah [1968] EA 93, where the Court held that:-**

a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the Court is to do justice to the parties.

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

c. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically.

15. Where a suit is dismissed the application to set aside the dismissal orders are made under order 12 rule 7 in the Court that dismissed the application. In the instant case the application has been made in an appeal. It is evident from the record that Applicant has filed an appeal in this case. In his Memorandum of Appeal dated the 12/10/2020 the appeal is against the orders of Hon P Gichohi CM delivered on the 29/9/2020 in MCEL No 57 of 2018.

16. Inter alia, the Applicant states that he is aggrieved by the dismissal orders and sought orders of review and setting aside of the said orders.

17. I have reviewed the application, the affidavit evidence and the submissions of the parties and it is my firm view that this application is for dismissal for the grounds; the orders being complained about were made in the lower Court and the right forum to canvass an application of this nature is the Court that issued the orders. Secondly the Applicant has already filed an appeal against the said dismissal orders. Once he chooses the route of appeal, he cannot come to Court and ask the very Appellate Court to review the decisions in the lower Court. Proceeding in the manner proffered by the Applicant is tantamount to abuse of the process of the Court.

18. There was uncontroverted evidence that the Applicant is deceased to the extent that letters of grant of administration have been issued. If that was the case (not rebutted) the application before me is dead on arrival. I say so because a dead person cannot sustain a legal suit.

19. In the end the application is found incompetent.

20. It is struck out with costs in favour of the 2nd Respondent.

21. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF NOVEMBER 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

MAKORI FOR THE APPLICANT/APPELLANT

1ST RESPONDENT – ABSENT

2ND RESPONDENT – ABSENT

MS. PHYLLIS MWANGI – COURT ASSISTANT