REPUBLIC OF KENYA

IN THE HIIGH COURT OF KENYA

AT EMBU

ELC CASE NO. 123 OF 2017

EZEKIEL MWAKA MUSAU.....1ST APPLICANT

EUNICE KOKI MUSAU.....2ND APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

RULING

INTRODUCTION

1. The application before me is a motion on notice dated 17TH May 2021 filed in court on 18th May 2021. The motion is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Article 159 of the Constitution of Kenya and all other enabling provisions of the law. The motion is essentially about reinstating the suit herein after dismissal for want of prosecution.

APPLICATION

2. The Applicants are **EZEKIEL MWAKA MUSAU** and **EUNICE KOKI MUSAU**, who are Plaintiffs in the suit, while the Respondent is **NATIONAL BANK OF KENYA** which is the Defendant.

The motion came with three (3) prayers which are as follows:

> *i) **THAT** this honorable court be pleased to reinstate this suit following its dismissal on 11th May, 2021 for want of prosecution.*
>
> *ii) THAT upon the granting of prayer 1, above, this Honourable Court be pleased to order for the matter to be allocated a hearing date.*
>
> *iii) **THAT** costs be in the suit.*

3. The application was anchored on grounds interalia, that the matter was scheduled for notice to show cause on 11 .11.2021 but the applicants sent an affidavit on the court email a day before the hearing for assessment and filing which, according to them did not go through. It is pleaded that on the date for hearing it the court website had a court virtual link and according to the applicants this implied that the matter would proceed virtually and physically. It is alleged that the applicants logged in the online platform at 9.00am until noon without any success in admission and that calls made to the court were unanswered. Accordingly, the suit is said to have proceeded physically and dismissed for non- attendance.

4. The applicants express their desire to prosecute the suit. The court registry has been blamed for the delay in setting down the matter for hearing. It is alleged that they were giving priority to matters filed on or before 2015. It is pleaded that it is in the interest of justice that the suit be reinstated and according to the applicants no prejudice will be occasioned if the application is allowed.

5. With the application is filed a supporting dated 18.5.2021, sworn by Eva Musa advocate for the applicants which reiterates the grounds in the application also annexed to the application is an affidavit and email extract together with a copy of the virtual link in support of the case.

RESPONSE

6. The application has been responded to by way of replying affidavit filed on 18.5.2021 and dated 17.5.2021. The replying affidavit is sworn

by the advocate on record, one Caroline Njari, who averred that the suit was filed on 17.5.2017 and they entered appearance and filed defence on 1.9.2017. According to the respondent the last time the applicants set the matter down in court was two years ago when it came up for mention and no further steps were taken in prosecuting the matter until when the Notice to show cause was issued.

7. The advocate indeed confirms that on the material date the matter was scheduled for hearing to show cause. Both the applicants and/or their advocate did not attend court and as a result the matter was dismissed. It is pleaded that the affidavit said not to have been filed by the applicants was not served upon them and further doubt has been cast on the explanation given for failing to attend court. It is said that when a court intends to proceed virtually they give notice and send the link to the parties.

8. According to the respondent the applicants were never willing to prosecute the matter and their explanation on delay of such prosecution is inexcusable. The applicants have been said to be indolent and were only woken up by the dismissal of the suit. The respondent has stated that it will suffer an injustice if the suit is reinstated. The application has further been termed to be an afterthought and an abuse of the court process and the court has been urged to dismiss it with costs.

SUBMISSIONS

9. The application was canvassed by way of written submissions. The applicants filed their submissions on 16.6.2021. They submitted that the court has wide and unfettered jurisdiction to review, vary or set aside its decisions. It is their case that mistake of advocate should not be visited on the client. In support of this, reliance was placed on the case of Mohan Galot Vs Walter Omosa Nyakundi & 21 Other (Interested parties) 2020 eKLR.

10. Reliance was further made on the case of Wachira Karani Vs Bildad Wachira (2016) eKLR where it was held that sufficient cause is that which a party could not be blamed for it's absence. It was further stated that a party must demonstrate that he was prevented from attending court by a sufficient cause. Further reliance was made on the case of Jim Rodgers Gitonga Njeru Vs Al Hussain Motors Limited & 2 Others 2018 eKLR.

11. The applicants justified the delay by reiterating that the court's directive to have matters for 2015 and below be fixed for hearing, impeded them from fixing the matter for hearing which the court had determined should proceed undefended. The corona - virus pandemic was also said to have contributed to the delay due to the closure of court during the period.

12. The applicants expressed their desire to prosecute the matter and further submitted that the present application had been filed timeously. It is claimed that the respondent will not suffer any prejudice as their defence was struck out, and that the application, if allowed would mean that the suit would proceed undefended. It was reiterated that the applicants had sufficient cause to warrant grant of orders sought, that they would suffer prejudice if the application is not allowed, and that the threshold for reinstating a suit had been met. With regard to costs the court was urged to have the costs be in the cause.

13. The respondent's submissions were filed on 15.10.2021. The respondent relied on the provisions of Order 17 rule 3 as read with Order 12 Rule 3(1) on courts powers to dismiss a suit for nonattendance by a party. It was said that a court's power to set aside an order of dismissal should be just and a party seeking such orders should adduce sufficient and plausible reasons persuasive to the court.

14. According to the respondent the reasons given by the applicants do not raise just cause to warrant varying of the orders and are said to be inexcusable. Reliance was made on the case of Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another [2014] where the court held that the plaintiffs have a duty to take steps to progress their case.

15. It was further submitted that courts cannot set aside dismissal of a suit on the sole ground of a mistake by counsel for the litigant on account of such advocate's failure to attend court. To put this point across the respondent's relied on the case of **Edney Adaja Ismail Vs Equity Bank Ltd 2014 Eklr** which cited with approval the case of **Savings and Loan Limited Vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002.**

16. The court is urged not to reinstate the suit as doing so would go against fairness and equity. Ultimately the court was urged to dismiss the application.

ANALYSIS AND DETERMINATION

17. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The sole issue for determination, is whether the suit herein should be reinstated after it's dismissal on 11.5.2021.

18. **Section 3A** of the Civil Procedure Act gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. Further, the provisions of Order 51 rule 15 of the Civil Procedure Rules grant the courts power to set aside any order made ex parte. Dismissal of suits for want of prosecution is normally done under order 17 of Civil Procedure Rules, 2010. The purpose of Order 17 is to provide the court with the necessary administrative machinery to dis-encumber itself of case records if the parties appear to have lost interest. Reinstatement of a suit after dismissal is a matter of discretion.

19. In the case of **Shah -vs- Mbogo & Another (1967) EA 1116,** the court stated on the matter of its discretion, that:

> *"The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."*

20. The principles governing reinstatement of suit were well discussed in the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** stated as follows:

> *"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 acts 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."*

21. Further in the case of **Ivita Vs Kyumbu [1984] KLR 441** the court stated that in determining such an application, it ought to consider the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

22. It is not in dispute that the suit herein was dismissed when counsel for the applicants and the applicants themselves failed to attend court to give explanation concerning a notice to show cause why the suit should not be dismissed.

23. The matter was last in court on 24th June 2019. This is close to two years from the date the notice to show cause was scheduled for hearing. Counsel for the applicants has squarely placed the blame for the delay on the court registry which is said to have given priority to matters that are more than five (5) years old. Further the corona-virus pandemic has been termed as a contributing factor to the delay for reasons that the courts had closed in the year 2020 and it became hard to fix the matter for hearing. I think the applicants are making a valid point here.

24. Then there is the issue of non-attendance to court to defend the notice to show cause. Counsel for the applicants has attributed the non-attendance to a mistaken belief that the suit was to proceed virtually. He alleged to have logged in at 9.00am only for the suit to proceed physically and then subsequently dismissed. A link has been annexed in support of their application to show that counsel had logged in. Despite this, the court cannot be certain that counsel indeed was in virtual attendance as alleged. Furthermore the court on the material date proceeded physically and not virtually. There is however an email annexed to the application which appears to have been sent to court seeking for assessment of an affidavit. The email address is indeed the court's and the court is inclined to believe the averment by the applicants that indeed they made an attempt to defend the notice to show cause.

25. However, even then, counsel for the respondent was not served with the said affidavit and the applicants did not see to it that they attended to the matter physically considering that their on-line attempts had failed. As pointed out above the reasons for non-attendance and delay in prosecuting the matter are not sufficient. A party who has instituted a suit has the duty to prosecute the suit and take such steps to ensure that the suit is prosecuted expeditiously. I am inclined to agree with the respondent that the applicants were merely woken up by the notice to show cause; otherwise their suit would have remained unprosecuted.

26. The applicants have averred that the suit herein is a land matter which is an emotive issue. They are claiming ownership of the suit parcels of land on the basis that they purchased the land from the respondent by way of auction. The suit was defended but the court struck out the defence and made a determination that the suit proceed undefended. The only thing then pending in the suit is for it to proceed for hearing.

27. The respondent on his part has alleged that they have suffered economic and time-related prejudice with having to keep carrying the case herein on it's shoulders. In balancing the prejudice to be suffered by both parties it is clear that the level of prejudice to be suffered by the applicants in the circumstances will be greater than that likely to be suffered by the respondent and especially considering that the suit already is to proceed undefended.

28. Further, it is trite law that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the seat of justice. The court is of the view that it is in the interest of justice to have the suit herein reinstated. The upshot of the foregoing is that the application herein is allowed.

29. With regard to costs, it has been held time and again that costs follow the event. However, I am inclined to depart from that principle given that the court itself had a policy of not hearing matters that were less than five years old. This matter itself fell in that category. I therefore order that each side should bear its own costs.

30. The applicants are to have the matter set down for hearing within the next 60 days otherwise the suit shall stand dismissed.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF NOVEMBER 2021.

In the presence of M/s Wacheke for M/s Musa for plaintiff/applicant and in the absence of Kibicho for defendant respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

24.11.2021