



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 30 OF 2021 KWALE

(FORMERLY ELC MOMBASA 50 OF 2014)

DAVID MAIKO CHALO.....PLAINTIFF

VERSUS

1. RUA CHITUPA MWANYAWA

2. NDEGWA SENYA WA MWIRO

3. BORA GABRIELS

4. MOSES KATOTO GUWE

5. DANIEL MRIZI KOKAI

6. NGOME KABIDEFENDANT

RULING

INTRODUCTION

1. The Plaintiff has filed a Notice of Motion dated 5th August 2020. The application is made under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 15. It seeks to set aside the court orders made on 26th November 2018 dismissing this case for want of prosecution and reinstatement of the suit.

2. The application is supported by the Affidavit of David Maiko Chalo, the Plaintiff, sworn on the 10th August 2020 and the grounds reiterated therein.

3. The application is opposed by the Defendants. The grounds are set on the face of the application and further buttressed in the replying affidavit of Mr. Godfrey Mutubia, Counsel for the Defendants sworn on the 18th January 2021.

Plaintiffs/Applicant Case

4. The Plaintiff avers, he was keen in prosecuting the case and after filing the suit I'm March 2014, formal proof was prosecuted on 1st December 2014, though the interlocutory judgement was set aside by consent of the parties. He suffered major illness during 2015 to 2017 when he underwent major in 2017 to 2018 he entered negotiations with the Defendants for amicable settlement. The Court was made aware of his ill health and attempts for amicable settlement.

5. He further depones following information from his advocates on record, that the case came up for pretrial on 19/6/2018 but the court was not sitting prompting parties to fix a further date. Thereafter the court file could not be traced to fix a hearing date. His Advocates retrieved the file in March 2020 where it was noted that on 19/7/18 the Deputy Registrar (DR) made an order that the file be placed for hearing for dismissal before the Judge on 7/11/2018. The DR also made an order for Notice to issue by the registry. No such notice was issued to the Plaintiffs advocate.

6. It is further stated that instead of the said 7/11/2018, the matter came up before Justice Waithaka on 26/11/2018, without notice to the

Plaintiffs advocate and was dismissed for want of prosecution.

7. The Plaintiff urged the Court to grant him an opportunity for the ends of justice since the delay was not deliberate nor inordinate.

Plaintiffs Submission

8. The application was heard by way of written submissions, the Plaintiffs are dated 25th May 2021. The submissions reiterate the matters deponed in the affidavit in support of this application.

9. The Plaintiff emphasizes that the Plaintiffs ill health was the basis upon which several adjournments were granted by the court. The Defendants also contributed to the delay in the matter since by the year 2018 they had not complied with pretrial directions making commencement of hearing impossible.

10. The Plaintiff further advanced that while they were trying to fix the case for hearing in vain, the court had recalled the file on its own motion. The registry failed to issue notice to the parties for 19/7/2018 despite the courts order for notice to issue. Even upon failure to issue notice the registry fixed the matter for dismissal on 26/7/2018 and even then, the Plaintiff advocates were not notified. The Plaintiff was unaware of the dismissal until 2020 when the file was recovered, and this application brought promptly.

11. It is urged by the Plaintiff that the suit is reinstated and determined on merits in the interests of justice since both the Plaintiffs and Defendants claim interest in the suit property as the Defendants had also filed a counterclaim for adverse possession. Failure to decide the suit on merit would result to more litigation on the same parcel leading to waste of time and resources and further against the principle of overriding objectives.

12. The Plaintiff notes that they would be prejudiced by dint of limitation of action law.

13. Further that the Defendants apart from the averments in their replying affidavit herein had not shown that they will suffer any prejudice should the orders be allowed.

14. Two authorities were relied upon by the Plaintiff, **CMC Holdings Ltd Vs Nzioki (2004) 1 KLR** cited in **JIM Rodgers Gitonga Njeru Versus Al Husnain Motors Ltd & others (2018) eKLR**. Briefly the court noted that discretion to set aside *ex parte* orders, was meant to ensure that *'a litigant does not suffer injustice or hardship on result of among other things an excusable mistake or error'*. The case of **Phillip Chemowolo & Ano. Versus Augustine Kubende (1982-88)1KAR 103** also cited in the CMC Holdings case above which underscored that *...the broad equity approach to mistakes 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...exists for the purpose of deciding rights of the parties and not for the purpose of imposing discipline'*

15. The Plaintiff therefore submitted that the failure to attend court on the date of the dismissal was not deliberate but was a result of failure on the part of the registry to give proper notice. Further that he had demonstrated interest in having the matter determined by his earlier expeditious prosecution (formal proof) and the negotiations herein when his health was failing. It would be unjust for these efforts to be watered down by circumstances that were not only excusable but were also beyond his control, that is the sickness and the missing file.

Defendants Case/ Submissions

16. The Defendants filed written submissions dated 31st May 2021. The submissions emphasize on the matters deponed in the Defendants replying affidavit filed herein.

17. The defendants identified the following issues for determination; -

1). Whether the applicants have satisfied the test for setting aside orders for dismissal for want of prosecution on the following sub-issues; -

a) Is the application filed without inordinate delay?

b) Whether setting aside will be prejudicial to the defendants.

The Defendants pointed that; -

18. The matter came up severally for Notice to Show Cause (NTSC) why the suit should not be dismissed for want of prosecution. The Plaintiff did not set the matter down for hearing and the Court accordingly dismissed the suit. The case of **Anna Kamorinjithi Vs David Munene; Pauline Wangithi & 4 Others (interested Parties) (2021) eKLR** was also relied upon. The court pointed that *'the overriding objective of Section 1A of the Civil Procedure Act cannot be achieved where sufficient or excusable explanation is not given for failure by an advocate/client to attend court during hearing were allowed. The consequence of the negligent act must be allowed to fall on the negligent counsel.'*

19. It is the Defendant's contention that the Plaintiff was guilty of inordinate delay having filed the application in August 2020 against the orders of dismissal issued in November 2018. In the absence of correspondence between the Plaintiff and the Court the allegations that the court file was missing were thus baseless. The Plaintiff was at liberty to seek for reconstruction of the file which he did not. Furthermore, the file was before court on 19/7/2018, 7/11/2018 and 26/11/18.

20. Further that the suit belongs to the Plaintiff and not his advocate and the Plaintiff was obligated to follow up his case filed in court.

21. They relied on the case of ***Tirth Construction Ltd Vs Orion Hotels Ltd (2020) eKLR*** where the court in dismissing a similar application observed among others that the applicant had failed to give reasonable explanation for the delay in seeking reinstatement of the suit. While the interests of justice were of utmost importance in a case for reinstatement, the court should look at both parties' interests and which one outweighed the other since justice cuts both ways. The Plaintiff having commenced the suit had an obligation to ensure that his case proceeded. The court in this matter quoting from a South Australia case Beverage Bottlers (SA) Ltd (in liquidation) and Arvo Vs Abode Enterprises PYT let (2009) SASC 272 where it was noted among others that ... 'if the Plaintiff has conducted his case so that the defendant suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice and justice can only be achieved by shutting the Plaintiff out of his case. There comes a time when the defendant is entitled to have some peace of mind and to regard the incident as closed. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that cause of action arose'

Based on the foregoing it was the Defendants submission that the Plaintiff was clearly guilty of inordinate delay and therefore not deserving of the discretionary orders of setting aside the dismissal and reinstatement.

22. On whether setting aside would be prejudicial to the Defendants, the Defendants contend that they will be greatly prejudiced if the orders were granted. It has cost them time, money and mental anguish having the suit against them since 2014 yet it was obvious the Plaintiffs were not interested to prosecute the case. They cited Kesten ***Company Ltd Vs. Ndala Shop Ltd & 2 Others (2018) eKLR*** where the court found that failure to set the suit down for hearing for 10 years was an infringement of Articles 159 and 47 of the Constitution. Delay was a source of prejudice to the other party as it affects the fair administration of justice and delayed justice.

23. It is further submitted that the Defendants had lawfully occupied the suit property for over 25 years and will suffer prejudice if the application is allowed.

ANALYSIS AND DETERMINATION

24. Since events in the proceedings of the court from inception have been extensively mentioned and affect the disposition of this application, it is imperative that this court sets the record straight at this point on proceedings relevant to this application. It is noted as follows; -

- 1) March 2014 – the suit was filed.
- 2) May 2014 – case set down for formal proof on 1/12/2014.
- 3) 1/12/2014 – formal proof did not proceed. Court was informed that the Plaintiff had been referred to Nairobi for Medication. Consent setting aside interlocutory judgement was recorded.
- 4) 30/8/2016 – no appearance for defendant. Court was informed Plaintiff unwell, undergone several operations causing delay in the matter. More time was sought. Mention fixed on 21/11/2016
- 5) 21/11/2016 – No appearance for both parties. Court ordered parties to fix pre-trial date only after filing all pleadings.
- 6) 17/10/2017 - Court was informed that plaintiff underwent surgery in 2015 and advocate had been unable to get further instructions to fix hearing date. Defence insisted that the matter be dismissed but counterclaim be allowed. Court noted the Plaintiffs explanation and fixed the matter for hearing on 19/2/2018. Defendant was directed to comply 30 days before the hearing. (This court notes that Defendant had not yet filed pleadings)
- 7) 19/2/2018 – Court was informed that parties were negotiating settlement. Defendant granted 45 days to comply with Order 11 in default whereof in the absence of explanation for delay they would not be permitted to file any documents. Parties were also allowed time to negotiate. Matter fixed for mention on 15/2/2018.
- 8) 15/2/2018 – Counsel for Plaintiff informed the court that there was indication that parties had agreed on the settlement but he required to discuss with the defendants' advocates. Counsel also prayed that in the event settlement is not reached the defendants should comply and file pleadings to enable him fix the matter for hearing. Matter was fixed for pre-trial on 19/6/2018 incase no settlement reached.
- 9) 19/7/2018 – Before Hon Wasike DR. No appearance by the parties. The DR directed that the matter is fixed for dismissal before the Judge on 7/11/2018, in view of absence of the parties.
- 10) 7/11/2018 – there are no proceedings for this day in the court file.
- 11) 26/11/2018 – parties did not appear. Matter was dismissed for want of prosecution.
- 12) 27/10/2020 – Plaintiff court clerk fixed the current application for hearing on 16/2/2021.

The matter has come up before court on diverse dates since the 16/2/2021 culminating to the date for this ruling.

25. From the foregoing this court notes that there were three attempts by the court suo motto to dismiss this case for want of prosecution. I have come across several NTSC issued by the DR for both parties to appear before the court; On 30th August 2016 (NTSC dated 2nd August 2016), the Plaintiff advocate appeared; On 17th October 2017 (NTSC dated 27th September 2017) both parties appeared and on 19th July 2018 (NTSC dated 16th November 2018) no appearance by both parties, no adverse orders were made.

26. The Court on 15/2/2018 fixed the matter for Pre-trial directions on 19/6/2018, however the matter was fixed by the registry for NTSC on 19/7/2018 which could also be indicative there may have been a mix up with the months since the dates were corresponding except for the months.

27. I have meticulously gone through the court file herein; I have not come across a NTSC issued in respect of the 26th November 2018 when the matter was dismissed for want of prosecution. Indeed, the record confirms that the DR had directed that notice should issue to the parties by the registry. The only NTSC 's are as pointed earlier.

I find that both parties were not aware of the date, there having been no NTSC issued for service upon them.

Issues for determination

28. The issues are adopted as framed by the Defendants herein and I proceed to deal with them seriatim.

Is the delay inordinate?

29. There are two limbs to the delay, these are on the filing of the application and in respect of the age of the suit. I note that the orders dismissing the matter for want of prosecution were issued on 26/11/2018 and the notice of motion filed on 18/8/20, approximately twenty months after the event. The Plaintiff avers that he was not aware of the dismissal until 2020 when the file was recovered, whereupon he filed this application promptly.

30. The Plaintiff pleads that the file could also not be traced from the 15/2/2018. I have observed from the court file that the same was available in the registry/court on 19/7/2018 and 26/11/2018. Moreover, no efforts have been made to annex correspondence from the Plaintiffs advocates requesting for the file or its non-traceability. I'm therefore not convinced that the court file was missing until sometimes in August 2020. The Plaintiff having failed to convince the court about the missing file, for this reason I find the delay in filing the application inordinate.

31. In respect of the age of the suit and failure to set down the same for hearing, the suit was filed in the year 2014. It is 7 years old or thereabouts. Order 11 requires that before a suit can be set down for hearing, pre-trial proceedings must be taken and complied with. The Plaintiff contends that the defendant contributed to the delay for not having filed their pleadings and attendant documents, a prerequisite for pre-trial and setting the matter down for hearing note from the proceedings in the court file that as at 15/2/2018 the defendant had not filed pleadings. I note that parties were negotiating settlement, but this was not an excuse for failure to file pleadings. I find that the Defendants partly contributed to the delay in failure to comply with filing of their pleadings.

32. The Plaintiff's health has also been raised as a reason for the delay herein. I have noted from the record that the court was informed about this issue, and no reason to doubt the long convalescence. No medical evidence was adduced then and the Defendants never raised any concerns thereto. To raise concerns when it now suits the defendants is in my view not appropriate.

Whether setting aside will be prejudicial to the defendants.

33. The Defendants have urged that setting aside the dismissal orders and reinstating the suit would prejudice them. They have suffered mental anguish and expended time during the pendency of this suit. I also note that the Defendants have a counterclaim which was not upheld when the suit was dismissed. I have observed from the proceedings of 17/10/2017 Counsel for the Defendant in applying for dismissal also prayed that the counterclaim be allowed. The Plaintiffs also pointed in their submissions the existence of the counterclaim. The orders of 26/11/2018 dismissed the suit and no separate orders were made on the counterclaim. I find that both parties will suffer prejudice.

34. I have looked at the authorities cited by the defendant in support of the fact that inordinate delay without reasonable explanation should be used against the party guilty of the delay. I have also read the case cited by the Plaintiff. Based on the Plaintiffs health, the Defendants contribution to the delay, the Defendants Counterclaim; the want of service herein of the NTSC and in the interests of justice, I'm inclined to lean towards substantive justice in exercising my discretion herein. The balance of convenience tilts in favor of retaining the suit to be heard on merit on both the Plaintiffs claim as well as the Defendants Counterclaim. This is the only way that both parties will have closure since both parties' claims will have been determined.

Determination

35. The upshot of the foregoing is that I make the following orders; -

1. The Notice of motion dated 5th August 2020 is hereby allowed.
2. The Plaintiff shall pay thrown away costs of Kshs. 10,000 before the case is fixed for hearing.
3. The Defendants Counterclaim stands.

4. Parties shall comply with Order 11 within 45 days of today's date.

The case shall be mentioned 27th January 2022 for pre-trial and fixing a hearing date.

DATED 17th OF NOVEMBER 2021

DELIVERED IN THE PRESENCE OF THE PARTIES (VIRTUALLY).

HON. LADY JUSTICE A.E DENA

JUDGE, ENVIRONMENT AND LAND COURT

AT KWALE.