



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MATRIMONIAL CAUSE NO. 2 OF 2018 (O.S)**

**(Formerly Civil Case No. 19 of 2018 (O.S))**

**EWM.....APPLICANT**

**VERSUS**

**JMK.....RESPONDENT**

**CORAM: Hon. Justice S. M. Githinji**

**Gicharu Kimani & Associates Advocates for the Applicant**

**A. M. Omwancha & Company Advocates for the Respondent.**

**RULING**

On 3<sup>rd</sup> August, 2021 this case was dismissed for want of prosecution. EWM, the Applicant filed a Notice of Motion application dated 23<sup>rd</sup> August 2021 seeking an order to set aside the dismissal of the case on 3<sup>rd</sup> August 2021.

In that regard, the Applicant herein filed a Notice of Motion dated 23<sup>rd</sup> August, 2021 seeking the following orders:

- 1. THAT this Honourable Court be pleased to review, vary and/or set aside the order of the Honorable Court made on the 3<sup>rd</sup> day of August, 2021 dismissing the Applicant's case dated 25<sup>th</sup> January, 2018 herein for want of prosecution.***
- 2. THAT the suit filed on the 25<sup>th</sup> day of January, 2018 be reinstated for hearing and final disposal.***
- 3. THAT the costs of this application be in the cause.***

The application is supported by an affidavit sworn by **Gicharu Kimani** on the 23<sup>rd</sup> day of August, 2021. He deposed that when the matter came up for directions before the presiding Judge on the 11<sup>th</sup> day of May, 2021, the Applicant was given twenty-one (21) days to prosecute her case failure to which the suit stands dismissed. That on 25<sup>th</sup> May, 2021 the Applicant through her advocate fixed the matter for pre-trial directions on 22<sup>nd</sup> June, 2021 and served the Respondent. That the Honorable Court was not sitting on the 22<sup>nd</sup> day of June, 2021 and the matter was later fixed for further pre-trial directions on the 3<sup>rd</sup> day of August, 2021 at the High Court Registry.

He also deposed that on the 25<sup>th</sup> day of June, 2021, the Applicant through her advocate effected service of the said pre-trial date vide a Mention Notice dated 23<sup>rd</sup> June, 2021 and filed the return of service on 27<sup>th</sup> July, 2021. When the matter came up on the 3<sup>rd</sup> day of August, 2021, the suit was dismissed for want of prosecution. He contends that the Respondent will suffer no prejudice if suit is reinstated and that the Applicant has an arguable case with a high chance of success and it is in the best interest of justice that the suit be reinstated so that the same can be heard and determined on merit.

**RESPONSE**

The Respondent in rebuttal filed a Replying Affidavit dated 8<sup>th</sup> October, 2021. He stated that on the 3<sup>rd</sup> day of February, 2020 the Applicant's advocate sought leave of the court to amend the pleadings which application was allowed and the applicant was granted Twenty-One (21) days to amend her pleadings. That there was no amendment done by the applicant until 3<sup>rd</sup> August, 2021 when the matter was

dismissed for want of prosecution.

He deponed that the issue raised by the Applicant on the reasons meant to persuade the court to review the orders issued on 3<sup>rd</sup> August, 2021 are of no basis and are only meant to mislead the court. He also contends that the Applicant failed to comply with the order of the court made on the 3<sup>rd</sup> day of February, 2020 and there is therefore no way the Applicant would have fixed the matter for Pre-Trial Hearing without duly amending the pleadings. That it is One (1) year and Eight (8) months since the Applicant was granted leave to amend her pleadings and failed to till the matter was dismissed for want of prosecution.

He also stated that the Applicant has not been diligent in prosecuting the matter as she went to slumber after she got leave to amend pleadings and that the Applicant's case has no merit as she has not equally raised a good reason why she failed to attend court on the material day when the matter was dismissed.

## **SUBMISSIONS**

The application was canvassed by way of written submissions. The Applicant having filed submissions in support of the Application dated 23<sup>rd</sup> August, 2021 on the 19<sup>th</sup> day of October, 2021. The main issue for determination in their submission is whether there are basis for court to set aside the court order of 3<sup>rd</sup> August 2021. In her submissions, the Applicant cited Section 3A of the Civil Procedure Act which provides that:

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the court.”***

She also drew the attention of the court to **Order 12 Rule 7 of the Civil Procedure Rules** which makes the following provision:

***“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”***

In her submission, she relied on the authority of **Belinda Murai & Others vs Amoi Wainaina (1978)** where the court set out the approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake. A similar analysis was also discussed in the authority of **Philip Chemwolo & Another vs Augustine Kubebe (1982-88) KAR 103**.

It is her submission that this Honourable court has unlimited discretionary powers to set aside interlocutory judgment against the Applicant to avoid causing injustice and hardships caused by excusable errors. She pointed out **Article 50(1) (2)** of the Constitution citing that every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. She submitted that the inadvertence mistake and/or excusable mistake or error of her advocate on record should not be visited upon her personally and that the Respondent does not stand to suffer any prejudice if the Application is granted as the suit shall proceed and heard on its substantive merits.

The Respondent filed submissions on the 5<sup>th</sup> day of November, 2021 persuading the court not to allow the application dated 23<sup>rd</sup> August, 2021. In his submission, the Respondent gave a history and events leading up to the dismissal of the matter on the 3<sup>rd</sup> day of August, 2021. The Respondent relied on **Order 17 Rule 2 (1)** which provides for a notice to show cause why the suit should not be dismissed and argues that the minimum requisite period for the court to exercise the jurisdiction to dismiss a suit is one year after a party fails to take any step to prosecute a suit and in the present case, the applicant has taken a total of 3 years and 7months without taking any necessary steps to ensure that the matter is prosecuted.

It is also his submission that if the prayers in the application are granted, the same will affect the fair administration of justice and will be contrary to **Article 47 of the Constitution** which provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair, as well as **Article 159** that provides that justice shall not be delayed.

He also submitted that failure on the part of the Applicant to set down the cause for hearing for 3 years and 7 months was a clear infringement of Article 159 as was held in **ELC No. 95 of 2013 Kestem Company Limited vs Ndala Shop Limited & 2 others**.

## **ANALYSIS AND DETERMINATION**

Digging into the substance of the application, the Applicant's case as stated before was dismissed on 3<sup>rd</sup> August 2021 for want of prosecution. The Applicant alleges that on 11<sup>th</sup> May, 2021 she was granted Twenty-One days to set down the matter for pretrial directions. Going by the proceedings of the said date, the order made by the Honorable Court was that the Applicant was granted 21 days to prosecute the matter and in default the matter to stand dismissed for want of prosecution.

Without doubt, the applicant ignored at least 2 court orders. The first one was issued on 3<sup>rd</sup> February, 2020 when the Applicant was granted 21 days to amend her Originating Summons. The other one was issued on 11<sup>th</sup> May, 2021 when the court ordered that the

Applicant move with speed to ensure that the matter is prosecuted within 21 days failure to which the same to stand dismissed for want of prosecution. Instead of amending the pleadings as directed by the court, the Applicant went ahead to purport to fix the matter for Pretrial directions.

I wish to state that the conduct of the applicant and her advocate demonstrates that she was an indolent litigant who is now seeking

reinstatement of a suit that this Honorable Court already dismissed for want of prosecution, while the respondent continues being prejudiced by the delay and incurs further expenses.

My interrogation of what the Applicant stated as her reason for not proceeding with this matter is something that is not backed by the proceedings or the application at hand. The Applicant sought leave to amend her pleadings which the court granted on the 3<sup>rd</sup> day of February, 2020 but to date no amendment has been effected. This leaves the question as to whether the Applicant was desirous of prosecuting this matter to conclusion.

This court has also noted that upon dismissal of the matter on the 3<sup>rd</sup> day of August, 2021, the Applicant moved the court on the 23<sup>rd</sup> day of August 2021 seeking to have the suit reinstated.

The Applicant in both her application and submissions cannot sufficiently explain the delay in ensuring that the matter is prosecuted by blaming her advocate. This case belongs, and always, to the Applicant. The Applicant has the duty to ensure that the right action is taken in her case. In this regard I refer to the case *Edney Adaka Ismail v Equity Bank Limited (2014) eKLR* thus:

*“However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows: -*

***“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)”***

This court acknowledges that dismissal of a suit is a draconian action and that in considering such dismissal and whether or not there ought to be reinstatement of this case, of paramount consideration is the interests of justice. Justice cuts both ways, it is a double-edged sword. The interests of justice faces both ways. That is the Applicant's side and the Respondent's side. The weight of what parties have placed on the scale of justice, tilts in favour of the Respondent. It is the Applicant who sued and therefore the one who dragged the Respondent to this Court. The Applicant had an obligation to ensure that this case, which was filed in the year 2018 proceed expeditiously.

This Honourable Court relies on the South African Case of *Beverage Bottlers (SA) Ltd (in liquidation) and Arvo V Abode Enterprises Pty let (2009) SASC 272* where the Judge stated:

***“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.***

***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 the cause of action arose.”***

I am also inclined to agree with the Respondent, as it is clear from the pleadings filed, and which is yet to be amended that the Applicant seems to be in a fishing expedition as she is claiming declaration of matrimonial property and distribution, and from a look at the documents she has filed, she fully participated and consented to the sale of the property she is now urging the court to declare as matrimonial property. This is evident from the List of Documents filed by the Respondent filed on the 11<sup>th</sup> of October, 2019. It is vivid from the materials presented that there is nothing if any, to litigate about and reinstating the suit might be a task in futility.

I therefore find that the Applicant raises no compelling reason to persuade this court to review the orders issued on **3<sup>rd</sup> August, 2021**. The record is explicit on the valid events leading to the dismissal of the suit.

*The Notice of Motion dated 23<sup>rd</sup> August 2021 is therefore dismissed with costs to the Respondent.*

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14TH DAY OF FEBRUARY, 2022.**

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**S.M. GITHINJI**

**JUDGE**

**IN THE ABSENCE OF MR GICHARU FOR APPLICANT AND MR OMWANCHA FOR THE RESPONDENT.**