



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC JR NO. 2 of 2020**

**ANNE R. WESONGA ..... EXPARTE APPLICANT**

**VERSUS**

**THE CHIEF LAND REGISTRAR**

**MINISTRY OF LANDS .....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TITLES**

**MINISTRY OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE OFFICIALS OF KWARE MUKURU KWA**

**NJENGA JUA KALI ASSOCIATION ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL**

**REPUBLIC OF KENYA .....4<sup>TH</sup> RESPONDENT**

**AND**

**BONIFACE MWANZIA MUINDI.....INTERESTED PARTY**

**RULING**

1. Coming up for ruling is a Notice of Motion application dated 1<sup>st</sup> February 2021 by the Applicant seeking the following orders:

*i. Spent*

*ii. THAT the Applicant's application dated 27<sup>th</sup> May 2020 and which came for directions on 15<sup>th</sup> December, 2020 be prioritized for hearing as the applicant complied with all the requirements.*

*iii. THAT costs be in the cause.*

2. The application is premised on the grounds that the file was placed before another court for hearing and that the record shows that the application was dismissed, which is erroneous. In her supporting affidavit dated 1.2.2021, the Applicant avers that she filed an application dated 27<sup>th</sup> May 2020 for an order of mandamus compelling the Chief Land Registrar and the Registrar of Titles Ministry of Lands to cancel Certificates of Lease on the subject title but due to an erroneous mistake the application was dismissed. The Applicant depones that she is exposed to loss of land and damages if the court fails to correct the error and reinstate the application.

3. The application is opposed by the Interested Party, one Boniface Mwanzia vide his Replying affidavit dated 22<sup>nd</sup> March 2021, where he states that the application dated 27<sup>th</sup> May 2020 came up for hearing on 15<sup>th</sup> December 2020, the Applicant was not in court to prosecute the same, hence the dismissal orders. He added that the Applicant did not give any reasons as to why they did not attend court. He also averred that there is another suit **ELC No. 7 of 2020 (OS)** on the same subject matter thus the current application is an abuse of the court process and noted that the dispute cannot be resolved by way of a judicial review since no decision has been made that should be reviewed.

## Submissions

4. The Applicant's submissions are dated 9<sup>th</sup> August 2021. She avers that under **Order 12 Rule 7** of the **Civil Procedure Rules, 2010**, the court may set aside or vary judgement or order for dismissal on terms that are just. The Applicant cited the case of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR** in which the court held that "*although a litigant who is represented by an advocate is bound by the acts and omissions of the advocate, ... courts must exercise care to avoid unjust and ridiculous results.*"

5. It was also submitted that the Notice of Motion filed on 27<sup>th</sup> May 2020 (which was yet to be heard) had abided to **Order 53 Rule 3 (1)** of the **Civil Procedure Rules**. Applicant avers that the file was coming up before Justice Eboso, but was placed in another court. Thus the order for dismissal should be set aside. To this end, the Applicant cited the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR**, where it was stated 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..."

6. The Interested Party filed his written submissions dated 10<sup>th</sup> August 2021 averring that the application dated 27<sup>th</sup> May 2020 was dismissed for want of prosecution. He stated that the current application had no prayer for reinstatement of the dismissed application dated 27<sup>th</sup> May 2020. Thus, the prayer for the application to be given a date on priority basis cannot stand since the application is non-existent. He added that the supporting affidavit did not give compelling reasons why the orders dismissing the application dated 27<sup>th</sup> May 2020 should be reviewed.

7. It was further submitted that the suit **ELC No. 7 of 2020 (OS)** was filed by the Applicant seeking the same prayers as the impugned application relating to same title numbers Nairobi Block 263/1259 and 1258 and is set for hearing on 8<sup>th</sup> December 2021. That the said suit (**ELC 7 of 2020 (OS)**) was filed after this court (Justice Eboso), on 24<sup>th</sup> January 2020, asked why the matter could not be heard and determined by way of a normal suit. To this end, the Applicant is abusing the court process by filing several suits on the same issue against the same parties in different courts.

## Analysis and determination

8. This court has considered the issues raised herein. **Whether the application dated 1<sup>st</sup> February 2021 has merits is the issue for determination.**

9. From the court record, it is noted that on 15<sup>th</sup> December 2020, the Interested Party was in court but neither the Applicant nor her advocate was in court. Based on this, Justice Eboso dismissed the application dated 27<sup>th</sup> May 2020 for want of prosecution. The dismissed application was the substantive Judicial Review Notice of Motion.

10. **Order 12, rule 3. (1)** of the **Civil Procedure Rules** provides that if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

11. **Order 12, rule 7** thereof further provides that, 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.

12. Courts have often held that reinstating suits which have been dismissed for non-appearance is a function exercised in the discretion of the court. The Applicant states that the file had been placed in a different court. This court has keenly looked at the court records of 15.12.2020, which indicate that the matter was before Judge Eboso, the same Judge who gave directions as to the hearing of the matter on the previous court sitting on 10.11.2020 in the presence of a Mr Wachakana for the Applicant. The Applicant and his advocate were not in court on 15.12.2020. It follows that no good reasons have been advanced by the Applicant as to why they failed to turn up in court when the suit was dismissed.

13. The Court of Appeal in **Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR** Stated as follows:

*"...Furthermore, the record shows that on the day of the hearing the Appellant's Advocate sent another counsel to hold his brief and to request the court to issue instructions on the hearing of the appeal instead of the respondent's application. The record clearly shows that said advocate did not request for a further time allocation at 2p.m as alleged by the appellant. In the end, we find that there is nothing on record to show that the Appellant offered any cogent explanation for the delay in prosecuting his appeal..."*

14. In **Ivita -v- Kyumba [1984] KLR 441** which was cited in the above mentioned case of **Peter Kipkurui Chemoiwo (supra)** the court had this to say on matters dismissal;

*"...the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay."*

15. The Court of Appeal in **Savings & Loan Kenya Ltd v Onyantha Bwomote [2014] eKLR** held that;

*"... Rule 102 gives this Court discretion to reinstate an appeal that has been dismissed for want of appearance. The rationale behind the rule is the fact that sometimes, for reasons beyond the control of the parties or their counsel, they may fail to attend court on the appointed day. The rule has two conditions that the Appellant must satisfy before the court can exercise its*

*discretion in his favour.”*

Whereas in this particular case the Court of Appeal was making reference to the Court of Appeal Rules, this court is persuaded by the rationale behind the decision.

16. From the above decisions, it is clear that the courts have based their discretion on reasonable grounds for delay. The Applicant has given no tangible reasons for their non-appearance in court on the date of 15.12.2020. That is not all, the Applicant has not even sought for the reinstatement of the suit in her application dated 1.2.2021. She only seeks orders that the application of 27.5.2020 (**the none existent substantive motion**) be heard on priority basis.

17. The overall conduct of the Applicant in the prosecution of the current application is also wanting. It is noted that on 9.3.2021, the current application could not be prosecuted as the Applicant had not complied with courts directions given on 2.2.2021 on service. The Applicant was even condemned to pay court adjournment fees. Come 13.7.2021 when the court gave directions for the Applicant to file their submissions within 14 days (that is by 27.7.2021). The Applicant’s submissions are dated 9.8.2021. These are tell-tale signs of a litigant who has no regard for court’s directions.

18. In light of the foregoing analysis, I find that the Notice of Motion dated 1<sup>st</sup> February 2021 is not merited and the same is dismissed with costs to the interested party.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff

..... for the Defendant

Court Assistant: Edel Barasa