REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC SUIT NO. 24 OF 2017

ANDREW MBARE……..……..……..APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL…..……2ND DEFENDANT/RESPONDENT

JOSECK NGARI…….……..3RD DEFENDANT/RESPONDENT

PETER NJERU……...……4TH DEFENDANT/RESPONDENT

JONAH MUCHURU MACHANGIA……..……5TH DEFENDANT/RESPONDENT

NTHIGA IRANDI…….6TH DEFENDANT/RESPONDENT

JULIUS NYAGA NJIRA……....…….7TH DEFENDANT/RESPONDENT

NJUE KIUMA……....……..8TH DEFENDANT/RESPONDENT

RUNJI NJIRU……..9TH DEFENDANT/RESPONDENT

NIMROD NJUE MATE……..……..…….10TH DEFENDANT/RESPONDENT

DAVID NTHIGA……11TH DEFENDANT/RESPONDENT

NICHOLUS NTHIGA……....……..12TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Before the court is a notice of motion dated 5.10.2020 and filed by the Applicant on 24.11.2020. The Application is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law.

2. The Applicant is ANDREW MBARE, who is the Plaintiff in the suit while the Respondents are THE HON. ATTORNEY GENERAL, NAMU MACHAI, JOSECK NGARI, PETER NJERU, JONAH MUCHURU MACHANGIA, NTHIGA IRANDI, JULIUS NYAGA NJIRA, NJUE KIUMA, RUNJI NJIRU, NIMROD NJUE MATE, DAVID NTHIGA and NICHOLUS NTHIGA who are Defendants in the suit.

THE APPLICATION

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

*i) **THAT** the honorable court do review and or set aside the orders of 30 .1. 2020 and 7· 7. 2020.*

ii) ***THAT*** *this suit be reinstated and set aside for hearing and determination on merit.*

iii) ***THAT*** *cost of this application be provided for.*

3. The application was anchored on grounds, interalia, that the suit was struck out in error as the applicant is said to have complied with the Civil Procedure Rules and had filed further statements and list of documents at the time the suit was struck out. It is pleaded that the applicant is a poor man and he shall be greatly affected if the application is not allowed. The applicants further aver that the mistake leading to the striking out of the suit is not of the making of the applicant.

4. With the application is filed a supporting affidavit dated 5.10.2020 and sworn by Andrew Mbare, the applicant. It is said that the court had issued an order on 30th January 2020 for the applicant to file a trial bundle within 14 days in default of which the suit shall stand struck out automatically. It is further averred that the suit was to be mentioned on 18.3.2020. However, due to corona-virus pandemic the mention did not take place but the matter was instead mentioned on 7.7.2020 when the suit was struck out.

5. The applicant stated that the matter had been filed in Nairobi and later transferred to Embu in 2017. It is his assertion that prior to the transfer of suit he had filed statements, documents, supplementary list of documents and even testified but was stood down before completing his testimony. He said he had amended his plaint and had brought in more defendants and, according to him, the only thing pending was filing of a further list of documents and witness statements. He mentioned that his then advocates had not realized that he had fully complied with the Civil Procedure Rules save for the filing of documents as stated above.

6. The applicant is said to have been tracing documents between January to March 2020 and in March 2020 he claims to have been unable to file the documents until the present system was introduced. The delay in filing for reinstatement of suit has been attributed to his lack of financing. Ultimately, the court was urged to reinstate the suit and allow it to be heard on merit. It is further stated that if there was any mistake which necessitated the striking out of the suit, then it was the advocate's and not the applicants. The applicant averred that he would suffer serious loss if the application is not allowed and urged the court to allow the application.

RESPONSE

7. The 11th respondent responded to the application by way of replying affidavit filed on 15.12.2020. According to him, the application is a non-starter and a ploy to deny him the rights of enjoying his properties. He averred that the suit was dismissed after the applicant failed to comply with court orders issued on 30th January 2020, which required him to comply with order 11 of the Civil Procedure Rules. It is further alleged that the applicant has not been keen on prosecuting the suit which was filed in 2005 and that all attempts to have the matter heard were initiated by the respondents.

8. The 11th respondent stated that non-compliance with Order 11 of the Civil Procedure Rules is not a mere technicality that could be cured by Article 159(2) of the constitution. He claims to have suffered greatly financially, mentally and emotionally trying to defend the suit. According to him, the applicant was given ample time to comply with the court orders issued on 30.1.2020. It is said that by 7.7.2020 the orders were yet to be complied with. On the issue that the applicant was unable to file documents during the Covid period, it was argued that courts were allowing filing of documents through email, a fact that the applicant and his counsel are alleged to have been aware of.

9. Lastly, on the fact that the applicant was tracing documents during the pendency of the suit, it was said that the applicant had filed the suit prematurely with an aim of making the 11th respondent suffer. The court was urged to dismiss the application with costs.

10. The 10th respondent opposed the application by way of replying affidavit filed on 22.1.2021. He reiterated the averments as pleaded by the 11th respondent and urged the court to dismiss the application with costs.

11. The 2nd, 4th, 6th and 9th respondents opposed the application by way of grounds of opposition filed on 21.12.2020. The suit was said to be defective, bad in law and an abuse of the court process. The applicant was accused of not complying with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules on change of advocate after judgment. It was further pleaded that the applicant had failed to explain the inordinate delay in filing the application from the time the suit was dismissed to when the application was filed. Finally, the applicant was faulted for failing to explain why the previous advocates had failed to comply with pretrial directions as ordered by the court.

12. The 7th respondent opposed the application by way of replying affidavit. He too termed the application as a non-starter for failing to comply with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. The suit against the 7th respondent was said to be unmerited on grounds that the suit parcel of land Evuvore/Nguthi/2075 did not exist. The applicant was accused of failing to give sufficient reasons as to why he had taken long to file the instant application or prosecute the suit. The court was finally urged to dismiss the application with costs.

SUBMISSIONS

13. The application was canvassed by way of written submissions. The 2nd, 4th, 6th and 9th respondents filed their submissions on 7.10.2021. They submitted that the application by the applicant was not based on any mistake or error on the face of the order striking out the plaintiff's suit. The application was further said not to be based on discovery of a new and important matter which was not within the applicant's knowledge that would necessitate review.

14. It was further submitted that an application for review ought to be filed without unreasonable delay and that a satisfactory reason should be given in case of delay. The obligation to prosecute the suit and ensure the same is prosecuted through the advocates was then placed on the applicant. It was stated that the applicant was also to blame for the non- compliance as he had conceded to have been tracing documents

more than 14 years after filing the suit. The pre-trial directions are stated to have been on three diverse dates, with the last being on 30.1.2020, yet the striking order was on 7.7.2020. Doubt was cast on the applicant's explanation that he was unable to file pleadings due to the Covid pandemic and the court was urged not to accept the reasons given. Further, the court was urged not to accept the explanation that the applicant was looking for money to hire an advocate, hence the delay in filing the application.

15. The applicant was said not to have placed sufficient material before the court to merit warrant of grant of the orders sought and that the delay was inordinate and unexplained. According to the respondents, the applicant is indolent and should not be favoured with the discretionary orders he was seeking. The court was urged to dismiss the application as it lacked merit. It was urged to follow the decision in the case of **KIRU TEA FACTORY CO LTD Vs EVANS NJIRU MUCHIRI & ANOTHER EMBU ELC CASE NO. 46 OF 2014 (2020) eKLR** where the court is said to have found that six month delay in filing for an application for review was inordinate and dismissed the application with costs.

16. The 10th and 11th respondents filed similar submissions on 2.11.2021. They submitted that the applicant had failed to comply with Order 11 of the Civil Procedure Rules despite having been given ample time to comply. According to the 10th and 11th respondents, the applicant had not given sufficient reasons for the court to grant review of its orders. It was said that court orders are not to be disregarded or disrespected by litigants and reliance was made on the case of **Mae Properties Ltd Vs Jospeh Kibe & another [2019] Eklr** where it was held that failure to obey a valid court order amounted to contempt of court.

17. On the issue of failure to adhere to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, it was argued that the provision is mandatory and ought to be adhered to. To put this point across, the respondents relied on the case of **James Ndonyu Vs Muriuki Macharia [2020]Eklr.** It was their submission that the firm of Duncan Muyodi & Co. Advocates did not seek court's permission when filing the application and the application was said to be incompetent and ought to be struck out. The application was ultimately said not to adhere to the provisions of Order 45 Rule 1 of the Civil Procedure Rules and the court was urged to dismiss it with costs.

18. The applicant filed his submissions on 9.11.2021. He relied on the averments of his application and submitted that his previous counsel on record had committed a mistake by failing to attend court when the suit was struck out. According to the applicant, he had complied with Order 11 of the Civil Procedure Rules, a fact he argues would have been pointed out by the advocate if he was present in court.

19. He pleaded that there was a mistake or error apparent on the record on the basis that he had complied with Order 11 of the Civil Procedure Rules. He submitted that he had filed a list of documents, supplementary list of documents and even testified before the court when the matter was in Nairobi. According to him, the only thing pending was filing a further list of documents which was necessitated by the fact that he had amended his plaint and added more defendants. He is of the view that since he had filed a list of documents then the court ought to have issued him with a hearing date and barred him from filing a further list of documents rather than strike his suit out.

20. On the issue of non-compliance with Order 9 Rule 9, he insisted to have complied and even annexed a consent between his previous advocates and the advocates on record. He is of the view that the application was brought without delay. He reiterated that the court had made an error in striking out the suit on non-compliance yet there were documents on record. According to him no prejudice will be occasioned to the respondents if the application is allowed and he urged the court to set aside the order for striking out and proceed with the hearing of the suit.

ANALYSIS AND DETERMINATION

21. I have considered the application, the responses made, and the rival submissions. I have also looked at the court record. The issues that commend themselves to me for determination, are three:

> *i) Whether the applicant adhered to the provisions of Order 9 Rule 9 of the Civil Procedure Rules in bringing the suit before the court?*
>
> *ii) Whether the court should reinstate the suit as prayed?*
>
> *iii) Who should bear the cost of the application?*

22. On the first issue the applicant has been said not to have adhered to the provisions of Order 9 Rule 9 when engaging his advocates on record. Order 9, Rule 9 of the Civil Procedure Rules provides as follows;

> *"When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—*
>
> *(a) upon an application with notice to all the parties; or*
>
> *(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."*

23. I have perused the court record and have come across a consent filed together with the notice of change of advocates. The consent is signed between the firm of Duncan Muyondi & Co. Advocates and the firm of Momanyi Gichuki & Co. Advocates. It is dated 5th October 2020 and filed on 24th November 2020. The consent mandates the advocates on record to come on record in place of the applicant's previous advocates. I am therefore convinced that the provisions of Order 9 Rule 9 of the Civil Procedure Rules were adhered to and the applicant's counsel is therefore properly on record.

ii) Whether the court should reinstate the suit?

24. Reinstatement of a suit is discretionary. **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. What the court is to consider while exercising discretion was emphasized in the case of **Patriotic Guards Ltd. v James Kipchirchir Sambu[2018]eKLR** where it was stated as follows:

> *"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."*

25. In the case of **MWANGI S. KIMENYI –VS- ATTORNEY GENERAL & ANOTHER [2014] eKLR**, the Court outlined the test to be considered in a case for reinstatement of suit where it stated as follows:-

> *"The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. See the case of IVITA Vs KYUMBU [1984]KLR 441, Chesoni J. (as he then was) that:-*
>
> *The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too.*
>
> *The defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

26. This suit was filed in the year 2005 by the applicant and was set down for hearing on 4.10.2016. The applicant testified but was stood down to allow him amend his plaint and subsequently add more defendants to the suit. The amendment of plaint was done and more parties brought on board. The court on 11.11.2019 gave an order that the parties to the suit file and exchange their respective trial bundles, which bundles were to be bound and paginated within 30 days. On 16.12.2019, a month after the order by the court, the plaintiff had not complied and the court gave him 14 more days to comply. The matter was set down for mention on 30.1.2020.

27. On 30. 1. 2020, the plaintiff still had not complied and the court gave him 14 days to comply failure to which the suit was to be struck out automatically. The matter was to be mentioned on 18.3.2020 but on the said date the courts had closed due to the Covid pandemic but the matter was later mentioned on 7.7.2021 where neither the plaintiff nor his advocate attended court. Neither did they file the trial documents and as a result the court held that the suit automatically stood struck out upon lapse of the 14 days from 30.1.2020.

28. On 24.11.2020 the present application was filed seeking to set aside and review the orders of the court and to also reinstate the suit. The reasons given were that the court had made an error when issuing the orders for compliance and striking out of suit as the applicant had already complied with Order 11 and further that the mistake leading to the striking out was not of the making of the applicant but his previous counsel on record.

29. From the chronology of events leading to the striking out of the suit, I note that the applicant had not been diligent with complying with the court's directions as given on 11.11.2019. The directions of the court were to the effect that all parties were to file their trial bundle of documents and have them paginated. It is evident that the court on three different occasions gave the parties a chance to comply, with the applicant failing to comply in all the three instances and the suit was dismissed.

30. The application before me seeks for review and/or setting aside of the court's orders issued on 30.1.2020 and 7.7.2020 on grounds that there was an error apparent on the record by virtue of the fact that the applicant had already complied with order 11 of the Civil Procedure Rules at the time of dismissal of suit. The legal framework on review is Section 80 of the Civil Procedure Act which gives courts power to review its judgments and make such orders as it thinks fit. Order 45 of the Civil Procedure Rules also gives courts power to review its order on grounds of discovery of new and important matter or evidence not within one's knowledge or could not be produced at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

31. In the circumstances then, is there an error on the face of the record at the time the order was issued and the matter subsequently dismissed? The court in the case of ***Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218*** stated that for an error to qualify as one apparent on the face of the record it is one that:

> ***'...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.'***

32. It is contended that there was already in the court record the applicant's list of documents and witness statements which formed the trial bundle that the court sought the parties to file. This has been said to be an error of the court and mistake by counsel who failed to bring to the court's attention of this fact. I note, however, that the court was specific on what it sought from the parties, which was the trial bundle that was to be paginated. The court not only sought filing of the trial documents but compilation of all documents that parties sought to rely upon. My view is that the court had sought for such compliance in order to enable a smooth hearing of the suit considering there are many parties to the suit and if everyone was allowed to randomly file their documents without a proper order then hearing would have been difficult for the parties and the court itself. If anything, the applicant has conceded that there are more documents which he still seeks to rely on but had not filed such documents as at the time of dismissal of suit. I therefore find that there was no error apparent on the record as alleged by the

applicant.

33. Having established that the application does not meet the threshold for a review, then there is need to determine whether there was a delay and whether there are sufficient reasons for such delay. The dismissal of suit was done on 7.7.2020. However as at that time, the court held that the suit had stood dismissed 14 days from 30.1.2020. I note that the present application was filed on 24.11.2020, a period of 10 months from the time the suit stood dismissed. The delay in filing for reinstatement in my view is inordinate considering the nature of the suit. The reasons for such delay have been outlined to be that the applicant opted to instruct a different counsel in the matter and that he did not have finances at the time to instruct counsel. I am not convinced that these are sufficient reasons to warrant such delay.

34. The court had been clear that the matter would be dismissed 14 days after its orders of 30.1.2020. The applicant would have at the very least pestered his advocate or followed up in court considering he had prior notice of the fact that his suit would have been dismissed. Needless to state, whether the applicant was aware of such orders or not he has a duty to prosecute his matter and to do so diligently. The reasons therefore given are not sufficient.

35. As earlier stated dismissal and reinstatement of a suit is discretionary and courts have a duty to exercise such discretion judiciously. The court needs to consider whether justice will be served despite the delay. Such Justice ought to apply to the applicant and the respondents.

36. The applicant has filed this suit against 11 defendants seeking to reclaim land he alleges to have been awarded during an appeal case before the minister. The matter is part heard with the applicant having testified before he was stood down to include the other defendants. To me, the suit is at an advanced stage considering that the matter is already part heard and that the applicant has partly complied with the pre-trial directions.

37. In the case of **NAHASHON MWANGI –VS- KENYA FINANCE BANK LTD (In liquidation) (2015) eKLR** the court was of the view 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…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.*

38. I agree with the above sentiments. Dismissal of a suit should be a last resort as it permanently removes a party form the seat of justice. Further, every party has a right to be heard, which right is protected under the constitution, and if there is a delay in prosecuting a suit and justice will still be served if such suit is prosecuted, then a party should be heard. I am of the view that it is in the interest of justice to reinstate the suit. In balancing the prejudice to be suffered by the parties to the suit, the applicant will suffer greater prejudice if the suit is not reinstated as compared to respondents if the suit is reinstated. I therefore order for reinstatement of the suit with the applicant to file their trial bundle within 60 days and to have the matter set down for hearing 90 days from delivery of this ruling. If the applicant shall not have filed their trial bundle within 60 days as directed, the suit shall proceed for hearing without waiting further for such documents. Further, if hearing shall not be set down as ordered herein then the suit shall stand dismissed.

39. It is clear from what we have said so far that the applicant's behavior in preparation of this matter for trial has been dilatory, even indolent. The court has however decided to indulge him because of the over-arching need to hear both sides and deliver judgement on the merits. The respondents gave good reasons as to why the application was not merited. Though the applicant says he is poor, it would be wrong in my view to treat the respondents input as if it is worth nothing. With this in mind, I order that the applicant should pay costs amounting to 3,500/- to each respondent within 90 days after the delivery of this ruling. It is so ordered.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **16TH DAY** of **DECEMBER, 2021.**

In the presence of Njagi M. for Okwaro for plaintiff; M/s Mutegi for 10th & 11th respondent/defendants; 6th, 8th 9th respondents/defendant present in person and in the absence of the rest of the parties.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

16.12.2021