



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC 699 OF 2017

ERNEST NJAGI MUTHARA.....PLAINTIFF /APPLICANT

VS

NDERITU WACHIRA.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff's/Applicant's Notice of Motion Application before Court is dated 3/5/2021 seeking

a. Spent

b. THAT upon hearing and determination of this Application exparte, this Honourable Court be pleased to issue an Order reinstating the Applicant's Notice of Motion dated 3rd December 2018 and status quo be maintained.

c. THAT the pending the hearing and determination of this Application interparties, this Honourable Court be pleased to stay the Order dated 13th May 2019.

d. THAT upon hearing and determination of this Application interparties, this Honourable Court be pleased to review, vary and/or set aside the dismissal Order issued on 13th May 2019.

e. THAT upon hearing and determination of this present Application, this Honourable Court be pleased to issue further Orders regarding the hearing and determination of the Application dated 3rd December 2018.

f. THAT the Costs of this Application be in the cause.

2. Various Orders on the face it. Strictly speaking the said orders save for **prayer e** are spent as they were pegged to hearing and determination of the Application. The integral prayers are review and setting aside of this Court dismissal order issued on 13th May 2019 and reinstating the application's motion dated 3/12/2018 forthwith.

3. The application is based on the 22 grounds on the face it and supported by the Affidavit of **Peter Mwenda Njagi**, the Applicant's counsel. In a nutshell, counsel concedes that the dismissal order issued on 13/5/2019 was as a result of his failure to attend Court for the hearing. That his landlord locked his office from 25/3/2019 because of landlord tenant dispute that was the subject in BPRT case No 275 of 2020. That the BPRT ordered the landlord to re-open counsel's office but the landlord opted to challenge the orders vide THIKA ELC JR Misc. App No 15 of 2020. That the JR Court determined the case in his favor. Ultimately he was able to access his Thika branch office in 2021 and without access to the office and indeed his files and diary, he could not attend Court on 13/5/2019. He averred that failure to attend was not intentional and beseeched Court not to visit the mistake of counsel on an innocent litigant.

4. He further deponed that the Applicant is at risk of losing his property despite his adverse occupation of the suit land for over 12 years. That it is now clear that the Applicant has fully paid the purchase price of the suit land and seek reinstatement of the suit. He pleaded for an early hearing date because the Applicant is of advanced age and cited the right to fair hearing in Article 50 of the Constitution of Kenya.

5. The Application is opposed. The Defendants filed their grounds of opposition dated 18/6/2021. Additionally, the 2nd Respondent's Receiver and Manager, **Evanson M. Karanja** swore a Replying Affidavit on 8/10/2021. He recounted the history of the case since its original filing as Nbi ELC No. 482 of 2013 ad later transferred to this Court on 26/7/2017. That the Court sua moto fixed the matter for mention on 3/7/2018 and for NTSC on 2/10/2018. On 2/10/2018 the Court was not sitting and further date for 30/10/2018 was issued to all parties. That the matter was set down for hearing on 8/11/2018 and Applicant's suit was dismissed with no orders as to costs. Despite service

of all those Court dates, neither the Applicant nor his counsel attended Court, he contended.

6. The deponent averred that the Applicant is guilty of laches coming to Court over two years since the said dismissal. He denied any payments as alleged by the Applicant in his supporting affidavit and urged the Court to dismiss the application with costs.

7. Directions were taken on 21/6/2021 to prosecute the application by way of submissions.

8. The firm of **Mwenda Njagi & Co. Advocates** filed submissions dated 3/11/2021 on behalf of the Applicant. Two issues were drawn for determination; whether there are reasonable grounds to reinstate the application and whether there was undue delay.

9. On the first issue, the Applicant submitted that he has demonstrated a reasonable ground to allow his application based on the locking of his Thika office and subsequent BPRT and Thika JR cases. That the Applicant has triable issues in his claim including payment of purchase price and the application of the doctrine of adverse possession over the subject property.

10. Secondly, the Applicant maintained there was no inordinate delay in filing the instant application. This is because he gained access to his office in 2021. He affirmed that failure to attend Court was not intentional and the Respondents have not established how they will be prejudiced if the application is allowed. Reliance was placed on the cases of **Ivita vs Kyumbu [1984] KLR 441**, **Philip Keipto Chemwolo & anor. Vs Augustine Kubende [1986] eKLR**.

11. Conversely, the Respondents filed their submissions dated 8/10/2021 through the firm of **Kimondo Gachoka & Co. Advocates**. A recap of the facts of the case was given. Notably the Respondents pointed out that it is the Applicant who fixed his application dated 3/12/2018 for hearing on 13/5/2019 and served a hearing notice upon them. That the said hearing notice was dated 8/5/2019 and therefore the allegation of closure of counsel's office on 25/3/2019 is misleading and cannot hold water. That the Applicant's failure to attend Court on two previous occasions is a clear demonstration of lack of interest to prosecute his case.

12. The Respondents similarly sketched two issues for determination; whether the Applicant has established a case for reinstatement and whether the Plaintiff has satisfied the criteria for grant of interim injunction.

13. They were categorical that the Applicant has not proffered satisfactory reasons to call for this Court's discretion to reinstate his application. That there was no nexus between counsel's dispute at the Business Premises Rent Tribunal and in any event the case was filed in 2020 yet hearing was on 13/5/2019. Moreover that counsel has not explained clearly when he allegedly gained access of his office since the Thika JR case was determined by this Honorable Court on 16/7/2020. They termed the delay in filing this application as not only inexcusable but inordinate.

14. The Respondents added that the Applicant has only awoken from his slumber following the filing of THIKA CML & E No. 97 of 2020 by the rightful owner of the property. Further that there is no explanation on what steps the Plaintiff himself took to follow up on his case if counsel's argument was anything to go by. The case of **Ronald Mackenzie v Damaris Kiarie [2021] eKLR** was cited to that end. They implored the Court to dismiss the application with costs.

Analysis & Determination

15. The germane issue for consideration is whether the Applicant has established a case to reinstate the dismissed application.

16. The Court is empowered under Order 12 Rule 7 Civil Procedure Rules where a suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just. Section 3A of the Civil Procedure Act gives this Court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 Civil Procedure Rules gives the Court power to set aside any order made ex parte.

17. The Court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. The guiding principle in the Court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. The Court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice

18. The Applicant has gone into great lengths to explain the predicament that he found himself due to rent dispute and the attendant action taken including the lock up of the offices preventing him from accessing his office and his failure to prosecute the Applicant's suit. In my view this offers satisfactory explanation. It is the Applicant that stands to suffer hardship if he is denied the opportunity to agitate his case for reasons that he cannot be blamed for.

19. In the end the application is allowed in terms of prayer (d) as follows:-

a. That the dismissal orders issued on 13th May 2019 be and are hereby set aside.

b. The Applicant is ordered to fix the application dated the 3rd December 2018 for hearing within the next 30 days from the date hereof in default its dismissal shall be maintained with no further orders.

20. Costs shall be in favour of the Respondent.

DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Githae for Plaintiff/Applicant

Ms. Mburu for Defendant/Respondent

Ms. Phyllis – Court Assistant