



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 11 OF 2016

RONALD MACKENZIE.....PLAINTIFF

VERSUS

DAMARIS KIARIE.....DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated the 19th August 2019, brought by the plaintiff/applicant under Order 12 Rule 7 of the Civil Procedure Rules and Sections 1, 1A, 3A and 7 of the Civil Procedure Act and Article 159 (d) of the Constitution. It seeks to set aside the dismissal orders made on the 22nd June, 2018 and that the suit and all the interlocutory orders given therein be reinstated. It seeks a further order for stay of the defendant's taxation of the bill of costs emanating from the dismissal order and the costs of the application.
2. The application is based on the grounds on its face and its supported by the affidavit sworn by Daniel K. Maanzo advocate in which he deposes that upon receipt of instructions from the plaintiff, the firm of Maanzo & Co. Advocates proceeded to file the plaint and the case was assigned to a senior associate in the firm according to their internal policies, an advocate he believes was compromised and he failed to fix the matter for hearing and kept the file in such a way that no staff in the firm could reach it and clandestinely dealt with it in a manner that the office could not establish the status of the matter.
3. He further deposed that during the entire period, the firm believed that the advocate was in complete control of the matter and that he was following all the established statutory procedures to ensure that the plaintiff/applicant's right were protected. That it was not until the 29th July, 2019 when he learnt that the case had been dismissed for want of prosecution when the defendant served him with a Bill of Costs and on locating the file, he discovered the existence of a notice to show cause pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules, which was hidden by the said advocate and that their firm was not represented in the show cause hearing.
4. He has urged the court to reinstate the suit so that all the parties can have a fair hearing for a just determination of the case as the matter is extremely sensitive as it touches on gross accusations of rape, sexual harassment, misuse of office and dishonesty. He stated that it will not be fair for the plaintiff to suffer because of the mistakes made by rogue lawyer and that the defendant is not likely to suffer any prejudice should the suit be reinstated.
5. The defendant in her replying affidavit deposes that the application is an abuse of the court process since the plaintiff seeks to set aside the dismissal orders on the same grounds which were considered by the court before it dismissed the same. That the plaintiff is guilty of inordinate delay in bringing the present application and that the allegations contained in the supporting affidavit are not viable grounds for reinstating the suit.
6. She further deposed that the plaintiff's firm of advocates has come to court with unclean hands since it has cast very grave and negative aspersions alleging unprofessional conduct on the part of its former advocate without adducing any evidence and without revealing his identity.
7. That the paragraphs of the supporting affidavit alleging such conduct are at best offensive and scandalous and the court ought to strike them out. She states that the matters deposed to, do not amount to an excusable mistake or errors warranting the exercise of the discretion in favour of the plaintiff and that the same are an afterthought devoid of any evidence to support them.
8. She further deposed that the defendant's advocate was served with the notice to show cause, appeared in court and made unconvincing representations before the suit was dismissed and the plaintiff cannot be allowed to feign ignorance of the proceedings herein. That the plaintiff is completely disinterested in the prosecution of his suit and the explanation offered is not plausible and she urged the court to dismiss the application with costs.
9. The application was disposed off by way of written submissions which both parties filed and which this court has duly considered.

10. The application herein seeks to reinstate the suit. It is trite that the decision on whether the suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. The principles that should guide the court when dealing with such an application were well laid out in the case of **Ivita Vs Kyumbu [1984] KLR 441** which are; the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

11. In addition to the above principles, the court will also consider if the application before it is frivolous, vexatious and an abuse of the court process.

12. On the reasons for the delay, counsel for the plaintiff attributed the delay to an associate in the firm who is alleged to have been compromised and he mishandled the same. He has urged the court not to visit the mistake of a counsel on the plaintiff and has cited the case of **Susan Chebuso Mkanda Vs Eshikuku Girls Secondary School & 5 Others [2020] eKLR**.

13. On the part of the defendant, they have contended that the matters as deponed to in the supporting affidavit are not supported by evidence and the same are scandalous, far-fetched and unsubstantiated and reliance was placed on the case of **Musikari Nazi Kombo Vs Moses Masika Wetangula & 2 Others [2013] eKLR** in which the court stated as follows:

“Allegations.....are scandalous if they state matters which are indecent or offensive or made for mere purpose of abusing or prejudicing the opposite party.”

14. The court has looked at those allegations and has noted that the same are not substantiated and they are to say the least, scandalous. They are serious allegations against an advocate but they were not supported by any material particulars or evidence. The name of the advocate has not been disclosed and in view of the above observations, this court is not convinced that the allegations are true.

15. On the issue of the delay and whether the same is prolonged and inexcusable, the matter was dismissed on the 22nd June 2018 and the application was filed on the 19th August, 2019; a period of two years and almost two months. Though it has been deponed that the ‘rogue’ advocate clandestinely dealt with the file in a manner that the firm could not establish the status of the same, there is no mention of the plaintiff and the steps he took to follow up his matter. In the case of **Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another [2014] eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. I find that the delay was prolonged and inexcusable.

16. On the issue of whether justice can be done despite the delay, it is trite that justice is justice for both the plaintiff and the defendant and the plaintiff having dragged the defendant to court, he ought to have expedited the prosecution of the matter. The court notes that when the matter was last in court before it was listed for notice to show cause, there was no appearance on the part of the plaintiff or his advocate, yet the date was fixed by counsel for the plaintiff.

17. As to whether the application is scandalous and an abuse of the court process, as rightly submitted by counsel for the defendant, when the matter was listed for notice to show cause, the plaintiff was represented by an advocate and showed cause why it should not be dismissed. The court was told that the plaintiff counsel had lost touch with his client and he was not able to proceed with the matter. She procured a mention date to enable him to trace his client. Counsel for the defendant in his address to court supported the dismissal and stated that there were no good reasons given why it should not be dismissed.

18. It is not therefore true as deponed in the affidavit in support of the application that the plaintiff’s firm of advocate was not represented in the show cause hearing. Counsel for the plaintiff also admitted that their firm of advocates was served with the notice to show cause.

19. The court having considered the representations made by both counsel for the parties, dismissed it with costs. In my considered view, the court heard the parties on the notice to show cause and made a decision to dismiss the matter. The plaintiff cannot purport to bring an application to reinstate the suit, he ought to have filed an appeal against the decision of the court to dismiss the matter. In any event, even on substance, he has not convinced the court that there are good reasons for setting aside the dismissal orders made on the 22nd June, 2018.

20. I find that the application has no merits and I dismiss the same with costs to the respondent/defendant.

21. It is so ordered.

Delivered, dated and signed at Embu this 11th day of May, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent