



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 128 OF 2014

JANE WANGARI KANYORO.....PLAINTIFF

VERSUS

EDWARD GICHUKI.....1ST DEFENDANT

NAFTALI KAIRU MWANGI.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 2nd April 2019 and filed on 4th April 2019 sought for setting aside of orders of 30th July 2018 in which her suit was dismissed for want of prosecution and for the transfer of the suit to the Chief Magistrate's Court for trial and final determination.
2. In her Affidavit in support of her application that was sworn on 2nd April 2019, she deponed that she became aware of the dismissal of her suit in August 2018. She avers that her suit was dismissed despite the Defendants' application seeking the dismissal of her suit for prosecution having been served on her previous advocates M/S Kanyi Ndurumo & Co Advocates.
3. She pointed out that she became incapacitated after she fell ill whereupon her brother was tasked to follow up the matter on her behalf. However, her said previous advocates refused to divulge any information relating to the case to him on the ground that he was not their client.
4. She further stated that she reported the said advocates to the Advocates Complainants Commission but they were advised to seek an amicable settlement of the matter. It was her contention that when it became difficult for her to obtain the file from the said advocates, she opted to proceed with them on the understanding that they would proceed with the case diligently. This was not to be and later, she discovered that her suit was dismissed for want of prosecution.
5. She urged this court to allow her application as her advocates' conduct had prejudiced her. She admitted that although there had been delay in prosecution of the matter herein, she had given a plausible reason to explain the said delay.
6. In opposition to the said application, the Defendants filed Grounds of Opposition dated 25th June 2019 on 26th June 2019. They averred that the application was a non-starter and an abuse of the process of the court as her case was properly dismissed after the court was satisfied that the same ought to have been dismissed. They were emphatic that the present application was incurably defective and could not stand in law. They therefore urged this court to dismiss her application with costs to them.

LEGAL ANALYSIS

7. The Plaintiff relied on the cases of **Pithon Waweru Maina vs Thuka Mugira [1983] eKLR** and **Mwangi S Kaimenyi vs Attorney General & Another [2014] eKLR** where the common thread was that even where there had been a delay, in exercising its discretion to reinstate a suit, a court should consider whether the delay was intentional, inordinate and inexcusable, whether the delay amounted to an abuse of the process of court and whether there would be prejudice to be suffered by the applying and opposing parties.
8. She explained that she had advanced a good reason why her suit was dismissed and was certain that her present advocates would pursue the matter diligently, which she urged the court to transfer to the Chief Magistrate's court as it had the pecuniary jurisdiction to determine the same.

9. On the other hand, the Defendants relied on the case of Eliud Barasa Imao vs John Omuse Emoit [2011] eKLR where Muchemi J dismissed a suit where the plaintiff therein had failed to take action to prosecute the same for over a year. They were in agreement with the Plaintiff's submissions on the factors a court will consider when dismissing a suit.

10. Notably, this court did not consider the cases which parties had cited in their Written Submissions but were not annexed therein and the cases which they attached but were not referred to in their said Written Submission.

11. This court carefully considered the Plaintiff's Affidavit evidence and was persuaded that the case was dismissed due to her advocates' failure to exercise due diligence in this matter. In allowing the Defendants' Notice of Motion application dated 19th March 2018 and filed on 20th March 2018, this court noted from the Affidavit of Service of Maurice Muema that was sworn and filed on 27th June 2019 that the Plaintiff's previous advocates had been duly served with the application but failed to attend court.

12. The Plaintiff explained how she was unwell and how the said advocates failed to keep her posted of the matter despite her brother following up on the matter on her behalf. She also indicated that she had even reported the said advocates to the Advocates Complaints Commission. Clearly, the advocate-client relationship appears to have broken down leading to the dismissal of the Plaintiff's suit for want of prosecution.

13. It is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. In exercising its discretion, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.

14. From the aforesaid, this court was satisfied that the Plaintiff herein had advanced a plausible, good and satisfactory explanation for the delay in prosecuting her case. She had even appointed a new firm of advocates, M/S Njuguna J.K. & Co Advocates to act for her in this matter herein.

15. This court appreciated that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Taking all the factors hereinabove into account, it was the considered view of this court that the Plaintiff ought to be given an opportunity to have her case heard on merit as she would suffer greater prejudice if she was denied an opportunity to fully present her case on merit as compared to the prejudice the Defendants would suffer from the delay in prosecution of the case herein.

16. Going further, the Plaintiff further wished to have her dispute determined by the Subordinate court as it had pecuniary jurisdiction to do so. The Defendants did not submit on this issue.

17. The court has power to proceed as was proposed by the Plaintiff by virtue of Section 18 (1) (a) of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides as follows:-

“On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same.”

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision is that the Plaintiff's Notice of Motion application dated 2nd April 2019 and filed on 4th April 2019 was merited and the same is hereby allowed as prayed.

19. It is hereby directed that the file herein be and is hereby transferred to the Chief Magistrate's Court Milimani Commercial Courts and that the same be placed before the Chief Magistrate of that court on 19th May 2020 for his or her further orders and/or directions.

20. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2020

J. KAMAU

JUDGE