



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 20 OF 2016

TUIYA SALIM.....APPLICANT

VERSUS

MAHMOUD CHEMWOR TARUS.....RESPONDENT

RULING

This ruling is in respect of an application dated 19th June 2019 brought by the applicant seeking orders that the court grant temporary orders of stay of execution of the orders issued on 24th September 2018 dismissing the suit and set aside the proceedings and all the consequential orders thereto pending the hearing and determination of the appeal. The applicant also sought orders for reinstatement of the suit.

APPLICANT'S CASE

It was the applicant's submission that he has satisfactorily demonstrated reasonable excuse for non-attendance in court on 24th September 2018. The applicant stated that he instructed the firm of Wambua Kigamwa & Co advocates to institute the suit in 2016 and that he has never been updated on the progress of the suit despite several visits to the office and phone calls. That he only discovered what was happening after visiting the offices of Mukabane and Kagunza Advocates when they were advised to peruse the court file only to find it had been dismissed on 24/09/2018 for non-attendance.

It was the applicant's submission that the suit was dismissed for non-attendance because of the mistake of the plaintiff's previous counsel on record who never attended court or informed the plaintiff of the hearing dates hence the applicant is an innocent litigant.

Counsel submitted that the plaintiff's case against the defendant was straightforward and he shall suffer great prejudice occasioned by being condemned unheard. The claim is over a piece of land which is an emotive issue and therefore the applicant should not be condemned unheard contrary to the constitutional right to be heard.

Counsel cited the case of **Phillip & Another v Augustine Kibede 1982-88 KLR 103** and asked the court to balance the substantial injustice the applicant is likely to suffer if the orders are not set aside.

RESPONDENT'S CASE

Counsel submitted that the applicant is before the court with unclean hands. That it is unlikely that he visited the advocate's office and he failed to update him on the progress of the suit for all those years.

Counsel submitted that Mr. Stanley Kagunza was the advocate in personal conduct of this matter since institution under the firm of Wambua Kigamwa & Co advocates and has now 'come on record' under his new firm Mukabane Kagunza & Company advocates. That counsel has grossly misled the court and any reference to previous advocate is to himself.

It was Counsel's submission that the plaintiff should have sought alternative counsel if he was unsatisfied with the services rendered by the advocate. The plaintiff/applicant who is the respondent's stepmother has confirmed that she has not instructed any other counsel. Further, she is illiterate therefore the respondent is convinced that the applicant did not sign the supporting affidavit. She only thumbprints as seen in her verifying affidavit to the plaint in this case.

Counsel submitted that litigation must come to an end as the plaintiff has failed to take action in this suit since 7th March 2018 as the suit has abated. Further, there has been inordinate delay in filing this application as the suit was dismissed on 24th September 2018.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant's suit should be reinstated.

By asking the court to set aside the orders and proceedings consequential to the orders of 24th September 2019 the applicant is asking that the court reinstate the suit.

Order 17 Rule 2 of the Civil Procedure Rules provides;

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.

The respondents filed an application to dismiss the suit for want of prosecution on 27th March 2019. The application was granted and the order issued on 24th September 2019.

It is on record that the applicant's advocate appeared for him under the previous firm being Wambua Kigamwa & Co Advocates. It is therefore peculiar for the applicant's advocate to claim that there was no communication between himself and the applicant while he acted for him under the previous firm on record. The applicant's advocate is deliberately misleading the court. The applicant chose the services of the very advocate he complained was not informing him of the progress of the case since institution.

MCT1 is proof that the applicant thumb prints documents that are to be filed in court. I find it odd that the applicant switched to a signature for the supporting affidavit. This therefore raises questions as to the validity of the supporting affidavit. There are other affidavits signed by the applicant by way of thumb print before the current advocates came on record. The lack of consistency raises questions about the veracity of the document. In the premises the application stands to be considered unsupported.

The applicant failed to take any action on the suit between 7th of March 2018 and 27th of March 2019. Further, the application for reinstatement was filed on 19th June 2019 and the suit had been dismissed on 24th September 2018. The applicant has not explained the delay considering the same advocate was personally on record for the applicant under the previous firm.

In **Bilha Ngunyo Isaac v Kembu Farm Ltd & another & another [2018] eKLR** the court held;

Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in finalising cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.

No reasonable cause has been given for the failure of the applicant's advocate to attend court on 24th September 2018. The applicant did not show any urgency in prosecuting the suit the times it came up for hearing.

I have considered the application and counsel's submission and find that the application lacks merit and is therefore dismissed with costs to the defendant.

DATED and DELIVERED at ELDORET this 19TH DAY OF FEBRUARY, 2020

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Magut holding brief for Mr.Kagunza for Plaintiff/Applicant and in the absence of the Defendant/Respondent

Mr. Yator – Court Assistant