REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 27 OF 2009

OMBUI ONYANGO..... PLAINTIFF/APPLICANT

VERSUS

KUNGA MORUMBASI.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant moved this Honourable court by way of Notice of Motion dated 9th March 2020 filed under Certificate of Urgency and brought under section 1A, 1B and 3A of the Civil Procedure Act, Article 159 of the Constitution, Order 51 Rule 1 & 15 of the Civil Procedure Rules seeking the following Orders:

1. Spent…

2. The Orders dismissing this suit on the 4th November 2015 be vacated and the matter be heard on merit to its logical conclusion.

3. Any further orders deemed just to be made.

2. The Application is premised on the grounds on the face of the Application and the Applicant's Supporting Affidavit sworn on the 9th day of March 2020 which reiterated the grounds aforementioned. The Applicant urges that this court in the interest of justice to reinstate the suit and the same be heard on merit.

By consent the parties canvassed the Application dated 9th March 2020 by way of written submissions in support of their opposing positions.

BACKGROUND

3. The Plaintiff/Applicant instituted a suit against the Defendant/Respondent vide a Plaint dated 16th February 2009 seeking *inter alia* permanent injunctive orders and eviction orders. It was the Plaintiff/Applicant's claim that he is the sole absolute registered owner of parcel No. **SOUTH MUGIRANGO/BOIKANGA/618** while the Defendant/Respondent is the registered owner of parcel No. **SOUTH MUGIRANGO/BOIKANGA/608**. The Plaintiff/Applicant claimed that the Defendant unlawfully and without any justifiable excuse or consent, invaded the Plaintiff's parcel of land and started construction of a semi-permanent house.

4. The matter was dismissed on 4th November 2015 under Order 17 Rule 2 (1) of the Civil Procedure Rules for want of prosecution.

It is the Applicant's claim that he was not informed of the dismissal and thus he was unaware of the position. The Applicant claims that he learnt about the dismissal when he was following up with the Land Registrar on the issue of the Land Registrar's visit to the suit land.

The application is opposed by the Defendant through his Replying affidavit sworn on 30th June 2020.

ISSUES FOR DETERMINATION

5. The singular issue for determination that emerges is whether the Applicant has demonstrated *"sufficient cause"* to warrant the exercise of the courts discretion in his favour.

ANALYSIS AND DETERMINATION

6. Learned counsel for the Applicant submitted that on 4th November 2015 the suit was dismissed for want of prosecution and that unfortunately the former advocates did not inform the Plaintiff/Applicant about the dismissal and as such the Applicant was not aware of the dismissal.

7. In his submissions learned counsel for the Applicant invoked Section 3A of the Civil Procedure Act in pursuit of the Applicant's prayer to have the suit reinstated. It is his submission that the said section gives this court inherent power to make suchorders as may be necessary for the ends of justice to be met.

8. The Applicant's learned counsel urged the court to exercise its discretion under Order 51 Rule 15 of the Civil Procedure Rules and referred the court to the case of **Gold Lida Limited v NIC Bank Limited & 2 others [2018] eKLR** where the court opined thus:

> *"the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. If that be case indeed, there would be a basis for a hearing to determine that single issue. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right."*

9. Applicant's counsel argued that the dismissal was due to an inadvertent error by the Plaintiff/Applicant's previous advocates and the same should not be visited upon the Plaintiff/Applicant and relied on the case of **Belinda Murai vs Amoi Wainaina (1978)**, where **Madan J** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

> *"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule…..…"*

10. Learned counsel for the Respondent submitted that the Applicant had failed to prosecute his case for 11 years as he kept changing advocates in order to delay the finalization of the case. He is of the view that the dismissal of the suit was proper as the applicant and his advocate failed to attend court on the date when the matter came up for Notice to Show Cause Why the case should not be dismissed. Counsel submitted that since the matter involves a boundary dispute, the same can be determined by the Land Registrar in accordance with sections 17 and 18 of the land Registration Act.

11. In order to determine whether court should exercise its discretion in favour of the applicant we first have to establish the meaning of the term "sufficient cause".

The term was analyzed by the High Court in the case of **Wachira Karani v Bildad Wachira [2016] eKLR** where the court referred to the definition espoused by theSupreme Court of India in the case of ***Parimal vs Veena*** where it was observed that:-

> *"**sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fides on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

The court further stated that:

> *"The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."*

12. It is clear from a scrutiny of the pleadings that the basis of this application is that the Applicant was let down by his erstwhile advocates.

However, the law now is that it is not in every case that a mistake committed by an advocate would be a ground for setting aside the orders of the Court.

13. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** the court opined thus:

> *"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders…Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him…Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone… Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to*

assist the indolent".

14. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002 Kimaru, J** expressed himself as follows:

> *"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."*

15. Be that as it may, a perusal of the court file brings to light the fact that there is no evidence of service upon the Applicant and/or their previous advocates on record in regards to the Notice to Show Cause why the suit should not have been dismissed.

16. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

> *"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".*

17. I am therefore persuaded to give the Applicant the benefit of the doubt that he was indeed not aware of the matter when it came up for the Notice to Show Cause why it should not be dismissed as there is no affidavit of service on record.

18. In consideration of the foregoing, I am satisfied that this is a matter where the Court in exercising its discretion ought to balance the interests of both parties. Consequently, I grant the application as prayed but order that the Applicant pays thrown away costs of Kshs. 10,000 to the Respondent.

The costs of the Application shall be in the cause.

Dated, signed and delivered, at Kisii this 8th day of October, 2020.

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J. M. ONYANGO

JUDGE