



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 256 OF 2010

BERNARD NJENGA GACHAMARU.....1ST PLAINTIFF

CATHERINE MUKAMI NJENGA.....2ND PLAINTIFF

(Suing as the Administrators of the Estate of BEATRICE WAMAITHA NJENGA (Deceased))

VERSUS

MOHAMMED ELIAS.....1ST DEFENDANT

SAMSON MARITA.....2ND DEFENDANT

GEORGE MOSETI.....3RD DEFENDANT

RULING

1. Before me for consideration is a Notice of Motion brought by the plaintiffs and dated 9th July, 2018. The aforesaid Motion is supported by the grounds set out on the body thereof and the sworn affidavit of one *Moses Maina Karuga*. The orders sought thereunder are:

i) THAT this Honourable Court be pleased to set aside the order made on 1st November, 2017 and that the suit be admitted for hearing.

ii) THAT costs of the application be provided for.

2. The deponent in this instance, *Moses Maina Karuga*, averred that being the test suit, this matter was scheduled for hearing on 1st November, 2017 and on which date the plaintiffs' advocate sought an adjournment. That this court granted the said adjournment on condition that the suit be prosecuted within 120 days from the date thereof, failure to which it would be dismissed.

3. It was the deponent's further assertion that the only available dates were from May, 2018 and that a letter was addressed to the deputy registrar by the plaintiffs' advocate to that effect. That thereafter, the plaintiffs' advocate managed to obtain a hearing date for 12th February, 2018 but that on the said date, the matter was taken out of the daily causelist. The deponent explained that the matter was scheduled for a mention on 20th February, 2018 but on the said date, the matter was postponed to 22nd February, 2018. He avers that, on that particular date, the suit was once again taken out of the causelist. The deponent added that when the matter came up for mention on 4th June, 2018, the plaintiffs were directed to lodge a formal application; and for the abovementioned reasons, the plaintiffs were unable to comply with the order of 1st November, 2017. The deponent was keen to add that being the test suit, it would cause an

injustice to have the same dismissed.

4. The Motion stands unopposed. In view of this, *Mr. Karuga* advocate for the plaintiffs made oral arguments by and large expounding on the averments in his supporting affidavit in addition to making reference to the documents annexed to his affidavit. He added that at one point, the parties had made attempts to settle the matter out of court and there has been compliance with pre-trial directions. Counsel was sure to emphasize that the delay was not caused by the plaintiffs.

5. I have taken into consideration the grounds set out in the Motion and the supporting affidavit, coupled with the oral arguments by the counsel. What is of importance to me is whether or not the reasons given by the plaintiffs are sufficient to convince the court to set aside the order made on 1st November, 2017. This is in appreciation of the fact that setting lies purely within the discretion of the court.

6. I do recall the orders made by this court on 1st November, 2017. Further to this, I have perused the annexed documents and established that the plaintiffs' advocate wrote to the deputy registrar vide a letter dated 1st November, 2017 marked "MMK 1" thereby requesting for a hearing date in January, 2018. However, it is not clear whether the deputy registrar received the said letter since it does not bear the court's stamp.

7. Be that as it may, I am able to confirm from the court record that the plaintiffs' advocate obtained the following dates consecutively: 12th February, 2018 and 20th February, 2018. That on the aforementioned 20th of February, Honourable Justice J. Serگون directed that the file be placed before me on 22nd March, 2018 for further directions. The plaintiffs offered an explanation that this court was not sitting on 22nd March, 2018 and have annexed a notice to that effect, marked "MMK 3."

8. The court record notably shows that the matter was subsequently scheduled for 4th June, 2018 and when the plaintiffs' advocate appeared before me then, I ordered that the file be returned to the registry for non-compliance with my order of 1st November, 2017.

9. That said, the evidence before me leads me to opine that the failure in prosecuting the suit timeously was occasioned by factors beyond the plaintiffs' control. The events portray that the plaintiffs had made every effort possible to have the suit prosecuted within the set timelines but this was not actualized. Given the circumstances, I am required to consider whether justice will be served if the suit stands dismissed.

10. The courts are entrusted with the discretion to vary or set aside orders already in place where necessary to meet the ends of justice. Equally, Honourable Justice John Mativo in *Wachira Karani v Bildad Wachira [2016] eKLR* in his analysis referred the Court of Appeal case of *CMC Holdings Ltd vs James Mumo Nzioki [2004] eKLR* that:

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error..."

11. I have adjusted the reasoning by the judge above to fit into the distinctive circumstances before me. The plaintiffs at first instance managed to obtain a convenient date but for various reasons, the court was not sitting. To my mind, there were active attempts to set the matter down for hearing. Under the circumstances and in the interest of justice, I find no reason to deny the plaintiffs an opportunity to prosecute their case.

12. The upshot is that I find merit in the Motion and grant prayer (i) of the same. Consequently, the plaintiffs shall prosecute the suit within 90 days from today, failure to which the same shall stand dismissed. I make no order as to costs.

Dated, signed and delivered at **NAIROBI** this **14th** day of **February, 2019**

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants