



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 298 OF 2011

EUSTACE GITONGA.....PLAINTIFF/APPLICANT

-VERSUS-

DR. IDLE FARAH.....1ST DEFENDANT/RESPONDENT

NATIONAL MUSEUMS OF KENYA.....2ND DEFENDANT/RESPONDENT

RITA TININA.....3RD DEFENDANT/RESPONDENT

JOE AGEYO.....4TH DEFENDANT/RESPONDENT

NATION MEDIA GROUP LIMITED.....5TH DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 18th December, 2018 has been brought by the plaintiff/applicant herein and the same is supported by the grounds set out on the body thereof and the affidavit of *Evans Ondieki*. The applicant is seeking to set aside the dismissal order made on 19th March, 2018 and subsequently, a reinstatement of his suit.
2. The abovementioned deponent, being the advocate for the applicant, stated that the suit was fixed for hearing on 21st November, 2018 and which date fell outside the timelines set by this court on 19th March, 2018, adding that the aforesaid date was the only available date from the registry.
3. The deponent averred that the applicant was under the mistaken belief that he had complied with the order of the court and has shown an interest in prosecuting his case. That the respondents will not be prejudiced should the orders sought be granted.
4. The 1st and 2nd defendants/respondents did not put in any response to the Motion.
5. The 3rd, 4th and 5th defendants/respondents on their part filed Grounds of Objection fundamentally stating that the provisions under which the application is brought do not apply; that the applicant has not given sufficient reason to warrant the orders sought and that the application is barred by laches.
6. The aforesaid respondents also filed a replying affidavit sworn by *Zehrabanu Janmohamed* on 18th March, 2019 asserting inter alia that the applicant has failed to comply with the orders of 19th March, 2018 and without reason; that the 3rd, 4th and 5th respondents have suffered and continued to suffer unnecessary anxiety due to the delay in the prosecution of the suit.
7. The parties made oral arguments in respect to the Motion. *Mr. Ondieki* counsel for the applicant restated the facts deponed to in his affidavit in support of the application, save to argue that the relevant staff at the registry indicated that they were not aware of the existence of the order of 19th March, 2018.
8. *Ms. Obara* counsel for the 1st and 2nd respondents opted not to make any oral arguments.
9. *Ms. Oluma* advocate for the 3rd, 4th and 5th respondents similarly relied on the Grounds of Objection and facts stated in the replying affidavit. The said counsel also submitted that the applicant's counsel ought to have moved this court before the lapse of the set timelines, to which *Mr. Ondieki* responded by urging this court to exercise its discretion in favour of the applicant.

10. I have carefully taken into consideration the facts articulated in the Motion, both the Grounds of Objection and reply in opposition thereto, as well as the rival oral arguments.

11. I am able to recall my order of 19th March, 2018 wherein I granted the applicant an opportunity to prosecute his suit. More specifically, the applicant was granted three (3) months within which to set his suit down for hearing and fourteen (14) days within which to supply the respondents with any pre-trial documents yet to be served.

12. The record discloses that on 27th March, 2018, the parties had the matter fixed for hearing on 21st November, 2018. The applicant explained that this was the only available date according to the information obtained from the registry. The applicant also submitted that the registry personnel were not aware of my order of 19th March, 2018.

13. From the foregoing, it is fair to state that the blunder was on the part of the applicant's advocate who did not inform the registry staff of the strict timelines so as to ensure the applicant was given a hearing date on priority basis. Nonetheless, it would go against the interest of justice to punish the applicant for the shortfall of his counsel. In addition, the court in *Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103* fully acknowledged the following:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”

14. Furthermore, I am satisfied that attempts were made in complying with my earlier order. In saying so, I make reference to the invitation letter from the applicant to the respondents dated 20th March, 2018 and marked “EO1a” inviting them to fix a hearing date.

15. Needless to say, I agree with Ms. Oluma's submission that the applicant ought to have brought the Motion in good time and prior to the expiry of the 90-day period given by this court. That notwithstanding, this court enjoys the power to enlarge time for the performance of an action through Order 50, Rule 6 of the *Civil Procedure Rules*. The provision reads as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

16. On the subject of reinstatement, it is also of importance for me to consider the prejudice that will be visited upon the respective parties vis-à-vis the interest of justice. In so doing, I wish to cite with approval the court's rendition in *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* that:

“I admit that a party should always take steps to progress his case to logical conclusion...But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff...”

17. I turn to the 3rd to 5th respondents' contention that they have suffered and will continue to experience unnecessary anxiety if the orders are granted as sought; this has not been demonstrated in any way. In my view, on a balance of probabilities, it is the applicant who is likely to suffer a greater degree of prejudice in the sense of being hindered access to justice. It is also clear that since this is a defamatory claim, it is the applicant who will be at a disadvantage if his suit remains dismissed.

18. Before I conclude, I also observed the 3rd to 5th respondents' submission that they are yet to be served with the remaining pre-trial documents as ordered by this court on 19th March, 2018. The applicant did not address this issue. Nevertheless, I have perused the court file and established that the applicant vide his letter dated 23rd April, 2018 indicated to the respondents that all the requisite documents had already been served, save for a statement belonging to a witness who could not be traced.

19. In the end, the Motion succeeds on the prayer for reinstatement of the suit and the following consequent orders made:

- a) The applicant shall serve the respondents with all pending pre-trial documents within 14 days from today.
- b) The applicant is granted a last opportunity to prosecute his suit within 120 days from today, failing which the same shall be dismissed.
- c) The respondents shall have the costs of the application assessed at Kshs. 7,000/- for each Respondent. The same to be paid within seven (7) days from today.

Dated, signed and delivered at NAIROBI this 4th day of April, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st and 2nd Defendants/Respondents

..... for the 3rd, 4th and 5th Defendants/Respondents