



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL CASE NO. 4 OF 2015

BERNARD MUGO & 8 OTHERS.....PLAINTIFF/APPLICANT

VERSUS

KAGAARI SOUTH FARMERS

CO-OP SOCIETY LTD.....1ST DEFENDANT/RESPONDENT

MICHAEL M. MUGUSHU.....2ND DEFENDANT/RESPONDENT

JAMES NAMU NJERU.....3RD DEFENDANT/RESPONDENT

CYRUS NTHIGA.....4TH DEFENDANT/RESPONDENT

NAHASHON NYAGA.....5TH DEFENDANT/RESPONDENT

RULING

A. Introduction

1. This is a ruling for to the application dated 4th July 2018 in which the applicants seeks for orders for setting aside orders issued on 3rd July 2018 and for reinstatement of the suit.
2. It is the applicant's case there had been frequent efforts by the applicant's advocate to list the suit for hearing prior to its dismissal which was not successful as they were turned back by the court registry. It was further stated that the counsel for the defendants' advocates were reluctant to have the matter fixed for hearing for the reason that the matter was before the Court of Appeal and as such the delay in prosecuting the suit was occasioned by the respondents and not the applicants.
3. The applicants further state that it would be in the interest of justice if the suit was reinstated and that no prejudice would be occasioned on the respondents.
4. In rejoinder, the 1st respondent opposed the application and deponed that the applicants have lost interest in the case and that is why their advocate has sworn the supporting affidavit to the application instead of the applicant. Further, the 1st respondent further depones that the only attempt the applicant's advocate made in securing a hearing date came on the 9th May 2018 after receiving the court's notice to dismiss.

B. Applicant's Submission

5. It is the appellant's submission that the court has discretion to reinstate the suit and urges it to bear in mind the case of **Gold Lida Limited v NIC Bank Limited & 2 Others [2018] eKLR** where in a similar application the court allowed the reinstatement of the suit whilst making emphasis on the constitutional and statutory framework in civil procedure to achieve substantive justice to all litigants.
6. The applicant submits that there has not been inordinate delay in prosecuting the main suit as they made several efforts to list the matter for hearing to no avail owing to the respondents' advocate's frustrations. The plaintiff submits that the delay in prosecuting the suit was not inordinate as the period of delay was not excessive, outstanding nor abnormal. He relies on the case of **Jackson Ngungu Kaguae v Attorney General & 595 Others [2016] eKLR** where the court held that the test for what amounts to delay is that which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.
7. The applicant further submits that they have not lost interest in their matter and since the delay itself is not inordinate, then it is excusable

and the court in exercising this power must apply it judiciously.

8. The applicant further submits that the respondent has not demonstrated any prejudice that they would suffer if the application is allowed and as such its application is merited.

C. Respondent's Submission

9. The respondents submit that the current submissions were filed 7 days late contrary to court directions and without leave of court and as such the application should be dismissed with costs.

10. The respondent further submits that the applicants advocate is not competent to swear the supporting affidavit on the application and this is a further indication that the applicant is not interested in the suit. The applicant relied on Misc. Civil Application No. 116 of 2015 where Justice Odunga stated that advocates should desist from swearing affidavits on behalf of their clients which raises contentious issues.

D. Analysis & Determination

11. Parties filed written submissions on the issues raised in the application, that are best summarized as follows:

- Whether sufficient cause has been shown to set aside the dismissal order and reinstate the suit.

12. A chronology of the events leading to the suit's dismissal is that the applicants filed the present suit on the 14th April 2015 and on the 15th April 2015 they filed an application seeking to allow them to pick and deliver the coffee beans at the 1st respondents' factory. The respondent put in their defence on the 30th April 2015 and also filed a preliminary objection to the applicant's application which was dismissed on 1/07/2015. The respondents then filed a Notice of appeal dated 3rd August 2016 against this court's decision. The next action in the file was a notice to the parties herein that the suit would be dismissed for non-prosecution and subsequently on 3rd July 2018 the present suit was accordingly dismissed.

13. It is the applicant's case that there has been frequent efforts to list the suit for hearing prior to its dismissal which were to no avail as they were turned back by the court registry. It was further stated that the counsel for the defendants' advocates were reluctant to have the matter fixed for hearing and as such the delay in prosecuting the suit was occasioned by the respondents and not the applicants. Evidence of this is an invitation letter dated 9th May 2018 and filed on the 17th July 2018. The respondents assert that the only attempt the applicant's advocate made in securing a hearing date came on the 9th May 2018 after receiving the court's notice to dismiss.

14. It is trite that a litigant who files a case is under a duty to take positive steps at all times to prosecute it expeditiously.

15. In the case **Shah -vs- Mbogo & Another [1967] EA 1116**, the court stated on the matter of its discretion, that;

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

16. A court's discretion to set aside its orders is not restricted but should be so exercised so as not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's indulgence has an obligation to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court.

17. Other than stating that failure to set down the case for hearing was caused by frustration from the respondents' advocate, nothing was placed before the court to demonstrate that the applicant was positively pursuing a hearing date. I also note that during the pendency of the appeal in the Court of Appeal if any, no orders for stay of the proceedings herein were obtained.

18. The discretion of the court must be exercised judiciously based on facts and the law. The party seeking to reinstate the suit must also demonstrate good faith in the circumstances of case.

19. I find the 1st Respondent's submissions quite persuasive that the applicants have failed to have the matter listed for hearing thus causing unreasonable and inordinate delay in the finalisation of the case thus causing prejudice to the respondents.

20. In the case of **Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014) eKLR**, the court held that: -

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

21. The record shows that for over a period of four years, the appellant has not prosecuted his case and that the respondents have not demonstrated any prejudice that they are likely to suffer if the suit is reinstated.

22. **Section 3A** of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

23. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. It was held that the discretion of the court is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

24. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, 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 mistake 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.....”

25. Apaloo JA outlined the following approach to a similar question in **Philip Chemwolo & Another v Augustine Kubede [1982-88] KAR 103**;

“Blunder 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

26. In my view, the overriding objective is intended to achieve substantive justice to the litigants. I do note that the issues raised in the plaint have never been addressed and the same ought to be concluded. This view is informed by Article 50 of the Constitution of Kenya which secures the right to hearing for every person in a case. This court is obligated to safeguard that right. In light of this, I am of the view that the inconvenience likely to be suffered by the respondents as a result of reinstatement of this suit cannot override the need to give substantive justice to the parties.

27. Consequently, I allow this application on the following terms: -

a) That the suit be and is hereby reinstated.

b) That the applicant is hereby ordered to meet the costs of this application.

c) That this suit be fixed for hearing within thirty (30) days failure to which it will stand dismissed.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mutegi for Mr. Mbuthia for Plaintiff

1st – 4th Plaintiff