REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 875 OF 2005

ESTHER WARUGURU KAHURA.....PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY LIMITED.....DEFENDANT

DR. MAINA RUGA ..... 3RD PARTY

RULING

1. Before me is a Notice of Motion dated 11th June 2019 taken out by the plaintiff (hereinafter the applicant) seeking that the dismissal orders issued by this court on 7th March 2019 be set aside and the suit be reinstated for hearing on its merits.

2. The application is premised on *Order 10 Rule 11* and *Order 22 Rule 22* of the *Civil Procedure Rules* and all other enabling provisions of the law. It is supported on the grounds stated on its face and the depositions made in the supporting affidavit sworn by *Ms Wanja G. Wambugu*, learned counsel for the plaintiff. Counsel has deposed that her failure and that of the plaintiff to attend the court on the hearing date was not deliberate but was caused by her inadvertent failure to diarise the case in her office diary; that reinstatement of the suit will not occasion any prejudice on the defendant and that the applicant is ready to abide by any condition that the court may impose to the reinstatement of the suit so that the same can be determined on merit. Counsel further averred that the mistake of counsel should not be visited on an innocent litigant.

3. The application is opposed by both the defendant and the 3rd party. *Mr. Hiram Nyaburi*, learned counsel for the defendant swore a replying affidavit dated 17th July 2019 in which he opposed the application on grounds that there is a three months' delay in moving the court to reinstate the suit which delay has not been explained; that the reason given for failure of the plaintiff and her counsel to attend the court on the hearing date was not plausible given that the plaintiff had fixed the hearing date *ex parte* and served hearing notices on the other parties; that there is undue delay in the prosecution of the suit which was filed over 14 years ago; that if the suit was reinstated, the defendant is likely to suffer prejudice as given the length of the delay, all its employees who witnessed the incident which gave rise to the suit have left employment and it will not obtain a fair hearing. Counsel further deposed that if the court was inclined to allow the application, the defendant should be awarded throw away costs of not less than KShs.30,000.

4. On his part, the 3rd party swore a replying affidavit on 30th August 2019. He urged the court to dismiss the application on grounds that the plaintiff was undeserving of the court's discretion given that she has failed to prosecute the suit for over 14 years; that litigation should come to an end and that if the suit was revived, its pendency would cause the 3rd party psychological trauma and further costs in the form of legal fees.

5. By consent of the parties, the application was prosecuted by way of written submissions which each party duly filed and which I have carefully considered together with all the authorities cited.

6. At the outset, I wish to agree with the position taken by the defendant and the 3rd party (hereinafter the respondents), as this is confirmed by the court record that the dismissal order sought to be set aside by the applicant was made on 7th March 2019 and not on 22nd May 2019 as alleged by the applicant. The continued reference to 22nd May 2019 by the applicant is obviously a mistake which this court will disregard in the interest of administering substantive justice to the parties in line with the dictates of the overriding objective of civil litigation.

7. Turning now to the merits of the application, it is common ground that this court has unfettered discretion under *Order 12 Rule 7* of the *Civil Procedure Rules* to *inter alia* set aside or vary orders dismissing a suit for a party's non-attendance on terms the court deems just. The court's discretion, however, must be exercised judiciously in accordance with the law and the facts of each case.

8. In this case, the applicant's counsel has claimed that her failure and that of her client to attend the court on the hearing date was not deliberate but was caused by her inadvertence in not diarizing the case in effect implying that she was not aware that the case was scheduled for hearing on that date. Although the applicant's counsel did not annex an extract of her diary to prove her claim, I am willing to give her

the benefit of doubt and accept her explanation as true considering that she is an officer of this court who is not only expected to be truthful and candid with the court but is also expected to assist the court in the administration of justice. In the premises, I have no reason to doubt the veracity of the reasons advanced in support of the application.

9. Having accepted the learned counsel's explanation as a true representation of what prevented her and her client from attending the court on the material day, I am convinced that it amounts to a mistake which can only be blamed on the counsel and not the plaintiff (applicant). Since cases belong to litigants and not their advocates, I find that it would be unfair and unjust in the circumstances of this case to visit the mistake of counsel on the applicant considering the nature of the orders sought to be set aside.

10. In finding as I have above, I have borne in mind the holding of the court in ***Belinda Murai & Others V Amos Wainaina, (1978) LLR 278*** and in ***Phillip Chemowolo & Another V Augustine Kubede, (1892-88) KAR 103*** where in the latter case the Court of Appeal held that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made 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 parties and not the purpose of imposing discipline."***

11. That said, it is not lost on me that this is an old case which has been pending in the judicial system for about 14 years. The respondents have blamed the applicant for the long delay in its prosecution claiming that she is guilty of laches and that the inordinate delay is proof that she is no longer interested in prosecuting the same. I have perused the entire proceedings in the court record and I must say that they reflect the complete opposite of what is claimed by the respondents. The court record shows that the applicant is actually not to blame for the prolonged delay in the hearing of the suit.

12. The record confirms that hearing was only adjourned on 20th September 2019 at the instance of the applicant while all the other adjournments have been occasioned by either the defendant or the court. The defendant is responsible for two adjournments on 7th October 2008 and 3rd November 2009 and on two other instances, hearing was adjourned by the court on its own motion for reasons that are on record. A look at the entire record clearly shows that the most delay has been caused by the time the parties took to negotiate for an out of court settlement before the negotiations eventually collapsed. It cannot therefore be validly said that the applicant was solely responsible for the delay in the prosecution of the suit and that the delay was an indication that she is no longer interested in pursuing her claim against the defendant.

13. In considering applications of this nature, the court must bear in mind the prejudice that each of the parties is likely to suffer if the application was decided one way or the other. If the application is dismissed, the applicant will definitely suffer great prejudice since the door of justice will be closed on her face before she is given an opportunity to be heard which in effect will run counter to the constitutional principle of access to justice and fair trial which this court is enjoined to promote and protect. If on the other hand the application is allowed, the respondents are not likely to suffer any prejudice that cannot be adequately compensated by an award of costs.

14. Given the foregoing, I make the following orders in disposing of the Notice of Motion dated 11th June 2010:

i. The application is allowed and the suit is hereby reinstated.

ii. The applicant will pay each of the respondents throw away costs of KShs.20,000 within the next 45 days of today's date failing which the order reinstating the suit will stand vacated.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mugo for the plaintiff/applicant

Ms Achole holding brief for Mr. Nyaburi for the defendant

Ms Kipruto holding brief for Mr. Maweyo for the 3rd party

Mr. Salach: Court Assistant