



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 6 OF 2019

(FORMERLY KISUMU CIVIL CASE NO.38 OF 2009)

DAVID OSCAR OWAKO..... PLAINTIFF/APPLICANT

VERSUS

CHEMELILI SUGAR COMPANY LIMITED1ST RESPONDENT

KIBOS SUGAR COMPANY LIMITED.....2ND RESPONDENT

MUHORONI SUGAR COMPANY LIMITED (under Receivership)..3RD RESPONDENT

JOHN KENY, DANIEL LELEI, SIMON SERONEY (sued in their capacity as elected officials KAMALAMBEI SOCIETY)4TH RESPONDENT

JOSEPH CHEPSIROR, DAVID KIMELI, STEVEN YEGO (sued in their capacity as elected officials of TUWAPSUL SOCIETY)5TH RESPONDENT

WILLIAM LANG'AT, DAVID BOEN MUSA (sued in their capacity as elected officials of BARMARENG SOCIETY)..... 6TH RESPONDENT

KAMALAMBU FARMERS COMPANY7TH RESPONDENT

KARATILI FARMERS COMPANY LIMITED8TH RESPONDENT

RULING

1. The plaintiff/applicant has filed an application dated 10th February, 2017 seeking that the orders of the court issued on 3rd February, 2017 by Majanja J. dismissing the suit be set aside and that the same be reinstated for hearing. The application is supported by grounds on the face of the application and by the supporting affidavit of the applicant of even date and further replying affidavit sworn on 2nd October, 2019.
2. The 1st and 3rd respondents opposed the application through the firm of **Otieno, Ragot & Co. Advocates**. Though Mr. Otieno of the said firm opposed the application orally in court I have perused the court file and I have not managed to see their grounds of opposition.
3. The firm of **Olel, Onyango, Ingutiah & Co. Advocates** appeared for the 2nd respondent. They opposed the application vide their grounds of opposition dated 5th April, 2017 and supporting affidavit of the 2nd respondent.
4. The firm of **Kimanga & Co. Advocates** appeared for the 5th and 6th respondents. They did not respond to the application. The case for the 4th, 7th and 8th defendants had been withdrawn by the time the impugned orders were made.
5. The background to the application was that the matter came up before Majanja J. on the 25th October, 2016, when the learned judge fixed

the matter for pre-trial directions on 15th November, 2016, which date was moved to 20th December, 2016. On the latter date, the learned judge gave directions on the hearing and determination of the suit, including the filing and service of witness statements by parties. He warned the parties that failure to comply with his order would result in the dismissal of the suit or the striking out of the defences as the case may be. The learned judge scheduled the suit for mention on 3rd February, 2017 to confirm compliance with the orders and fixed the substantive hearing on 21st March, 2017.

6. On the date of the mention on 3rd February, 2017, the applicant had not complied with the orders made on 20th December, 2016. The learned Judge then proceeded to dismiss the suit for the failure by the applicant to comply with the orders of 20th December, 2016. On the 10th February, 2017, the applicant made the instant application seeking for the reinstatement of the suit. The applicant then made an application for Majanja J. to recuse himself from the case. The learned judge dismissed the application on 25/7/2017. It would appear that Majanja J. went on transfer before he could deal with the present application.

7. The matter then went before Cherere J. who after briefly dealing with it recused herself after the applicant made a complaint against her. The case went before Ochieng J. who by consent of the parties, transferred the case to this court.

8. The applicant states in his supporting affidavit that after the court made its order of 20th December, 2016, he set out to obtain some of the documents he required in support of his case. That part of the documents were searches from the Commissioner of Co-operatives Societies to show the bearers of the offices and the dates of registration of the 4th, 5th and 6th societies. That the searches took longer than expected due to delay occasioned by the Co-operative Societies Registry. That he was unable to comply with the directions given by the court. That he filed his list of documents and witness statements on 3rd February, 2017, the same day when the matter was coming up in court for mention. The court then proceeded to dismiss his suit due to the failure to comply with the directions earlier given.

9. The applicant contends that he will be highly prejudiced if the suit is not reinstated as the money involved is huge that runs to Ksh. 112,121,000/=.

10. In her replying affidavit sworn on the 10th April, 2017, the legal officer of the 2nd respondent one **Lorna Orege** states that the applicant has not given any reasonable or satisfactory explanation why he failed to file his documents within the time given by the court. That the applicant has not been diligent in prosecuting the matter but has rather slept on his rights and now merely seeks to prolong the matter for ulterior motives.

11. Mr. Otieno for the 1st and 3rd respondents submitted that the applicant was ordered to file and serve the documents within 14 days. That as computation of time is excluded during the Christmas vacation time started to run on 14th January, 2017. That the 14 days expired on 27/1/2017. That the suit stood dismissed on 28/1/2017. That the documents that the applicant filed from the Ministries of Trade and Co-operative Development are dated 25/1/2017. That the documents made reference to the applicant's letter dated 24/1/2017. That this means that the applicant applied for the documents 3 days to the date when the 14 days of filing the documents was expiring. That he has not explained why he had not taken action between 21/12/2016 and 24/1/2017.

12. Mr. Otieno submitted that it was within the mandate of Majanja J. to give the directions that he gave. That it was meant to expedite the hearing and determination of the case.

13. In his arguments in court, the applicant stated that the witnesses that he wished to call were civil servants. That the time that he was given to file the documents was not sufficient. That he needed documents from the Lands office to prove ownership of the land. That when the matter came for mention on 3/2/2017 he had already filed witness statements. That he has a strong case against the respondents. That part of the money he is claiming has already been paid and a balance is remaining. That it is unfair for the case to be dismissed on a technicality.

14. Mr. Otieno however stated that the money paid to the applicant was obtained through fraud.

Analysis and Determination –

15. Section 1A and 1B of the Civil Procedure Act provides as follows:-

“1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters

presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

16. The directions given by Majanja J. on 20/12/2016 stated as follows:-

“(1) The plaintiff shall file and serve its witness statements together with all supporting documents upon the defendants within 14 days in default of such service the suit shall stand dismissed.

(2) Upon service of the statements and documents, the defendants shall file and serve their respective witness statements and documents within 14 days of service in default, the respective defences shall be deemed struck out.

(3) Mention for directions and further (orders) on 03.02.2017.

(4) Hearing of the suit on 21.03.2017.

(5) This order shall be served on all defendants for compliance by the plaintiffs.”

17. It was within the mandate of Majanja J. to issue the said orders in an attempt to expedite the hearing of the matter that had been pending in court since when it was filed in the year 2009. It was the duty of the applicant to comply with the orders of the court so as to expedite the hearing of the matter as provided under order 1A(3) of the Civil Procedure Rules.

18. It is the discretion of the court to reinstate or decline to reinstate a suit that has been dismissed. Such discretion should however be exercised judiciously. In **Alex Wainana t/a John Commercial Agencies - vs – Janson Mwangi Wanjihia (2015) eKLR**, the Court of Appeal set out the principles governing the exercise of discretion and held that:-

“The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of Gathiaka vs Nduriri (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it”

19. In **Stephen Ndichu –vs – Monty’s Wines and Spirits Ltd (2006) eKLR** Azangalala J considered the applicable principles for reinstatement of a suit and held that:-

“.....The discretion is free and the main concern of the courts is to do justice to the parties before it (See patel versus EA cargo Handling Services Ltd 1974 EA 75.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah –Vs- Mbogo 1969 EA 116.). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration -Vs-Gasyali 1968 EA 300). It also goes without saying that the reason for failure to attend should be considered”.

20. Two of the cardinal principles in the administration of justice as stipulated in Article 159 of the Constitution are:-

(i) Justice shall not be delayed and

(ii) Justice shall be administered without undue regard to procedural technicalities.

Courts of law exist to dispense justice to the citizenry. It is of utmost importance that every case should be determined on merit rather than being terminated on a technicality. Only when there is good reason to do so should a court terminate a case on such grounds. Though Majanja J had sufficient grounds to dismiss the suit herein, that does not take away the discretion of this court to reinstate the suit on such terms as are just. In **Trust Bank Ltd –Vs- Amalo (2003) 1EA 350**, it was observed that:-

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George CJ (Tanzania) in the

case of Essanji and Another –Vs- Solanki (1968) EA at 224.

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits on his right. That accords with the policy of the law as can be gleaned from Order IX, rule 1 of Civil Procedure rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

21. Guided by the above principles, I should then consider whether the application herein is merited. The main concern of the court in such an application is for the court to do justice to the parties and if the suit is reinstated it has to be on terms that are just. The discretion should not be used to assist a party to delay the cause of justice. It also has to be considered whether the other party can be compensated by way of costs.

22. As noted by Majanja J. in his ruling of 3rd February, 2017, this matter has been in court since when it was filed in 2009. It has been mired in a web and plethora of applications at the instance of the applicant which no doubt made Majanja J. to make the orders of 20th December, 2016 with the view to ensuring expeditious disposal of the matter. The applicant is entirely to blame for failing to comply with the orders of the court.

23. Though he did so late, the applicant had already filed his documents when the suit came up for mention on 3/2/2017. What was remaining therefore was service of the documents to the other parties for the matter to proceed to its logical conclusion. The applicant is claiming a huge sum of money from the respondents. In view of the above, I am persuaded that justice will be better served by an order for reinstatement of the suit so as to give the applicant a second chance to prosecute the case. The respondents will not suffer any prejudice by the said reinstatement. They can be compensated by way of costs.

24. The upshot is that the application dated 10th February, 2017 is allowed as prayed but the costs of the application will go to the 1st, 2nd and 3rd respondents.

25. The court file in this matter now runs to a bulky 9 volumes. This has largely been occasioned by the applicant who has been filing application after application to the detriment of the hearing of the main suit. I am constrained to make orders to limit such conduct by the applicant. The applicant is hereby barred from filing any application or documents without leave of the court. The matter to be heard on priority basis.

Delivered, dated and signed in open court at Kakamega this 11th day of December, 2019.

J. N. NJAGI

JUDGE

In the presence of:

.....N/A.....for 2nd respondent

Mr. Orieyo holding brief for Mr. Otieno for 1st and 3rd Respondent

Applicant:- present in person

Court Assistant:- Polycap

30 days right of appeal.