



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISC CAUSE NO. 12 OF 2017

(Formerly Nairobi Misc No. 277 of 2015)

EZEKIEL NYAMWEYA KEBATI.....APPLICANT

VERSUS

SWEETLAND LIMITED.....1ST RESPONDENT

HILLARY K. KIBOINET.....2ND RESPONDENT

RULING

What is before me for determination is the Applicant's Notice of Motion application dated the 18th February, 2019 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks for the following orders:

1. Spent
2. That the Honourable Court be pleased to stay/ or otherwise set aside its orders issued on 11th June, 2018.
3. That this Honourable Tribunal be pleased to reinstate and allow the Applicant's Application dated 22nd October, 2015 be determined on merit.

The Application is premised on the grounds on the face of it and the supporting affidavit of NOAH O. NYAKUNDI Advocate who deposes that the Applicant filed an application dated 22nd October, 2015 which was dismissed for want of prosecution on 11th June, 2018. He explains that the Application was initially filed at the Environment and Land Court (ELC) in Nairobi but the Judge ordered the matter be transferred to ELC Kajiado for the hearing of the application dated the 22nd October, 2015. He contends that upon being transferred the file had been missing for some time despite their visits to the Registry to check for it so as to fix the aforementioned application for hearing. He claims they later found out the Application had been issued with a new case number from the initial one, a fact which he was not aware of. He confirms that a Notice to Show Cause dated 14th May, 2018 was served upon them but unfortunately misfiled due to the confusion in the new case numbers. He avers that upon perusal of the court file, he learnt that the application had come up in court on 11th June, 2018 and dismissed for want of prosecution. He contends that the non attendance was not deliberate and this instant application has been filed without delay. He reiterates that an Advocate's mistake should not be visited upon the Client. Further, that the Applicant has an arguable case and would suffer prejudice if the suit/application is not heard on its merits.

The 2nd Respondent HILLARY K. KIBOINET opposed the application by filing a replying affidavit where he deposes that the application is an abuse of the process of court and thoroughly flawed. He contends that the Applicant lost interest in the matter and there is no evidence of a missing file nor a letter to show proof. He insists the Applicant's Advocate was aware of the change of Court and transfer and even attended the same in Kajiado a few times. Further, there is no plausible reason for the delay and the application lacks merit. He avers that the Applicant should have been vigilant to follow up the matter with his advocates. He claims the Applicant stands to suffer no prejudice as he lost the right to prosecute the suit and therefore cannot claim any remedy since he is a victim of his own misfeasance. Further, the application is prejudicial to the Respondents since they had moved on from this matter one year ago as it had been dismissed.

The Applicant and the 2nd Respondent filed their respective submissions to canvass this application.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 18th February, 2019 including the respective affidavits and submissions, the only issue for determination is whether the Court should set aside its orders issued on 11th June, 2018 and reinstate the Applicant's Application dated 22nd October, 2015.

The Applicant in his submissions reiterated his claim above and filed various authorities including **Patriotic Guards Ltd Vs James Kipchirchir Sambu (2018) eKLR**, **Edney Adaka Ismail V Equity Bank Limited (2014) eKLR**; **Bank of Africa Kenya Limited V Put Sarajevo General Engineering Co. Ltd & 2 others (2018) eKLR** and **JG Builders V Plan International (2015) eKLR** to support his averments. The 2nd Respondent in his submissions relied on the case of **Utalii Transport Company Limited & 3 Others V NIC Bank & Another (2014) eKLR** and contended that the Applicant has been indolent and should not excite any lenient exercise of discretion from the court. Further, that the Applicant's inaction is not explained and relied on the case of **Barnabas Maritim V Manywele Korgoren & Another (2016) eKLR** to buttress this argument.

Order 12 rule 7 of the Civil Procedure Act provides that: *'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'*

In the case of **Utalii Transport Company Limited & 3 Others V NIC Bank & Another (2014) eKLR** in dealing with an application for reinstatement stated thus: *'Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) Whether the delay is an abuse of the court process;*
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) What prejudice will the dismissal occasion to the plaintiff?*
- 6) Whether the plaintiff has offered a reasonable explanation for the delay;*
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court? '*

In line with the said principles, I will proceed to analyse the facts before me to determine whether the instant application is merited or not. According to the Court Records, I note this miscellaneous application was transferred to this Court by an Order made by Justice Obaga on 9th February, 2017 after which this file was allocated a new number. After the transfer of the file, there are no proceedings recorded in the Court file upto the 11th June, 2018 when the suit was dismissed for want of prosecution. This is contrary to the averments of the 2nd Respondent that the Applicant's Advocate had severally appeared before the Court. Be that as it may, I note the Applicant seeks to reinstate an application where he sought to transfer Nairobi CMCC No. 7047 of 2014 to the ELC as the Chief Magistrate's Court lacked pecuniary jurisdiction to handle it. The Applicant has offered his explanation above on why he delayed in setting the application dated 22nd October, 2015 for hearing. The Applicant's Counsel has admitted his mistake and averred that the said mistake should not be visited upon his client. The Respondent has opposed this application and insists the Applicant lost interest in the matter and has not explained the delay.

In the case of **Patriotic Guards Ltd V James Kipchirchir Sambu (2018) eKLR**, the Court of Appeal held that: *' We take the view that the Judge was wrong in failing to exercise his discretion in the appellant's favour. There is nothing on record to infer that failure to attend court by the appellant's counsel was meant to delay the determination of the claim, or had ulterior motives or was meant to defeat the ends of justice. As was stated in Mbogo v Shah (supra),*

"...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".....In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the Appellant from pursuing its defence and counterclaim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court's intervention.'

While in the case of case of **Ivita Vs Kyumbu [1984] KLR 441**, Chesoni, J as he then was stated thus:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."

Further, in the case of **Belinda Muras & 6 Others V Amos Wainaina (1978) KLR** Where Madan J stated thus:....' The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it

but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.’

Based on the facts before me while relying on Article 50 (1) of the Constitution on a party’s right to be heard as well as the authorities cited above, I find that the Applicant has indeed explained the delay in prosecuting the application dated the 22nd October, 2015 which was dismissed for want of prosecution. It is my considered view that the 2nd Respondent has not demonstrated the prejudice he stands to suffer if the said application is reinstated. Further, in the interest of justice and since the Application which the Applicant seeks to reinstate is one seeking to transfer a matter from the lower court to the ELC, I will exercise my discretion and allow the instant application and reinstate the Application dated 22nd October, 2015 to be heard on merit within 60 days from the date hereof.

Costs of this application are awarded to the 2nd Respondent.

Dated Signed and Delivered via email this 26th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE