



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 337 OF 2017

(Formerly Machakos ELC No. 66 of 2013)

C – ELEVEN LIMITED.....PLAINTIFF

VERSUS

FRANCIS MUREITHI.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 13th July, 2018 brought pursuant to Order 12 Rule 7 and Order 51 of the Civil Procedure Rules as well as Section 1A and 3A of the Civil Procedure Act. The Plaintiff seeks for the following orders:

1. That this Honourable Court be pleased to set aside its orders dated 12th June, 2018 dismissing the Plaintiff's Case.
2. That the Plaintiff's suit be accordingly reinstated and heard on merit.
3. That cost of the application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of Charles Muoki who is an Advocate in conduct of the matter on behalf of the Plaintiff where he claims that there was lack of communication between him and the Plaintiff's Directors as he lost their contacts. He confirms being served with a Notice to Show Cause why suit should not be dismissed and on 12th June, 2018 one Mr. Maina appeared on his behalf but the matter was dismissed. He insists that the Plaintiff cannot be punished for the mistakes related to the present circumstances as this was an honest mistake. Further, that the client recently showed up in their offices and they are ready to proceed with the matter. He contends that dismissing this suit is terminating it prematurely and this amounts to denial of justice on the part of the Plaintiff. Further, that the Defendant shall suffer no prejudice should the said application be allowed.

The Defendant filed his Grounds of Opposition dated the 25th September, 2018 where he contends that the application is incurably defective, incompetent and the same does not lie. Further, that the Plaintiff has introduced the 2nd and 3rd Defendants who were not parties to this suit when it was filed on 16th August, 2013 and no application has ever been filed to enjoin them. He insists the Plaintiff and its Advocates lack interest in this suit as they took a long unexplained period of about 5 years before the suit was dismissed. He states that the affidavit in support of the application is sketchy and the provisions of the law cited in the said application do not confer jurisdiction on the Court to reinstate the suit which has been dismissed by the court suo motu for want of prosecution. He reiterates that he has always been in possession of his rightful piece of land known as Kajiado/ Olooloitikoshi/ Kitengela/ 122.

The Plaintiff and the Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated 13th July, 2018 including the supporting affidavit, Grounds of Opposition and rivaling submissions, at this juncture the only issue for determination is whether this suit should be reinstated.

The Plaintiff in its submissions reiterated its claim and explained that the delay was occasioned by lack of ELC Judges which issue it had no control over. Further, that he had always attended court before the suit was dismissed for want of prosecution. It contended that the period slightly exceeding one year is excusable in law if well and legally explained. It reiterated that it will suffer irreparably and the suit raises triable issues. To support its averments, it relied on the case of **Golda Lida Limited Vs NIC Bank Limited & 2 others (2018) eKLR**. The Defendant in his submissions contended that the Court does not have jurisdiction to entertain the instant application as the Plaintiff who was represented should have appealed against the decision instead of applying to set it aside. He further submitted that the application is incompetent, made purely to abuse the process of this Court and does not have any merits whatsoever.

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.’***

According to the Court records, I note the respective parties’ Counsels appeared before the Deputy Registrar on 3rd April, 2017 after this matter had been transferred from Machakos to Kajiado ELC where the Plaintiff’s Counsel sought for more time to file further statements including list of documents and the matter was rescheduled to 3rd May, 2017, for pre trial directions. However, on the 3rd May, 2017, no party appeared before the Deputy Registrar who then marked the matter as stood over generally. Later on, the Plaintiff was served with a Notice to Show Cause why suit should not be dismissed for want of prosecution culminating in the dismissal of the same on 12th June, 2018. The Plaintiff’s Counsel as alluded to the fact that he lost contact with his client and it was his mistake that this suit was dismissed for want of prosecution. Further, that the suit raises triable issues. The Defendant on the other hand insists the Plaintiff has lost interest in the matter and the application lacks merit.

Section 3A of the Civil Procedure Act grants the Court inherent powers to make such orders as may be necessary to meet the ends of justice.

While Order 51 Rule 10 of the Civil Procedure Rules provides that:

‘(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.’

In the case of **Belinda Murai & Others Vs Amos Wainaina (1979) eKLR, Madan J** as he then was, while dealing with an issue relating to a mistake made by a lawyer, stated thus;

“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.....”

Further, in the case of **Golda Lida Limited Vs NIC Bank Limited & 2 others (2018) eKLR** the Court while dealing with a suit which was dismissed before it had been set down for hearing stated thus: **‘In pleading for reinstatement, the Plaintiff contends that it was not aware of the directions made on 19th July, 2017. In opposing the application, the defendant contends that the application is unmerited because, among other reasons, the only outstanding issue is that of costs of the suit. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. If that be case indeed, there would be a basis for a hearing to determine that single issue. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right. In light of this, I am of the view that the inconvenience to be suffered by the defendants as a result of reinstatement of this suit can be adequately remedied through an award of costs.’**

Based on the facts before me and relying on the legal provisions cited above including associating myself with the quoted decisions, I find that the Plaintiff’s reasons are valid and mistake to Counsel should not be visited upon it. I disagree with the Defendant that the application is unmerited and incompetent as the clear legal provisions were not cited. I opine that the Plaintiff raises triable issues which should be heard on merit. Further, that the Plaintiff has a right to be heard as enshrined under Article 50 of the Constitution. It is my considered view that the Defendant can be compensated with costs.

It is against the foregoing that I find the instant Notice of Motion dated 13th July, 2018 merited and will allow it. I further proceed to make the following final orders:

- a) That the Orders of this Court made on 12th June, 2018 dismissing the Plaintiff’s Case be and is hereby set aside.
- b) That the Plaintiff’s suit be and is hereby reinstated.
- c) The Plaintiff is directed to set down this suit for hearing on its merits within 60 days from the date hereof
- d) The Defendant is awarded throw away costs of Kshs. 20,000 to be paid by the Plaintiff within 30 days from the date hereof, failure of which the order reinstating this suit shall stand vacated.

Dated Signed and Delivered via email this 27th Day of July, 2020

CHRISTINE OCHIENG

JUDGE