REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 254 OF 2017

(FORMERLY NAIROBI ELC NO. 3 OF 2010)

HANNAH WANJIRU MBURU..PLAINTIFF/APPLICANT

-VERSUS-

SIMON MUHU MARARO...1ST DEFENDANT/RESPONDENT

JEREMIAH NYUTU MARARO..................................2ND DEFENDANT/RESPONDENT

CYRUS THIGARI MARARO.......................................3RDDEFENDANT/RESPONDENT

WANJIKU MARARO..4THDEFENDANT/ RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **4th Jun 2019,** by the Plaintiff/ Applicant seeking for orders that;

> **1. That the order issued by Hon. GacheruJ. on 31st October 2017, dismissing the entire suit for want of prosecution be set aside.**
>
> **2. That the suit be reinstated and the same be heard on merit**

The Application is premised on the grounds that the plaintiff's amended plaint raises triable issues which ought to be ventilated through trial.That when the suit was coming up for dismissal for **want of prosecution,** the advocate holding brief for the Plaintiff/ Applicant was seeking time and was and/ or still desirous of setting this matter for hearing. Further that it is trite law that the mistake of the advocate should not be visited upon the client and therefore the plaintiff inthis case should not be condemned unheard.

In his supporting Affidavit, sworn on **4th June 2019**, **Vincent Kiptoon**an Advocate of the High Court of Kenya practising as such in the Firm of **Kiplagat& Company Advocates** duly instructed by the Plaintiff, averred that on **31st October 2019,** the advocate who was handling the matter then, was indisposed and he instructed his assistant to request an Advocate to hold his brief. He contended that the instructions to the Advocate holding the advocates brief was to seek more time as the Plaintiff/Applicant was still desirous of setting the matter down for hearing. He further averred that the Advocate holding **Mr. Osiemo's** brief made an inadvertent omission and/or mistake by failing to raise to the court this issue that the Plaintiff / Applicant was still desirous of settling the matter down for hearing.

It was his contention that the Plaintiff/Applicant has a right to be heard and has alwaysbeen desirous of presenting its case, bearing in mind that the Plaintiff/Applicant has already filed her list and bundle of documents and witness statements and is ready to set the suit down for hearing. That the inadvertent omission and/or mistake of failing to raise the issue that the plaintiff was seeking time and was and/ or still desirous of setting this matter for hearing should not be visited upon the Plaintiff/ Applicant. He further averred that no party will suffer any prejudice if the suit is reinstated and therefore it isin the best interest of justice that the suit be reinstated.

The Application is opposed and the 1st and 2nd Defendants/ Respondents filed Grounds of opposition date**11th July 2019** and opposed the Application on the grounds that; the issue of the alleged mistake and/or omission made by the unknown and unnamed advocate that saw the suit dismissed for want of prosecutionon **31st October 2017*suo moto***, is a matter of evidence that can only be addressed by the said Advocate. Further even if one were to assume that the counsel who held brief on behalf of the Plaintiff's/Applicant's Advocate on **31st October 2017,** made a mistake by not seeking more time to prosecute this suit, which allegation remain unproven, the Plaintiff/Applicant

has not discharged her burden by even remotely attempting to explain her non-prosecution of the matter since **10thNovember2015,** when it was last in court before **Hon. lady Justice Gitumbi,** who directed that it be fixed for hearing at the registry on priority basis.

Further that it is close to one and half years since dismissal of this suit by this Honourable Court for want of prosecution (**suo moto)** and the filing of the instant application which invariably means that even if the court had been satisfied as to the reasons not to dismiss this suit **31st October 2017**, which it wasn't the suit would still be ripe for dismissal once again by the court on its **motion** for want of prosecution.Further that prior to its dismissal, this suit had been inactive to over close to **two(2) years** and after its dismissal, it has been inactive for close to another one and half **(1 ½) years**, before filing of the instant applicationa clear demonstration that the Plaintiff/ Applicant is not interested in prosecuting the suit rendering the instant application an abuse of the process of this honourable court and should be dismissed with costs to the 1st and 2nd Defendants/ Respondents.

That it is trite law that a counsel who holds brief should have full instructions to deal with the matter for all intents and purposes and it is the responsibility of the principal advocate to fully brief his/her agent Advocate and blaming the unnamed counsel who held brief for the Plaintiff's/ Applicant's Advocate and impugning his conduct amounts to professional misconduct for which the Plaintiff/ Applicant is at liberty to lodge a complaint with the relevant institutions as by law provided. Further that the conduct of the plaintiff and the nature of her delay in prosecuting this matter remains unexplained and is inexcusable as it has gravely prejudiced the 1st and 2nd defendants from enjoying their right to quiet possession and of the suit property that is registered in their names.

The Application was canvassed by way of written submissions andthe Plaintiff/Applicant through the Law Firm of **Kiplagat& Company Advocates,** filed her written submissions on **15th November 2019** and submitted that an error by an Advocate should not be visited on an innocent litigant . The Plaintiff/Applicant relied on the case of **Belinda Murai& Others…Vs… Amos Wanaina(1978),** where the Court held that;

> **"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 interest of Justice dictate. It is known that Courts of Justice themselves make mistakes which is politely referred to as erring in their interpretation of the laws and adoption of a legal point of view which Courts of appeal sometimes overrule."**

This Court was also urged to rely on the case of ***Kasama Kimani….Vs…Jane Wangechi Kimani (2018) eklr***in which this Court allowed an Application to reinstate the suit that had been dismissed for want ofprosecution.

It was further submitted that the dismissed Amended Plaint raises triable issues andit is in the interest of Justice that it is reinstated. It was the Plaintiff's / Applicant's further submission that the Court ought to exercise its discretionary powers in its favour for the ends of Justice and set aside the orders dismissing the suit. It was also submitted that the guiding principle under which the Application is brought clearly gives the Court the judicial authority to administer justice without undue regard to technicalities. Therefore, the Applicantsubmitted that she has a constitutional right under **Article 50,** of the Constitution to have the suit heard and resolved and that can only be realized if the suit is reinstated.

The 1st and 2nd Defendants/Respondents through the **Law Firm of Kipkenda& Company Advocates,** filed their written submissions on **17th December 2019,** and submitted that there is no Affidavit by the Plaintiff/ Applicant filed in support of the instant Application explaining the non-prosecution of the matter. They also submitted that the test for dismissal of a suit for want of prosecution is stated in the case of **Ivita…vs….Kyumbu(1984) KLR 441** where the Court held that;

> **"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the 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. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.**

Further that the conduct of the Plaintiff/ Applicant and the nature of the delay in prosecuting the matter remains unexplained and no satisfactory and sufficient explanation for the delay had been given andthat the delay has gravely prejudiced them. The Court was urged to dismiss the instant Application.

The Court has carefully perused the Application and the documents in support, together with the ***Replying Affidavit***. The Court finds that the issue for determination is ***whether the Application is merited.***

Order 12 Rule 7 **of** the ***Civil Procedure Rules*** 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. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in ***Patel….Vs….E.A Cargo Handling Services Ltd (1974) EA 75,*** held that:-

> **"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to feter the wide discretion given it by the Rules.''**

In deciding further on whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-prosecution of the suit and whether an injustice will be occasioned if the Application is allowed.

The Applicant has averred that the Court should allow this Application because it is the Advocate's mistake that occasioned the matter to be dismissed. It is the Applicant's contentionthat the mistake was caused when the Advocate sought to hold brief did not indicate that the Plaintiff/ Applicant was willing and deliriousto prosecute the matter.

In the case of ***Shah….Vs…Mbogo (1967) EA 166*** **,** the Court stated that:-

> **"This 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.''**

The Court has perused, the Court file and noted that when the matter came up for Notice to Show cause on the **31st October 2017**, the Applicant's Advocate holding brief for **Mr. Osiemo** stated that **Mr. Osiemo** was seeking for more time to seek for proper instructions from his clients. It then means that at that juncture, the Applicant had not given any instructions to her Advocates. Though the Respondent has alleged that the Advocate holding brief had misrepresented the instructions that were granted to him, the Court notes that the Supporting Affidavit was not sworn by **Mr. Osiemo,** who was the instructing Advocate and that it has not been divulged whether or not**Mr. Osiemo** is still working in the said Firm of Advocates. Further the Court would have expected that the Court Assistantthat was sent to seek counsel to hold brief would also have sworn an Affidavit stating these facts.

It is not in doubt that the suit was dismissed in the year **2017**, and the Application seeking reinstatement was brought before Court in the year **2019.** That would mean from the year **2017,** the next cause of action was actually taken in the year **2019**. It is this Court's considered view that if such a major misrepresentation was made, and the Applicant's Advocates havingbeen present in Court by representation by his assistant, would then move swiftly to rectify the same which did not happen. Therefore,this court is not satisfied with the explanation that the Advocate holding brief misrepresented the instructions given to him as no evidence has been adduced to prove the same.

Assuming on the day that the suit was set for dismissal, the Applicant had contended that they were still desirous of prosecuting the suit, would the Court then have been satisfied with the answer? In this Court considered view, that would not have been a justifiable answer. Calling Party to show cause requires that a good and valid explanation should be given on why the party had not taken steps to prosecute the matter and the mere desire to prosecute the matter without taking steps to prosecute it, is not enough explanation.

No explanation has been tendered to this Court as to why the suit was not prosecuted from the year **2015** to the time it was in Court in **2017.**Furthermore, no evidence has been tendered as to why the Plaintiff/ Applicant did not move the Court after the matter was dismissed in **2017** and only sought for the setting aside in **2019**. Without any explanation for the delay occasioned, even if the Advocate had misrepresentedthe instructions, the Court is not satisfied that the Plaintiff/ Applicant did her part and it would seem that she is privy to the default having failed to grant her Advocates instructions to proceed. See the case of ***Gideon MoseOnchwati….Vs….Kenya Oil Co. Ltd & Another (2017) eKLR*** cited the case of ***Shah….Vs…Mbogo*** and***Ongwom …Vs….Owota,*** where the Court held that;

> **"Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate , is bound by the acts and omissions of the advocates in the course of representation ,in applying that principle , Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequence s of the advocates default unless the litigant is privy to the default or the default results from failure , on the part of the litigant , to give the advocate due instructions.**

In applying the above principle, the Court finds that there are no sufficient reasons to warrant it to exercise its discretion to set aside the orders dismissing the suit. Though the Applicant has contended that he has a right to be heard and that that right should not be taken away, it is also not in doubt that the Respondents have the right to an expeditious and effective trial.

The Applicant had been given an opportunity to ventilate her issues and prosecute her suit but she failed to do so in good time. Requiring the Respondents to contribute to prosecute a matter that was filed in **2009**, **19** years later is prejudicial to the rights of the Respondents. The matter having been dismissed in the presence of the Plaintiff's/ Applicant's Counsel, if an omission had occurred then the Court would have expected the sad Advocates to move swiftly, but he failed to do so. To expect the Court to set aside the orders made without justifiable cause or explanation as why the suit was never prosecuted, is not proper.

The upshot of the foregoing is that the Applicant's ***Notice of Motion Application*** dated ***4th June 2019is not merited***. The **same is dismissed entirely with costs to the 1st and 2ndDefendants/Respondents**.

It is so ordered.

Dated, signed and ***Delivered*** at **Thika** this **9th day** of ***July*** **2020.**

L. GACHERU

JUDGE

9/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With consent and virtual appearance of:

No consent for the Plaintiff/Applicant

Mr. Wachira for the 1st Defendant/Respondent

No consent for the 2nd Defendant/Respondent

No consent for the 3rd Defendant/Respondent

No consent for the 4th Defendant/Respondent

L. GACHERU

JUDGE

9/7/2020