



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 215 OF 2014

JAMES CHUMA LUGO.....PLAINTIFF

VERSUS

FUAAD MOHAMED

ZAINABU ALLI.....DEFENDANTS

RULING

1. By a Notice of Motion dated 15th March 2019 brought under Order 51 Rules 1 and 15 and Sections 3A and 80 of the Civil Procedure Act and all other enabling provisions of the law, the Plaintiff/Applicant seeks orders to set aside the order made on 19th October, 2017 dismissing the suit and for the suit to be reinstated. The application is supported by the affidavit of James Chuma Lugo sworn on 15th March, 2019 and is premised on the grounds that the matter was on 19th October 2017 dismissed for want of prosecution. That the said dismissal was wrongful and/or unfair because the plaintiff was not given an opportunity to be heard before the court made the decision. The plaintiff states that he was not served with a notice to show cause prior to the matter being dismissed on 19th October 2017. That the notice served was for 26th October 2017. That the plaintiff stands to suffer irreparable loss and damage if the orders sought are not granted. The plaintiff contends that no prejudice will be occasioned to the defendants if the application herein is allowed since parties will have an opportunity to be heard and a determination of the suit reached on merit.

2. In opposing the application, the defendants filed grounds of opposition dated 28th June, 2019 on the grounds that the application is incompetent and bad in law as the court has no jurisdiction under Section 80 (a) of the Civil Procedure Act to reinstate a suit dismissed for want of prosecution, and that there is no proof of discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge and that there is no mistake or error apparent on the face of the record that has been proved to warrant this court invoke its jurisdiction and power under Section 80 (a) of the Civil Procedure Act. The defendants aver that Sections 80 (a) and 3A of the Civil Procedure Act do not apply and that the Application violates their rights under Articles 48, 50 (2) (e) and 159 (2) (b) of the Constitution and that no cogent reasons have been given to move the court to reinstate the suit.

3. The application was canvassed by way of written submissions. Only the plaintiff filed his submissions on 31st October 2019.

4. I have considered the application. First I will consider the defendants' objection that the application should fail because the law cited on the body of the application is wrong. Order 51 Rule 10 (1) of the Civil Procedure Rules states as follows:

“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.”

5. I am guided by the above law and also persuaded by the holding in the case of **Mbaya Nzulwa –v – Kenya Power and Lighting Co. Ltd (2018)eKLR** cited by the applicant in which Otieno J stated:

“That howsoever, is not to say that an application by an applicant citing the wrong provision the court or totally failing to cite any law would divest the court of the jurisdiction to answer to the calls of its very existence, look at a party's complaint and determine it according to the law whether that law be cited or misquoted. I think this to me is the natural and irrefutable character of the institution called the court of law. A court expects parties to guide it on the applicable law they seek to rely upon but the dereliction of that duty by the party takes no bit of the court's duty to apply the applicable law. That to me is the justification for the provision Order 51 Rule 10 Civil Procedure Rules which mandates.”

6. It has also been held that a judge in determining a dispute is not restricted to the provisions of the law cited by a party. See **Kwanza Estates Ltd –v- Dubai Bank of Kenya Ltd (2016) eKLR.**

7. Order 17 Ruled 2 (1) of the Civil Procedure Rules provides that “**in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction may dismiss the suit.**”

8. The record shows that this matter was last in court on 12th July 2016. It was then listed on 19th October, 2017 for notice to show cause why the same should not be dismissed for want of prosecution under Order 17 rule 2(1). None of the parties attended court on 19th October, 2017 and the court dismissed the case for want of prosecution. The plaintiff has stated that he was served for 26th October 2017 but apparently the matter came up for dismissal on 19th October, 2017. He states that his advocate took time tracing the file which had been filed away in the archives. The plaintiff has exhibited a copy of a notice to show cause for 26th October, 2017. The defendants have not controverted the plaintiff’s averment. If indeed a notice was served for 26th October 2017 by which time the suit had already been dismissed, and possibly the file had been filed away in the archives, then that is a good reason to grant the orders sought in the application. No doubt the overriding objectives of the court would come to the aid of the plaintiff.

9. For the foregoing reasons, I am satisfied that the plaintiff’s application dated 15th March 2019 has merit. The defendants have not demonstrated how they will suffer prejudice if the orders sought are granted and the suit heard and decided on merit.

10. The upshot is that the notice of motion dated 15th March 2019 is allowed. The orders made herein on 19th October, 2017 dismissing the plaintiff’s suit is set aside and the case is reinstated. Costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 7TH day of July 2020.

C.K. YANO

JUDGE

In the presence

Yumna Hassan Court Assistant