



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 175 OF 2011

EUNICE NYAKIUMBA WAWERU.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

JAMES MUTURI GATURA.....2ND DEFENDANT

ANTHONY KAMAU WACHAGA.....3RD DEFENDANT

RULING

1. This suit was filed in 2011. On 19/12/2017, the court directed the plaintiff to file and serve a bound, paginated, and indexed bundle containing pleadings, witness statements and documentary evidence within 45 days. In default of compliance, the suit was to stand dismissed. The pre-trial bundle ordinarily forms the basis of the subsequent trial. When the matter subsequently came up in court on 17/5/2018 for the purpose of fixing a hearing date, it was noted that the plaintiff had not complied with the order of 19/12/2017 and a hearing date could not be set in the circumstances. At the oral request of the plaintiff, the court extended the compliance period by 21 days. In default of compliance within the extended period of 21 days, the suit was to stand dismissed.
2. When the matter subsequently came up in court on 18/9/2018, Ms Kiget, counsel for the plaintiff, indicated to the court that, the plaintiff had not complied. She sought extension of the period. Having previously extended the period on the basis of an oral application, the court directed the plaintiff to file and serve a formal application if she was serious about reinstatement and prosecution of the suit.
3. Subsequently, the plaintiff brought a notice of motion dated 25/9/2018 seeking reinstatement of the suit and enlargement of the period within which to comply with the order requiring the plaintiff to file and serve a pre-trial bundle. That application is the subject of this ruling.
4. The application was supported by the plaintiff's affidavit sworn on 25/9/2018. She deposed that non-compliance was caused by an inadvertency on part of her advocate on record. She added that there was a mix-up in the records of her advocates, in that the counsel who handled the matter on 17/5/2018 did not convey to the law firm the orders of the court which required compliance. She annexed an unbound and unpaginated pre-trial bundle filed on 26/9/2018 and stated that she had since complied. She pleaded with the court to reinstate the suit.
5. The application was argued through written submissions by the plaintiff's advocates, M/s Arusei & Company Advocates, dated 16/9/2019. Counsel for the plaintiff/applicant submitted that the applicant was humbly seeking exercise of discretion by the court and was profusely apologetic for the inadvertency which had resulted in non-compliance with the order of the court in terms of the requirements of Order 11 of the Civil Procedure Rules. Relying on the decisions in (i) **Belinda Murai & others v Wainaina [1978]**; (ii) **Ali Mohamed Haji Suleiman Body Builders Ltd V Jivray & another (1990) KLR 224**; and (iii) **Philip Chemwolo & another v Augustine Kubede (1982-88) KAR 103**, counsel urged the court to exercise discretion and reinstate the suit.
6. The 1st defendant opposed the application through a replying affidavit sworn on 10/2/2020 by its Legal Counsel, Mr Jackson Nyaga. He deposed that this suit was filed on 10/5/2011 and for 8 years, the plaintiff had not taken any step to prosecute it. He added that the plaintiff had asked for extension of time for compliance since 2017. He argued that the plaintiff's failure to comply, despite extension of time by the court, was a demonstration of her laxity and lack of seriousness in prosecuting this suit.
7. The first defendant further opposed the application through written submissions dated 10/2/2020 filed through the firm of Kimondo Gachoka & Company Advocates. Counsel for the 1st defendant submitted that the issue which fell for determination in the application was whether the applicant had satisfied the principles for reinstatement of a suit. Counsel argued that the plaintiff did not deserve a reinstatement order because she had failed to comply with the Civil Procedure Rules and she had twice ignored the orders of the court; conduct which demonstrated lack of seriousness on her part. Relying on the decision in **John Waweru Mwangi & another v District Land Registrar, Nakuru & another [2019] eKLR**, counsel urged the court to dismiss the application.
8. The 3rd defendant opposed the application through a replying affidavit he swore on 14/2/2019. He deposed that the suit herein was

instituted in 2011 and he had been prejudiced by the plaintiff's failure to prepare the suit for hearing. He added that he was unable to enjoy quiet possession of the suit property due to endless litigation by the plaintiff. He further deposed that the plaintiff had continued to enjoy interim orders issued on 31/1/2012 to his prejudice.

9. The 3rd defendant further opposed the application through written submissions dated 9/9/2010 and filed by M/s Kinyua Mwaniki & Wainaina Advocates. Counsel argued that failure by the plaintiff to ensure that his case, filed in 2011, was heard and determined promptly, was a clear indication that she was no-longer interested in prosecuting the suit. Relying on the decision in **Elias Mwororo Kamau v Cooperative Bank of Kenya Limited [2018] eKLR**, counsel submitted that by deliberately failing to prosecute this suit while aware that she was enjoying interim orders, the plaintiff was engaged in an abuse of the court process. Counsel urged the court to dismiss the application.

10. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key questions in this application. Two questions fall for determination in the application. The first question is whether the application has satisfied the criteria upon which a trial court exercises jurisdiction to reinstate a dismissed suit. The second question is whether, in the circumstances of this suit, the *status quo* order issued by Nyamweya J on 31/1/2012 should be retained. I will make brief pronouncements on the two questions sequentially in the above order.

11. The court is invited to exercise discretionary jurisdiction within the context of an application for reinstatement of a dismissed suit. The guiding principle in the exercise of this jurisdiction was laid down in **Mbogo & Another v Shah EALR 1908** at page 13. In summary, the court's discretion to set aside an order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

12. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, Madan J articulated the following approach to be adopted when dealing with the question as to whether or not a party should be completely shut out of a court of justice on account of a mistake:

“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.....”

13. Apaloo JA set out the following approach to a similar question in **Philip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103**.

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

14. In the matter under consideration, the dismissal order ensued as a result of default clauses in the compliance orders of the court. The plaintiff subsequently moved the court and explained that there was inadvertency on the part of counsel who was seized of the matter, in that the said counsel did not convey the orders of the court to the law firm or to the plaintiff. This, in my view, is an excusable mistake.

15. In my view, in the absence of evidence to the contrary, and taking into account the nature of the dispute in this suit, the ends of justice dictate that I allow the substantive dispute to be adjudicated upon and resolved with finality based on the merits of the parties' respective cases. The two defendants who opposed the application will be indemnified through an award of costs assessed at Kshs 15,000/- for each defendant.

16. The second question is whether the *status quo* order issued by Nyamweya J on 31/1/2012 should be retained. The 3rd defendant opposed the retention of the *status quo* order and contended that the order had prejudiced him. I have reflected on that objection. The said *status quo* order reads as follows:

“The status-quo in the meantime shall be that the plaintiff will continue to be in occupation of the suit property, namely, LR No. Ngong/Ngong/18944 until further orders are given by this court; and that the plaintiff shall not in any way or manner interfere with the 2nd defendant's title to the said suit property”

17. The above order was a culmination of a determination relating to a plea by the plaintiff seeking injunctive orders. The Learned Judge dismissed the plea for injunctive orders but found it in the interest of justice to preserve the suit property in the above manner. Because the *status-quo* order is in the nature of a preservatory order preserving the suit property and is directed at both parties, it is my view that it should be retained. If parties were allowed to deal with the suit property in whichever manner they desire, the suit property may be disposed and the court may end up engaging in an academic exercise.

18. In light of the foregoing, the plaintiff's notice of motion dated 25/9/2018 is disposed in the following terms:

a) The plaintiff's suit herein is reinstated on condition that the plaintiff shall pay the 1st and 3rd defendants throwaway costs of Kshs 15,000 each within 30 days from today.

b) The plaintiff shall file and serve a single, bound, paginated, and indexed bundle containing pleadings, witness statements and documentary evidence within 30 days.

c) In default of any of the above, the reinstatement order herein shall stand vacated and the plaintiff's suit shall stand dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Ms Tanui holding brief for Mr Arusei for the plaintiff

Ms Mungai for the 1st defendant

Court clerk - June Nafula