



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL CASE NO 1118 OF 1999

FREDRICK KANYIRI WERU.....PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY.....1ST DEFENDANT

ANDREW WANYOIKE.....2ND DEFENDANT

RULING

1. For determination by the Court was the Plaintiff's application dated and filed on 10th July 2015. The application was filed under the ambit of Orders 45 Rules 1(1), (a), 2(1), 50 Rule 6, 51 Rule 1 of the Civil Procedure Act and Section 3 of the Civil Procedure Act. The Applicant sought the following orders *inter alia*;

1. THAT this honourable Court do review its orders of 23rd April 2015 dismissing this suit for failure on the part of the Plaintiff to file and serve the necessary pleadings and documents within twenty one (21) days;

2. THAT the honourable Court do reinstate the instant suit;

3. THAT the honourable Court do extend the time for the Plaintiff to file and serve the necessary pleadings and documents;

4. THAT the Plaintiff's witness statement and pre-trial questionnaire filed on 22nd June 2015 and 10th July 2015 respectively be deemed as properly filed and adopted to form part of the Court's pleadings and documents;

5. THAT the instant court file be placed in the strong room for safe keeping, custody and ease of access by Court and litigants herein;

6. THAT the costs be in the cause.

2. The application was predicated upon the grounds that the instant file could not be traced at the registry and that it was therefore impractical to comply with the orders of the Court issued on 23rd April 2015. Further, it was reiterated that the file was made available to the Plaintiff on 18th June 2015 after the intervention of the Plaintiff and the Deputy Registrar. In the affidavit in support of the application sworn

on 10th July 2015, the Plaintiff in deponing, reiterated the grounds as adduced in the application, and further, that it would be just and mete that the time granted by the Court for filing the documents be extended to allow for the Plaintiff to file and serve pleadings as ordered by the Court.

3. The application was opposed by the 1st Defendant through its Grounds of Opposition filed on 20th July 2015. In stating that there were no grounds set out in the application to warrant the grant of the orders sought, it was the 1st Defendant's contention that the application as file was misconceived, vexatious, frivolous and an abuse of the process of the Court. Further, it was averred that the Plaintiff was guilty of laches, and that he was undeserving of the exercise of the Court's discretion in his favour. Reference was made of the Plaintiff's past conduct of the matter and the 1st Defendant called for the dismissal of the application.

4. The Court has considered the application, the supporting affidavit thereto and the grounds of opposition in objection to the application filed by the 1st Defendant. The application seeks for the review of the orders of the Court issued by Gikonyo, J on 23rd April 2015. The orders as issued by the Court were clear and unambiguous, and it was encumbered upon the Plaintiff to ensure compliance with the same lest the matter stood to be dismissed.

5. The Plaintiff in his affidavit reiterated that he had recorded his statement with his advocates on record on 27th April 2015. On 30th April 2015, the said advocates visited the registry to file the witness statement, but were unfortunately, unable to do so as the relevant court file was purportedly missing. Nothing much is said of any steps taken by either the Plaintiff or his appointed advocates in the meantime, save for the Plaintiff taking it upon himself to visit the registry on 17th June 2015. It is during this visit that the Plaintiff attests that he met with the Deputy Registrar and by the following day, that is 18th June 2015, they were able to trace the court file and file the witness statement. The pre-trial questionnaire was not filed until 10th July 2015. No reason was adduced for the late filing.

6. In seeking an equitable relief, the person seeking grant of the Court's discretion must also do equity. On 23rd April 2015, the Court gave the Plaintiff a lifeline to sustain his suit, saving the same from imminent dismissal. The orders issued were conditional, and it was encumbered upon the Plaintiff, in his quest to sustain the suit, to comply with the conditions as set out therein. The conditions, as could be seen, were not so arduous or strenuous, and that the Plaintiff, had he been a diligent and conscientious individual keen at executing his cause, could have completed the task within the time frame given by the Court. No such diligence or industry has been portrayed by the Plaintiff; the letter dated 11th June 2015 addressed to the Deputy Registrar was written after the lapse of the twenty-one (21) day grace period given by the Court. Further, the Plaintiff did not pay the costs of Kshs 5,000/- as ordered by the Court, which was also a pre-condition for the preservation of the suit.

7. The Plaintiff, in his negligence and or failure to comply with the conditions as set out by the Court on 23rd April 2015, cannot thereafter come before the Court to seek its discretion in what can be seen as clear disregard and contemptuous conduct of the Plaintiff. This suit was filed sometime in 1999, and for such reason, it would have been prudent for the Plaintiff to seek to expedite the hearing of the same. However, in seeking to justify the reinstatement of suit, the Plaintiff relied on the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation)(2015) eKLR** in which the Court, in reinstating a dismissed suit, held *inter alia*;

“But when I place on scale the concerns by the Defendant against those of the Plaintiff, I'm inclined to reinstating the suit rather than interring its remains upon a permanent legal death. A legal resurrection of the suit as enabled by equity is in order. Accordingly, I set aside the order of dismissal made by the Court on 13th December 2011 and reinstate the suit for hearing and disposal expeditiously.”

8. The Court cannot grant a review of orders under Order 45 Rule 1(1)(a) and 2 of the Civil Procedure Rules, as the Plaintiff has not been able to establish a mistake or error apparent on the face of the record,

there was no new and important matter of evidence that had been discovered, there was no due diligence on the part of the Plaintiff, and in any event, there was no sufficient reason adduced by the Plaintiff. In the case cited by the Plaintiff in **John Nahashon Mwangi v Kenya Finance Bank Limited** (supra), the Court had issued a rider, a pre-condition that had to be fulfilled by the Plaintiff in order for the Court to reinstate the suit: the Plaintiff to comply with the pre-trial requirements and set down the matter for hearing with sixty days. The reinstatement of the suit was predicated upon the Plaintiff complying with the conditions set out by the Court, failure to which, the matter would stand dismissed.

9. Further, the Court cannot exercise its discretion capriciously and willfully and as such cannot extend the time limit for filing the documents as ordered by the Court on 23rd April 2015, unless it was shown, that the Plaintiff was deserving of such discretion for the Court to exercise its mandate under Order 50 Rule 6 of the Civil Procedure Rules. In **Shah v Mbogo & Another (1967) EA 116** on the exercise of the Court's discretion, Harris, J stated as follows;

“This discretion is intended so 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 to, whether by evasion or otherwise, to obstruct or delay the course of justice.”

Also in **John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation)** (supra), it was stated *inter alia*;

“The decision of the Court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law.”

10. In consideration of the foregoing, the Court finds that the application filed by the Plaintiff is unmeritorious, and the same is dismissed with costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of December, 2015.

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C. KARIUKI

JUDGE