



REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 50 of 2010

PRISCAH KHISA MISIKHO PLAINTIFF/APPLICANT

VERSUS

ELIAS BIKETI DEFENDANT/RESPONDENT

RULING

In an application dated 20th September 2012, the applicant has moved this court seeking orders of review and/or setting aside the order that dismissed her suit. She also sought for stay of execution proceedings commenced by the defendant/respondent.

Mr. Ocharo Kebira advocate swore and affidavit in support of the application. He contends that they were never served with notice of dismissal. He further averred that in 2011 the diary was full/had been closed and were therefore startled by the dismissal on 23rd August 2011. He learnt of the dismissal when his client brought to him notice to show cause served on her. Mr. Onkangi advocate also swore a further affidavit to counter issues raised by the respondent in his replying affidavit. He also stated that their firm was not served with dismissal notice.

He did not diarise the mention given in court hence the reason non of them attended court on the date extended for the matter to be dismissed for want of prosecution. The respondent has filed a replying affidavit in opposition to the application. He swore that parties were served with dismissal notice and he indicates to have annexed such notice although I see non annexed in his affidavit.

It is his contention that the plaintiff's counsel was in court when the matter was fixed for 3rd march 2011. No one appeared in court on that date for the plaintiff.

Mr. Onkangi then appeared on behalf of plaintiff on 18th April 2012 when defendant's bill was due for taxation and requested for more time to give his client time to pay the costs by instalments. His request was allowed and taxation deffered to 2nd May 2012. The respondent has also annexed judgement of the criminal case alleged by the applicant to be pending which shows he was acquitted of the charges on appeal. At paragraph 19, he states the applicant is guilty of laches, is intent in wasting the precious judicial time and prayed for the dismissal of the application.

I have perused the record of the court which reveal the following; On 20th July 2011 earlier (i presume during morning call over), the court by its own motion dismissed the suit for want of prosecution when both parties were absent. Later same day, Mr. Onkangi appeared for plaintiffs and Mrs. Mumalasi for defendant. Mr. Onkangi requested the court to set aside the order of dismissal, which the court did.

Mr. Onkangi thereafter explained to the court that they had not moved the court because the plaintiff is old and ailing. He prayed for a month to confirm if she is well and that she had relocated from where

they were living. This application was opposed but the court proceeded to grant an adjournment to 3rd August 2011. on 3rd August when the matter came up, no representative was present for plaintiff. The suit was thus dismissed for want of prosecution.

The defendant then filed their bill for taxation and fixed it for 18th April 2012. On 18th April Mr. Onkangi was present for plaintiff and Mrs. Mumalasi for defendant. The assessment was rescheduled to 2nd May 2012 by consent of the counsels. On 2nd May 2012, no representative of plaintiff appeared and the bill was taxed as presented.

From the above record, it is not correct for the plaintiff's counsel to state under oath that they were never aware of the notice of dismissal when Mr. Onkangi participated in the proceedings of dismissal for want of prosecution. No where in his submission to the court does he mention that he was not aware the case was coming up for dismissal. The reason he gave is that **"we have not moved the court because our client is old and ailing"**. He has also not explained why he missed to attend the court on the 2nd May 2012. Was it because he did not diarise again?

Once the taxation was done, the notice to show cause was fixed for 5th September 2012 when counsel alleges in his affidavit he learnt of the dismissal. If the diary was full in 2011 as put by Mr. Ocharo, he has given no explanation why he had not taken any steps to have this matter fixed for hearing between January – August 2012. The applicant's counsel has therefore chosen the wrong path of outrightly lying to this court. It is obvious they were aware of the dismissal and is only lying to cover up why they delayed in filing the present application for setting aside which has been filed after one year from the date of dismissal of the suit.

In his submissions, Mr. Ocharo has relied on article 159 (2) of the Constitution that the dismissal was a procedural technicality which article 159 provides should be disregarded. I hold a different view that dismissal for want of prosecution is not a procedural technical as given under article 159.

There are no activities/businesses of the court which took place on the 3rd March 2011 which date is referred to both by the applicant and respondent in their pleadings. As indicated it was 3rd August 2011 therefore counsel's submissions of 3rd March 2011 are misplaced. On the cited passage of Halsbury's Laws of England part (ii) of it reads **"The power to dismiss will not be exercised by the court unless...that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that is not possible to have a fair trial of the issues in action or is likely to cause substantial prejudice to the defendant..."**. This implies court would dismiss a suit in such an instance which I find similar to the present application. On the case law of Bungoma High Court Civil Appeal no 84 of 1999, the scenario was totally different from the present circumstance. The appellant's counsel in that appeal endeavoured to have someone hold his brief to explain his absence.

I would have therefore dismissed this application given the observations made above. However given this is a land dispute between mother and step son and it is coming out the dismissal was based on non-attendance of counsel, I will exercise my discretion in favour of the applicant for mistake of her advocates but at a cost. The Respondent has gone to great lengths of attending court on dismissal dates as well as taxation of his bill including service of notice to show cause upon the applicant why she cannot be committed to civil jail for non-payment of their taxed bill. The plaintiff/applicant also did nothing for over a year after the suit was dismissed hence making the respondent believe the suit was over thus he will suffer prejudice.

1. I therefore set aside the order of the court of 3rd August 2011 dismissing her suit and reinstate it forthwith.
2. I order that she pays the respondent costs of the application.
3. I order the applicant to pay costs incurred in the interim between 21st March 2012 to 5th September 2012 (in attendances) assessed by this court at Kshs. 10,000/= to be paid within 45 days from the date

hereof. In default execution to issue.

4. The applicant shall also comply with the Civil Procedure Rules within 21 days from today by filing and serving the respondent with her documents and witness statements if any.

5. The defendant/respondent to also comply within 14 days from date of service upon them of plaintiffs documents by filing and serving their respective documents.

RULING SIGNED, DELIVERED AND READ in open court this 9th day of May 2013.

A. OMOLLO

JUDGE.