



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 319 OF 2016

JOHNSON ONDIMU MOGUSU.....PLAINTIFF/APPLICANT

VERSUS

ELKANA MOENGA ONDIEKI

CHRISTOPHER NTENGA ONGERA

CHRISTOPHER MOMANYI.....DEFENDANTS/RESPONDENTS

RULING

Introduction

1. By a Notice of Motion dated 24th June 2020 the Plaintiff/ Applicant filed an application for setting aside of the order of dismissal of the suit herein made on 29.7.2019 together with all consequential orders. The application is premised on the grounds that the orders were made without the knowledge of the applicant and that the applicant's failure to attend court was not deliberate. He adds that he is still keen on pursuing his case.

2. These grounds have been amplified in the applicant's supporting affidavit. In the said affidavit he avers that he was not aware that the matter had been listed for a Notice to Show Cause why the suit should not be dismissed for want of prosecution as his former advocate failed to inform him of the same. He depones that he was surprised when auctioneers went to his home in a bid to execute warrants of attachment against him.

3. The application is strenuously opposed by the Respondents through the affidavit of Elkana Ondieki Moenga, the 1st Defendant /Respondent sworn on his own behalf and on behalf of the 2nd and 3rd Respondents. In the said affidavit the 1st applicant gives a blow by blow account of what transpired in the suit upto the time it was dismissed. The long and short of it is that the Plaintiff having instituted the suit failed to take any action to set it down for hearing with the result that it was dismissed for want of prosecution in the presence of counsel holding brief for the applicant's counsel after he failed to give a satisfactory explanation why the suit should not be dismissed for want of prosecution.

4. The respondent argues that since the order of dismissal of the suit was made in the presence of the applicant's counsel, the same cannot be set aside and that the only avenue open to the applicant is to lodge an appeal. In his view, granting the prayers sought would be tantamount to this court sitting on appeal on a court of equal jurisdiction. It is the Respondents' averment that the applicant had a duty to prosecute his case with dispatch and he cannot be heard to blame his previous advocate for failing to keep him informed. It is further deponed that even though the applicant admits that he discovered that his suit had been dismissed when auctioneers visited his home, he did not take immediate action and instead moved the court after a period of 4 months. Lastly the 1st Respondent depones that the court is functus officio as a decision was made after the applicant failed to explain the delay in prosecuting the case.

5. In addition to the Replying affidavit, the Respondent filed a Notice of Preliminary Objection dated 7th July 2020 in which he raised the following points:

- i. That the instant application is premature, misconceived, bad in law and otherwise untenable
- ii. The subject application has been filed/mounted by a stranger, albeit without the requisite capacity and/or locus standi. Consequently, the application has been filed in a vacuum.
- iii. The instant application is barred and/or prohibited by virtue of the provisions of Order 9 Rules 6,7 and 8 of the Civil Procedure

Rules, 2010.

iv. The Honourable court herein is devoid and/or divested of jurisdiction to entertain the instant application on account of the proceedings held on 29th July 2019, which were taken in the presence of the Plaintiff/Applicant.

v. The instant application and the reliefs sought hereunder are calculated to attract and/or invite the Honourable court to sit on appeal on the decision of a court of equal jurisdiction. Consequently, the subject application is bound to occasion judicial absurdity.

vi. The Honourable court is functus officio.

vii. In any event the instant suit and the application amount to an abuse of the process of the court.

viii. The Plaintiff/ Applicant is non-suited.

6. When the application came up for hearing, the court directed that the Preliminary Objection be argued together with the application and that the same be canvassed by way of written submissions. Both parties thereafter filed their submissions.

Applicant's Submissions

7. In his submissions Mr. Soire learned counsel for the applicant submitted on three main issues: whether the application was filed by a stranger, whether the court is functus officio and whether the application is merited.

8. On the first issue, counsel submitted that the application was not filed by a stranger as the firm of Sagwe & Co Advocates and the firm of J.O Soire who currently represent the Plaintiff/Applicant filed a consent allowing the firm of Soire & Company Advocates to come on record in accordance with order 9 rule 9(b) of the Civil Procedure Rules.

9. Turning to the second issue as to whether the court is functus officio, counsel submitted that the applicant was not present when the suit was dismissed for want of prosecution.

10. Lastly counsel submitted that the applicant only learnt of the dismissal when auctioneers went to his home in March 2020 just before the onset of the Corona virus pandemic which disrupted court operations. It is his further submission that the applicant is keen on pursuing his case and he pleads that he be given an opportunity to access the seat of justice.

Respondent's Submissions

11. Conversely, Miss Ochwal counsel for the Respondents submitted that after close of pleadings, the suit was set down for directions of 13th June 2019 but the plaintiff did not attend. The court then fixed the matter for Notice to Show Cause why the suit should not be dismissed on 29.7.2019. On the said date, the counsel who appeared for the plaintiff was unable to give an explanation as to why the suit should not be dismissed and the court proceeded to dismiss the suit for want of prosecution. The defendants subsequently filed their Bill of costs and applied for execution.

12. Counsel framed 4 issues for determination:

i. Whether the honourable court is seized with jurisdiction to grant the orders sought in the face of the orders made on 29.7.2019.

ii. Whether the honourable court is functus officio.

iii. Whether the application has been made timeously and without undue delay.

iv. Whether the plaintiff/Applicant has supplied any explanation for the lapse or failure to prosecute his suit.

13. With regard to the first issue counsel submitted that after filing suit, the plaintiff went to slumber and failed to take any action to fix the case for hearing forcing the court to dismiss the suit for want of prosecution after affording the plaintiff an opportunity to explain the delay. She submitted that to the extent that the decision was rendered in the presence of both parties, the same cannot be set aside under the provisions of Order 12 rule 7 of the Civil Procedure rules, 2010 as it was not made on the basis of any default or non-attendance. It is therefore her submission that the court lacks the jurisdiction to set aside the decision made by a judge of concurrent jurisdiction. She relied on the case of **Okello & Another v Osonga (1988) KLR 198-203** where the Court of Appeal held that a judge cannot set aside the decision of another judge of equal jurisdiction.

14. Turning to the second issue counsel submitted that the issue of the reasons for failure to prosecute the suit having been addressed by a court of competent jurisdiction, the same issues cannot be re-litigated by a court of concurrent jurisdiction. It is therefore her submission that the court is functus officio. She relied on the case of **Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others Petition No. 5 of 2013** (Unreported) for the proposition that a person vested with adjudicative powers exercises those powers only once after which the decision is subject to a right of appeal to a superior body and it cannot be revoked or varied by the same decision-making body.

15. On the third issue counsel submitted that even if the court were to hold that it has the discretion to set aside the order of dismissal, the applicant does not warrant the exercise of that discretion in his favour as he is guilty of laches as he filed the application after a period of

almost 4 months. Counsel cited the case of **Said Swaleim Gheithan Saanum v Commissioner of Lands (Sued through the A. G) & 5 Others (2015) eKLR** for the proposition that the principles in sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes and the said principles cannot be a panacea for breach of rules of procedure. The Court further held that it cannot be fashionable for parties to blame their advocates and disclaim that mistakes made by the advocates whom they have themselves appointed cannot be visited upon them”

16. Lastly, with regard to the fourth issue counsel contended that the applicant had not offered sufficient explanation for the delay in prosecuting his suit and his plea that the suit is a land matter is a not sufficient reason for the court to exercise its discretion in his favour.

Issues for determination

17. Having considered the application, preliminary objection and rival submissions, the following issues fall for determination:

- i. Whether the application has been filed by a stranger.
- ii. Whether the court is functus officio.
- iii. Whether the court has jurisdiction to entertain the application.
- iv. Whether the applicant is entitled to the reliefs sought.

Analysis and Determination

18. It is clear from the record that the firm of Sagwe & Co. Advocates and the firm of Soire & Company advocates filed a consent allowing the firm of Soire & Co Advocates to come on record in line with the provisions of Order 9 rule 9(b) of the Civil Procedure Rules and therefore the assertion that the application was filed by a stranger does not hold true.

19. I will deal with the second, third and fourth issues concurrently.

The plaintiff’s suit was dismissed under the provisions of Order 17 rule 2 of the Civil Procedure Rules. The court having issued a Notice to show cause why the suit should not be dismissed for want of prosecution, both parties attended court through their erstwhile advocates but the plaintiff’s advocate was unable to provide any explanation why no action had been taken by the plaintiff to progress the suit. It is for this reason that the court decided to dismiss the case. This scenario is totally different from one where the case is fixed for hearing and the plaintiff fails to attend either in person or through his advocate.

20. The plaintiff’s explanation that his advocate failed to inform him of the date for the Notice to show cause is neither here nor there as the record shows that the plaintiff was represented on the day the suit was dismissed. Having appointed the said advocate, the plaintiff is bound by his actions. In any case, the plaintiff has not demonstrated what efforts he made to ensure that his case was prosecuted. It is not enough for him to merely blame his former advocate as the case belongs to him.

21. Even assuming that this court had the discretion to set aside the order of dismissal, which is not the case here, it is trite law that it is not in every case that a mistake committed by an advocate would be a ground for setting aside the orders of the Court.

22. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** the court opined thus:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion, it must be exercised upon reason not capriciously or by sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.

23. Similarly, in **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

24. I am constrained to agree with counsel for the Respondent that in a matter where a suit is dismissed in the presence of both parties either

appearing in person or through their advocates, the court cannot revisit the order of dismissal made by a judge of concurrent jurisdiction in the absence of an application for review. The only other option would have been for the applicant to appeal against the order of dismissal. This was made clear in **Okello & Another v Osonga (1988) (supra)** where the Court of Appeal held that it is impossible for one judge of the High court to set aside the decision of another judge of equal jurisdiction, whether on appeal or at first instance. It is therefore my finding that this court is functus officio and it has no jurisdiction to entertain the current application.

25. In the premises of the foregoing the application lacks merit and it is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Kisii this 4th day of November of 2020.

J.M ONYANGO

JUDGE