



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. 340 OF 2015

(FORMERLY CIVIL CASE NO. 77 OF 2005)

WALTER NDWIGA MISHECK.....PLAINTIFF

VERSUS

NJAGI MUGO.....1ST DEFENDANT

(As Legal Representative of PHIDES WAMBUGU MUGO (DECEASED))

JOYCE MARIGU KINEGENI.....2ND DEFENDANT

RULING

1. By a notice of motion dated 24th July 2018 brought under **Order 12 Rule 7 of the Civil Procedure Rules** (hereinafter *the Rules*) the Plaintiff sought the following orders;

a. That this honourable court be pleased to set aside the order issued on 23rd July 2018 dismissing the Applicant's suit and reinstate the same for hearing.

b. That costs of the application be provided for.

2. The said application was based upon the grounds set out on the face of the motion and the supporting affidavit sworn by the Plaintiff on 24th July 2018. It was contended that the suit was dismissed for non-attendance on 23rd July 2018 because the Plaintiff had mistakenly proceeded to the wrong court room. It was stated that on the material day the Plaintiff was waiting to be called before the High Court and that when he finally realized that he was in the wrong court, he rushed to the Environment and Land Court only to find that his suit had already been dismissed.

3. When the said application was listed for *inter partes* hearing on 22nd October 2018, the Defendants' advocate did not attend court hence the Plaintiff was allowed to prosecute the said application *ex-parte*. At the hearing hereof, the Plaintiff submitted that the suit was dismissed owing to his absence for reasons contained in his supporting affidavit. He further submitted that both Defendants were deceased hence he could not prosecute the suit.

4. The court has considered the Plaintiff's said application for setting aside the dismissal order made on 23rd July 2018. The court notes from the record that the suit was not dismissed for **non-attendance** as claimed by the Plaintiff. It was dismissed for **want of prosecution** under **Order 17 Rule 2 of the Rules** after issuance of a notice to show cause under the Rules. The Plaintiff, in fact, annexed a copy of the notice to show cause dated 13th June 2018 to his supporting affidavit.

5. In the circumstances, before the court can exercise any discretion in his favour the Plaintiff is required to show cause why he was unable to prosecute his suit since it was filed on 20th June 2005. The court is aware that it has discretion to set aside a dismissal order made under **Order 17 of the Civil Procedure Rules** but such discretion, like all judicial discretion, must be exercised judicially. It must be exercised upon some reason. It cannot be exercised on the basis of sympathy, caprice or whim. See **CMC Holdings Ltd Vs Nzioka [2004] 1KLR 173**.

6. In the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors [1969] EA 696** it was held, *inter alia*, that;

“The second matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of a Plaintiff to bring his suit to early trial, and he cannot absolve himself of his primary duty by saying that the Defendant consented to the position...”

7. Similarly, in the case of **Abdul & Another Vs Home & Overseas Insurance Co. Ltd [1971] EA 564** the High Court dismissed the Plaintiffs' suit for want of prosecution when they failed to satisfactorily account for the delay of about 10 years in the prosecution of the suit. The court further held that the mere fact that the various periods of delay did not fall squarely within the specific provisions of the Rules could not prevent the court from dismissing the suit under the inherent power of the court.

8. The court assumes in favour of the Plaintiff that he went to the wrong court on 23rd July 2018 when he was required to respond to the notice to show cause under **Order 17 Rule 2 of the Rules**. However, now that the Plaintiff has filed an application for reinstatement of the suit, he must render an explanation for the delay of about 13 or 14 years in the prosecution of the suit. The only explanation which was tendered at the hearing was that both Defendants were deceased.

9. The court has perused the material on record. The court has noted that vide the replying affidavit filed by the 1st Defendant on 27th June 2005, she stated that the 2nd Defendant was already deceased by the time the suit was filed. She annexed a copy of a death certificate indicating that she died on 7th June 1992, that is, about 13 years before the filing of the suit.

10. The court has also seen an affidavit filed on 24th February 2011 exhibiting a copy of a death certificate indicating that the 2nd Defendant died on 23rd August 2010. An application for her substitution was made on 24th February 2011 but it was never prosecuted. A fresh application dated 4th December 2017 was later on filed on 5th December 2017 for the same purpose.

11. The court has perused the record of proceedings and noted that the Plaintiff has been absent from most of the proceedings. He has not been a diligent litigant at all despite having filed the suit as the Plaintiff. The delay of over 13 years in the prosecution of the suit has not been satisfactorily explained by the Plaintiff. He did not take any diligent steps to ensure that the legal representatives of the deceased Defendants were timeously joined in the proceedings. In the circumstances, judicial discretion cannot be exercised in favour of the Plaintiff.

12. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 24th July 2018 and the same is hereby dismissed with no order as to costs.

13. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of FEBRUARY, 2019.

In the presence of the Plaintiff and in the absence of the Defendants.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

21.02.19