



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ENVIRONMENT & LAND CASE NO. 91 OF 2013

PAUL MWANGI NJOROGE.....PLAINTIFF

VERSUS

GETRUDE OWINY ONYANGO.....DEFENDANT

RULING

1. The application dated 5/12/2018 before me is for the reinstatement of the suit.
2. The suit was dismissed for non-attendance on 29/10/2018. The order for the dismissal of the suit was made at the instance of the court. In other words, the court acted on its own motion.
3. The application is supported by an affidavit sworn by Mr. Allan Rimui Mbugua Ngigi, advocate for the plaintiff. Mr. Ngigi Mbugua deposes that this cause had been heard and concluded before Justice Obaga but was reopened at the instance of the defence. He contends that in April 2018 when the matter came up for hearing, he was informed that the defendant had died. It is his further contention that they took a hearing date for 6/11/2018 and served the defence counsel to cause them to substitute which notice was received under protest.
4. In urging the court to reinstate the suit, Mr. Ngigi Mbugua submits that the failure to attend court on 6/11/2018 was not deliberate nor reckless but an oversight. He further contends that the order of dismissal was made without all facts on record and it is in the interest of justice if the orders sought are granted.
5. The defendant has opposed the application through grounds of opposition dated 8/2/2019. The defendant contends that the application under consideration lacks merit and therefore should not be entertained by this court. The defendant takes the position that, the plaintiff has not provided any valid reasons or sufficient cause for failing to attend the hearing and prosecuting her claim.
6. The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 29/10/2018 and reinstate this suit.
7. A look at Section 3A of the Civil Procedure Act demonstrates clearly that courts have been given inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte.
8. The court's exercise of this judicial discretion was laid down in the classical case of **Shah -vs- Mbogo & Another (1967) EA 1116, where** the court stated on the matter of its discretion, that

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
9. In essence, this means that the court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.
10. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. This view is informed by **Article 50 of the Constitution of Kenya** which secures the right to a hearing before the court.
11. There was no inordinate delay in the lodging of the application.

12. Consequently, I hereby exercise my discretion and grant the application dated **5/12/2018** in terms of **Prayers No.2** and **3** of that application.

13. The costs of the said application shall be in the cause.

Dated, signed and delivered at Kitale on this 18th day of March, 2019.

MWANGI NJOROGE

JUDGE

18/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Qeu for the defendant/respondent

N/A for the applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

18/03/2019