



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 86 OF 2017**

**JACKSON MWANGANGI KING'OE.....PLAINTIFF/APPLICANT**

**VERSUS**

**MUTHIANI KING'OE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MBATIANI KING'OE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. What is before this court for ruling is the Plaintiff/Applicant's Notice of Motion application dated 12<sup>th</sup> July, 2018 and filed in court on 17<sup>th</sup> July, 2018 for orders:-

**1) Spent.**

**2) THAT this Honourable Court be pleased to review and set aside the Ruling delivered on 9<sup>th</sup> June, 2018 to the effect of dismissing the Plaintiffs suit for want of prosecution.**

**3) THAT this honourable Court does reinstate the Plaintiffs suit vide a plaint amended on 29<sup>th</sup> June, 2018 and dismissed on 9<sup>th</sup> June, 2018 for want of prosecution.**

2. The application is predicated on the grounds on its face and is supported by the supporting affidavit of Festus Mweu, the advocate for the Plaintiff/Applicant, on the 12<sup>th</sup> July, 2018. The Plaintiff/Applicant, Jackson King'oe swore a supplementary affidavit on 16<sup>th</sup> November, 2018.

3. The Defendants/Respondents have opposed the application through a document that they referred to as defence to the application dated 07<sup>th</sup> July, 2018. On the 17<sup>th</sup> December, 2018, the 1<sup>st</sup> Defendant/Respondent filed a replying affidavit sworn at Makindu on 14<sup>th</sup> December, 2018.

4. The Court directed that the application be disposed off by way of written submissions. The parties herein have since then filed their respective submissions.

5. Amongst of the grounds upon which the application is predicated upon are that when the matter came up for hearing on the 18<sup>th</sup> July, 2018 the Plaintiff/Applicant's Counsel arrived in court late since he was held up by personal emergencies as his wife in Nairobi was indisposed and he had to take her to the hospital, that there were demonstrations at Emali town on the material day which affected transport along Nairobi/Mombasa road, an issue that caused the Plaintiff's/Applicant's Counsels difficulties in reconnecting to other routes heading to Wote town, that the Plaintiff/Applicant was within the court precincts though he was not aware that this court had moved to the new building and this caused him to wait outside the former building and that he and his advocate were ready to proceed with the hearing of the suit. Festus Mweu, the Counsel for the Plaintiff/Applicant, repeated the same grounds in his supporting affidavit.

6. Jackson Mwangangi King'oe the Plaintiff/Applicant herein has deposed in paragraph 3 of his supplementary affidavit that he has been informed by his advocates on record that the response by the Defendants/Respondents is based on misapplication of facts. He further deposed in paragraph 4 of the same affidavit that he has been advised by his advocates on record that his application is merited and should be granted for ends of justice to be met.

7. The Defendants/Respondents have deposed in paragraph 6 of their affidavit that it was not true that the Plaintiff/Applicant was within the precincts of the court or that he failed to attend court as he was not aware that the court had moved to the new building.

8. The Plaintiff/Applicant's Counsel submitted that the applicant had demonstrated that he was and has always been ready to prosecute this

matter and that there has been no other time that he, together with his advocate were absent in court throughout the proceedings of this matter since its inception. The Counsel went on to submit that dismissal of the main suit is prejudicial to the Plaintiff/Applicant and that the justice that he deserves shall not have been granted if **the application is not allowed** (*emphasis are mine*). The Counsel cited the case of **Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR** where Gikonyo J cited the case of **Utalii Transport Company Ltd & 3 others vs. Nic Bank & Another [2014] eKLR** where the Court stated thus;

*“The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat.”*

The Counsel further urged the court to exercise its discretion as enunciated in **Shah vs. Mbogo & Another [1967] EA 116** in order to avoid hardship and prejudice as would be occasioned on the Plaintiff/Applicant if the matter stands dismissed.

9. It was also the Counsel's submissions that the replying affidavit by the Defendants/Respondents seeks to dismiss the application mainly on technicalities. The Counsel cited the case of **Consolata Ndinda Owira & Others vs. Banuelbovis Omambia [2005] eKLR** where Kubo J referred to the case of **Lt. Colonel Joseph Mweteri Igweta vs. Mukira M' Ethare & Attorney General** in Court of Appeal civil case No.270 of 2001 where Shah J. A quoted **Apaloo JA** (*as he then was*) in **Wachira vs. Ndanjeru [1982-88] 1 KAR 1062** who at page 1065 stated thus,

*“At all event it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must, at least at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules.”*

10. In **Consolata Ndinda Owira's case (supra) Shah JA** stated;

*“If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice. Whilst I do not condone errors on part of Counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearing of appeals take .....”*

11. Flowing from the cases that he quoted, the Counsel submitted that cases such as this application warrant to be decided on the basis of substantial justice and that procedural omissions ought to take a back seat.

12. The Counsel also referred to Article 50 of the Constitution which secures the right to a fair hearing before Court.

13. On the issue of whether there is merit in reinstating of the suits, the Counsel referred to the case of **Ivita vs. Kyumbu [1984] KLR** where Chesoni J (*as he then was*) while setting aside an ex-parte order of a dismissed suit observed that,

*“..... the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant, so both parties to the suit must be considered”*

The Counsel further cited the cases of **Simeon Muruchu Thiga T/A Newspapers services vs. Phoenix EA Assurance Co. Ltd [2012] eKLR**, **Kariuki Charles Kamau vs. Ambrose Kyalo Matee [2017]eKLR**, and **Agip (K) Ltd vs. Highlands Tyres Ltd [2001] eKLR** and urged the court to allow application.

14. On the other hand, the Defendants/Respondents were of the view that the application is frivolous, incompetent and an abuse of the court process since it was brought at a time when the Applicant had severally and unreasonably been adjourning this matter. The Defendants/Respondents further submitted that the applicant had not indicated **the order** (*emphasis are mine*) upon which the application is brought. They were of the view that to allow the application when the Plaintiff/Applicant had not demonstrated his willingness to prosecute the suit would prejudice them.

15. The Defendants/Respondents went on to submit that the Plaintiff/Applicant had not served them with the amended plaint. They urged the court to dismiss the application with costs.

16. Having read the application together with the supporting and supplementary affidavits as well as the replying affidavit and having read the submissions filed, my finding is as follows;

17. Firstly, whereas the Defendants/Respondents are correct in saying that the Plaintiffs/Applicants did not indicate the order upon which the application is brought under, in my view it would be unjust to strike out the application merely on want of form. The application is clear on the orders sought. Section 1A of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil cases. Similarly under Section 1B of the same Act, the court is obligated to further the overriding objective by handling all matters presented before it for the purpose of attaining the just determination of the proceedings amongst other aims. In the circumstances, therefore, I will presume that the Plaintiff/Applicant intended to bring this application under **Order 12 Rule 7 of the Civil Procedure Act** which provides as follows:-

**“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”**

18. Secondly, it is clear from the affidavit evidence that the Plaintiff/Applicant herein was present within the court precincts on the 9<sup>th</sup> June, 2018. His Counsel has given a plausible explanation as to what made him delay in coming to court on material day. The interest of justice demands that the suit be heard and determined on merits rather than on technicality. In my view, no prejudice will be occasioned to the Defendants/Respondents if the application is allowed and the party who is likely to suffer serious prejudice is the Plaintiff/Applicant should the court decline to allow the application.

19. For those reasons, I am satisfied that the application has merits and I hereby proceed to allow it in terms of prayers 2 and 3.

**Signed, dated and delivered at Makueni this 25<sup>th</sup> day of April, 2019.**

**MBOGO C. G.,**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff/Applicant

1<sup>st</sup> Respondent present

Ms. C. Nzioka – Court Assistant

**MBOGO C.G, JUDGE,**

**25/04/2019.**