



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 241 OF 2012

PARTICK KIGUNYA KABERA.....PLAINTIFF

=VERSUS=

GRACE WANJIRU MWANGI 1 ST DEFENDANT

JOHN NJUGUNA NJUKU 2 ND DEFENDANT

MESHACK MUGO KIMANI.....3 RD DEFENDANT

DAVID KAMANDE MUNGAI 4 TH DEFENDANT

RULING

1. On 25/5/2017, this suit came up for substantive hearing before Honourable Lady Justice Lucy Mbugua. Mr Ishamel Nguring'a who acts for the plaintiff was not in court but his brief was held by a Mr Kegoro. The said counsel informed the court that Mr Nguring'a was attending to urgent family matters and sought another hearing date. Defence advocates who were in court opposed the application. The Honourable Judge declined to grant an adjournment on the ground that no plausible reason had been advanced by the plaintiff. Counsel who held Mr Nguring'a's brief thereafter informed the court that he was not able to proceed with the hearing. Consequently, the court dismissed the suit under Order 12 of the Civil Procedure Rules. Arising from the dismissal, the applicant brought a notice of motion dated 25/5/2017 seeking the setting aside or review of the dismissal order. The said application is the subject of this ruling.

2. The application was supported by an affidavit sworn on 25/5/2017 by the applicants's advocate, Mr Ishmael Nguring'a. He deposed that he had a long preceding night and he developed a migraine which made it impossible for him to attend court. He averred that he sent a Mr Wokabi to hold his brief and seek an adjournment. He urged the court to reinstate the matter as the respondents do not stand to suffer any prejudice other than the costs for the day which he was prepared to meet.

3. The 2nd, 3rd and 4th respondents opposed the application through a replying affidavit sworn by their advocate, Kanyi Gakuya on 14/12/2018. He deposed that this suit was filed in 2012 and the applicant had never been keen to prosecute it. He added that the applicant had failed to attend court on several occasions including the day when the Deputy Registrar certified it ready for hearing. He further deposed that the applicant was duly served with a hearing notice but both the applicant and his advocate were not in court on 23/5/2017 when the matter came up for hearing.

4. The application was canvassed by way of oral submissions on 27/2/2019. Mr Nguring'a submitted that his non-attendance was not deliberate because he had been taken ill. He added that the court had powers to review a dismissal order made under Order 12.

5. Mr Omondi, counsel for the 1st respondent opposed the application. He argued that the requirement for review had not been met because the notice of motion was brought under Order 45 instead of Order 12. He argued that the applicant did not swear an affidavit stating why he did not attend court. He contended that the applicant's absence was an indication of his lack of interest to prosecute the case.

6. Mr Gitari, counsel for the 2nd, 3rd and 4th respondents also opposed the application. He argued that this suit was filed in 2012 and the applicant had never been keen to prosecute it. He submitted that there was no ground for review of the orders made on 23/5/2017 and there was no new evidence to warrant the application to be brought under Order 45 of the Civil Procedure Rules. Lastly, he submitted that the respondents will be prejudiced by a reinstatement of the suit.

7. In his rejoinder, Mr Nguring'a argued that the application was properly before court because the applicant was aggrieved by the order dismissing his suit. He added that the grounds of opposition were ambiguous as they did not state which provisions of the law had been violated.

8. I have considered the application, the rival affidavits, the grounds of opposition and the rival submissions. I have also considered the relevant legal framework and jurisprudence on the court's jurisdiction to set aside a dismissal order made under Order 12 of the Civil

Procedure Rules. The single issue falling for determination in this application is whether the applicant has satisfied the criteria for grant of setting aside a dismissal order under Order 12 rule 7 of Civil Procedure Rules.

9. Before I determine that single issue, I will make brief remarks about the Civil Procedure rules cited by the applicant. There is no doubt that the applicant has cited the wrong Civil Procedure Rules. The impugned dismissal order was expressly made under Order 12 of the Civil Procedure Rules. The framework for setting aside a dismissal order made under Order 12 is Rule 7 of the same Order. However, in my view, this is a procedural and technical irregularity which should not prevent the court from determining the substantive issue in the application. Guided by the framework in Article 159(d) of the Constitution, I will ignore the technical irregularity and proceed to determine the substantive issue in the application.

10. There is no doubt that Order 12 Rule 7 of the Civil Procedure Rules grants this court jurisdiction to set aside a dismissal order made under Order 12 of the Rules. Secondly, the jurisdiction to set aside a dismissal order is a discretionary one. Thirdly, the discretionary jurisdiction is exercisable on well settled principles.

11. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake.

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

12. **Apaloo JA** outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

13. In the present application, it is clear that the court dismissed the suit because counsel for the plaintiff was not in court and no plausible explanation had been tendered to explain his absence. All that the court was told was that the advocate was attending to a family matter. Counsel has subsequently sworn on affidavit in which he has explained that their two months old baby cried throughout the night and they took turns to sooth the baby. Failure to sleep caused him a migraine which made it impossible for him to attend court the following day. He did not however reach out to his colleagues to seek their indulgence.

14. The dispute in this suit relates to land. Taking into account counsel’s explanation and the nature of the dispute, I am of the view that there is a proper basis for exercising jurisdiction to reinstate this suit and have the dispute determined on merit. The respondents will be indemnified through an award of costs assessed at Kshs 20,000 for each law firm on record.

15. Consequently, I make the following disposal orders in relation to the plaintiff’s notice of motion dated 25/5/2017.

a) The dismissal order made on 23/5/2017 is conditionally set aside.

b) The plaintiff shall pay each law firm on record for the respondents throwaway costs of Kshs 20,000 within 45 days.

c) In default of payment within the said period, the setting aside order shall stand vacated and this suit shall remain dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JUNE 2019.

B M EBOSO

JUDGE

In the presence of:-

Meshak Mugo Kimani 3rd defendant present in person

John Njuguna Njuku 2nd defendant present in person

Court Clerk - June Nafula