



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND COURT CASE NO. 33 OF 2017

JAMES MBUVI MATURU.....APPLICANT/PLAINTIFF

VERSUS

MUSEE KAIMBIRU.....1ST RESPONDENT/DEFENDANT

MALIA NGUSYA.....2ND RESPONDENT/DEFENDANT

NZAMBA MUSYOKI.....3RD RESPONDENT/DEFENDANT

SIMEON MULAE.....4TH RESPONDENT/DEFENDANT

RULING

1. Coming up for determination is the Plaintiff/Applicant application dated 20/09/2018 and filed on 29/9/ 2018 pursuant to section 1, 1A, 3& 3A of the Civil Procedure Act and order 12 Rule 7, Order 22 Rule 52 and Order 51 of the Civil Procedure Rules, 2010. The applicant seeks the following Orders: -

- 1) **THAT this application be certified urgent and heard ex parte in the first instance**
- 2) **THAT taxation of costs proceedings/Ruling pending before the Honourable Court be stayed pending ex parte hearing and determination of this application**
- 3) **THAT a temporary stay does issue restraining the respondent/defendants from commencing any execution against the applicant/Plaintiff pending the hearing and determination of the application herein.**
- 4) **THAT the Honourable Court be pleased to set aside its orders dismissing the suit herein and do reinstate the same to be heard fully on merit.**
- 5) **THAT the costs of this application be awarded to the applicant.**

2. The application is supported by the Affidavit of James Mbuvi Maturu (Applicant) sworn on 20th September, 2018 and his further Affidavit sworn on 29th March, 2019.

3. In response to the Application, the 3rd Defendant/Respondent filed grounds of opposition and a Replying Affidavit dated 9th October, 2019 and filed on even date.

4. The parties vide a consent agreed to dispose of the matter vide written submissions and both Parties filed their written submissions. The Applicant submissions are dated 6th May, 2019 and filed on 17th June, 2019 whereas the Respondents filed joint written submissions dated 21st June, 2019 and filed on 24th June, 2019.

BACKGROUND

Applicant's Case

5. The applicant herein is seeking this Court to set aside its orders issued on 25th April, 2018 dismissing his suit for non attendance. The grounds upon which the application is hinged include the following. First, that the applicant has a genuine claim, being that the defendants who are purchasers of a part of his parcel of land and have instead taken the whole of the land, secondly, that the whole process leading to

the dismissal of this suit was as a result of failure and mistakes on the part of his former counsels on record who failed to inform him of the progress in the matter and/or act for him leading to dismissal of the matter with costs and finally that he is willing to pursue his claim to conclusion and have it determined by this court on merit.

6. Further, the plaintiff applicant in respect to the Respondents claim that he had filed another suit being Mwingi ELC No. 14 of 2018 stated that he was not aware of the same, and that it was filed by his Advocate without instructions and that he has since instructed them to withdraw the same.

7. In his submissions the plaintiff reiterated the above grounds insisting that if the suit is dismissed, he stands to suffer great loss and the resultant dismissal of the suit was as a result of his Advocates mistake. He urged the court to give him an opportunity to present his case and be heard. In this he relied in the decision of Hon. Eboso J in Nairobi ELC No. 177 of 2017 Gold Lida Limited vs NIC Bank Limited & Another.

Respondent's Case

8. The respondents in opposition to the applicant application have alleged that the same lacks merit, arguing that the plaintiff had sufficient notice of the hearing date of 25th April, 2018 that culminated with the dismissal of his suit.

9. In addition, the Respondents have alleged that the Plaintiff has filed a similar suit between the same parties and over the same subject matter at Mwingi Law courts, being ELC No. 14 of 2018 and that the instant application is an abuse of the court process and ought to be dismissed.

10. Through their Joint written submissions, the respondents have submitted that the applicant has no right of audience having failed to Honour previous court orders in the matter and specifically payment of costs.

11. Further, they submitted that the plaintiff is an author of his own misfortunes having failed to ventilate his issues despite the several opportunities given.

12. On the allegation by the applicant that the genesis of his mess was as a result of his advocate's mistake, they submitted that the applicant should approach the right forum to launch a complaint against his advocates and not this court. In sum they argued that the defendant's respondents have argued that the applicant has demonstrated inconsistency, dishonesty and malafides.

13. In support of their case they relied in the case of Stephen Mwangi Kimote versus Muratta Sacco Society (2018) eKLR.

ANALYSIS AND DETERMINATION

14. The issue for determination in the instant application is whether there is a basis for this court to exercise its discretionary power to set aside the orders dismissing the applicant's suit made on 25th April, 2018 and reinstate the same.

15. **Section 1A** of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

16. **Section 1B** of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

17. In the case of **Mbogo and Another vs. Shah [1968] EA 93** the principles to be applied before setting aside a judgment were enunciated as follows per Duffus P:-

“Applying the principles that the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

18. Consequently, the exercise of 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. However, in the same vain, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

19. Looking at the circumstances of this suit, it is important to consider the genesis of the process culminating with this court dismissing this matter. The Plaintiff first set this matter for hearing on 23/10/2017, the same did not proceed courtesy of the plaintiff application for adjournment, which this court allowed and directed that the Plaintiff pays defendants costs for the day.

20. This was followed by the hearing date for the application dated 20/9/2017 on 23/11/2017, when by consent the application was withdrawn. On 13/2/2018 the matter was fixed for hearing on 6/3/2018. The Plaintiff on 6/3/2018 sought an adjournment telling the court that he was not aware of the hearing and that he heard the same from someone and requested for an adjournment to enable him prepare his case. The court allowed the adjournment directing the plaintiff to pay the days costs for defendants.

21. Subsequently on 9/4/2018 the 1st and 3rd Defendants attended court for fixing of a hearing date. The plaintiff was absent, and the matter was fixed for hearing on 25/4/2018. When the matter came up for hearing on 25/4/2018 the plaintiff was absent, an affidavit of service was filed to the effect that the firm of Masaviru & Ketoo Advocates acting for the plaintiff were served with the hearing date, the court on application of the defendants dismissed this suit for non attendance.

22. The Applicant is blaming his Advocates for the events leading to the dismissal of his suit on 25/4/2018 and is urging this Court not to punish him for the mistakes of his Counsel.

23. Based on the foregoing legal principles, the overriding Objective demands just, expeditious, proportionate and affordable resolution of dispute and that the court in exercising its discretion must not do so to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

24. In this case the matter was dismissed for non-attendance, therefore it is incumbent upon the Plaintiff to establish that his non-attendance, or that of his advocate constituted an inadvertent excusable mistake and was not meant to deliberately delay the cause of justice.

25. It is my opinion that the Plaintiff and his counsel have not provided a plausible reason as to why they failed to attend court for hearing on 25/4/2018. The plaintiff general behavior towards the prosecution of his case depicts a litigant who takes business of the court casually and not deserving a favourable exercise of discretion by this court. In any event the plaintiff must always keep tabs with his matter.

26. Furthermore, the plaintiff in response to the Respondent allegation that he has filed another suit at Mwingi Law Courts ELC No. 14 of 2018 alleged that the same was filed by his Advocates without his instructions. In my view this explanation does not hold water as no evidence to that effect has been tendered, he does not deny the existence of such a claim only that he did not authorize the same.

DECISION

27. In sum, the plaintiff has failed to provide a plausible reason to warrant this court to set aside its orders issued on 25/4/2018 dismissing his suit for non attendance, therefore this application lacks merit and ought to be dismissed with costs. In the upshot, this application is hereby dismissed with costs to the Respondent/Defendant.

Read, delivered and signed in the Open Court this 30th day of July, 2019.

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E. C Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Nzili for the Respondents.
2. Respondents: Present.
3. Court Clerk: Taib.