



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 2204 OF 2007**

**STEPHEN MURIUKI CHIURI.....PLAINTIFF**

**VERSUS**

**ALICE MWANIKI.....1 ST DEFENDANT**

**JOHN KIAGO.....2 ND DEFENDANT**

**THE NAIROBI CITY COUNCIL.....3RD DEFENDANT**

**RULING**

1. This suit has a history of dismissal and reinstatement orders. On 26/1/2012, Nyamweya J dismissed this suit on ground of want of prosecution on part of the plaintiff. The plaintiff subsequently brought an application in May 2012 pleading for reinstatement of the suit. The application was vehemently opposed by the defendants. Through a ruling dated 14/7/2017, this court (Eboso J) conditionally reinstated the suit by directing the plaintiff to pay each defendant throwaway costs of Kshs 15,000 and file a trial bundle within 45 days to facilitate hearing and determination of the suit. In default, the suit was to stand dismissed. There was no compliance on part of the plaintiff, and the suit automatically stood dismissed.

2. On 21/11/2017, the plaintiff brought yet another application seeking a second order of reinstatement. The second application was similarly opposed vehemently by the defendants who contended that they had gone out of their way to plead with the plaintiff through his advocate to comply with the orders of 14/7/2017 in vain. Through a ruling dated 29/6/2018, for the second time, this court (Eboso J) conditionally reinstated the plaintiff's suit and directed the plaintiff to comply with the orders of 14/7/2017 within 15 days. This court further ordered the plaintiff to pay each defendant a further sum of Kshs 15,000 in throwaway costs within 15 days. In default, the suit was to automatically stand dismissed. Once more, there was no compliance by the plaintiff, and the suit stood automatically dismissed.

3. Subsequently, the plaintiff brought a third application, a notice of motion dated 20/11/2018, seeking reinstatement of the suit. That application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 20/11/2018 in which the plaintiff blamed his previous advocate for failing to attend court on 29/6/2018 and for failing to keep him updated on the court proceedings. She further deposed that his previous advocate had informed him that this suit was not listed on the cause list on 29/6/2018 and that they made a follow up in the court registry but were not able to trace the court file.

5. The 1st defendant opposed the application through her affidavit sworn on 12/3/2019. She deposed that the plaintiff had all along shown lack of seriousness and interest in prosecuting this suit. He narrated all the past omissions on part of the plaintiff which had led to dismissal of the suit on three occasions. She contended that the plaintiff's conduct was inexcusable.

6. The 2nd defendant opposed the application through his replying affidavit sworn on 27/2/2019. He narrated all the past omissions of the plaintiff which led to dismissal of the suit on three occasions. He further deposed that the application for reinstatement was an abuse of the process of the court. He added that it was unfair and prejudicial for the plaintiff to endlessly subject him to the anxiety of defending a suit which the plaintiff was not keen to prosecute. He urged the court to dismiss the application.

7. The application was canvassed through oral submissions on 13/3/2017. Mr Ochieng, counsel for the applicant, submitted that the suit stood dismissed because the plaintiff's previous counsel did not attend court when the ruling on the previous application for reinstatement was delivered. He added that the plaintiff was ready to pay costs to the defendants.

8. Mr Kiptum, counsel for the 1st defendant, submitted that the suit had been reinstated twice in the past and argued that the application under consideration was an abuse of the process of the court. He urged the court to reject the application. Mr Muindi, counsel for the 2nd defendant, submitted that the plaintiff had simply declined to comply with the orders of the court.

9. I have considered the application, the responses thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issue in the application. The single issue falling for determination in the application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to reinstate a suit.

10. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) eKLR, Madan JA** summed up the following approach relating to the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake:

***“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”***

11. Apaloo JA summed up the following approach to a similar question in **Philip Keipto Chemwolo & another v Augustine Kubende (1986)eKLR 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.”***

12. The Learned Judge added thus:

***“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. There is no gain-saying that the applicant has been indolent and least concerned about the need to have the dispute in this suit promptly adjudicated upon by the court. Thrice the suit has been dismissed and twice the suit has been conditionally reinstated. The applicant blames his previous advocate for the indolence. The indolence and lack of diligence on part of the applicant has exposed the defendants to unnecessary anxiety. Secondly, it is not lost to this court that the orders culminating in the last dismissal of the suit were made in a ruling rendered on a day appointed in the presence of the applicant's advocate. The applicant's advocate elected not to attend court on the appointed day.

14. I will nonetheless, in exercise of discretion, reluctantly and conditionally give the applicant a fourth chance to be heard and have the dispute in this suit determined on merit. The plaintiff's suit is accordingly reinstated on condition that the plaintiff shall pay to each defendant participating in the application throwaway costs of Kshs 25,000 in addition to any outstanding throwaway costs previously awarded by the court. The said sums shall be paid within 30 days from today. In default, the order reinstating this suit shall stand vacated and the suit shall stand dismissed with costs to the participating defendants.

**DATED, SIGNED AND READ AT NAIROBI ON THIS 24TH DAY OF JULY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Ochieng for the plaintiff

Ms Kipruto holding brief for Mr Kiptum for the 1st defendant

Mr Kimani for the 2nd defendant

Court Clerk - June Nafula