



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC SUIT NO. 70 OF 2011

SAMSON MURIITA M'INOTI.....PLAINTIFF

VERSUS

MERU MWALIMU CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LTD.....1ST DEFENDANT

KENNETH MUCHIRI M'ARAGWA.....2ND DEFENDANT

ISAAC G. RINGERA T/A VIEWLINE AUCTIONEERS.....3RD DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated **14th September 2018**. The said application was brought by way of Notice of Motion pursuant to **Sections 1A, 1B, and 3A of the Civil Procedure Act and Order 22 Rule 25 and Order 12 Rule 7 of the Civil Procedure Rules 2010** and all enabling provisions of the law.

2. The application seeks to set aside the court's order for dismissal of the suit for non-attendance made on the 19th June, 2017.

3. The application is based on the grounds stated on the face of the Notice of Motion and the plaintiff's supporting affidavit sworn on the 17th September, 2018. In his affidavit the plaintiff avers that the non-attendance of his advocate on the hearing date was as a result of the hearing notice not being served upon him. He further states that the suit was dismissed without him being given a chance to defend it, and that he has at all material times been ready and willing to defend the suit and bring it to its logical conclusion. He contends that he has a claim which should be given a chance to be heard and determined on its merit and that he has been rendered homeless, as his family resided in the subject property as a consequence thereof.

4. On the other hand, the defendant/respondents have opposed the application vide Replying affidavits sworn on the 10th December 2018 and those for the 2nd Respondent sworn on 14th December 2018. In essence the affidavits are to the effect that ; the plaintiff had not taken any steps to move the court necessitating the court on its own motion to fix the case for hearing and consequently dismissing the same for want of prosecution; that this suit was dismissed on 19/6/2017 and the applicant filed the instant application on 18/9/2018 , well over 1 year 3 months without an explanation for the inexcusable lapse of time; and that the application before court is an abuse of the process of the court as it is merely intended to delay the cause of justice.

5. The main issue for determination is whether the order for dismissal of the plaintiff's suit ought to be set aside and the suit reinstated for hearing.

6. The principles governing the setting aside of an order for dismissal of a suit for want of prosecution are enunciated in the case of **Mwangi S. Kimenyi V Attorney General & Kenya Institute for Public Policy and Research 2014 eKLR** where, citing the case of **Utalii Transport Co & 3 Others V NIC Bank & Another (2014) eKLR** the court laid down the following principles:

(1) Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;

(2) Whether the delay is inordinate contumelious and therefore inexcusable;

(3) Whether the delay is an abuse of the process of the court;

(4) Whether the delay gives rise to substantial risk to affair trial or causes serious prejudice to the defendant;

(5) What prejudice will the dismissal occasion to the plaintiff?

(6) Even if there has been delay what does the interest of justice dictate: lenient exercise of discretion by the court.

7. In the **IVITA -vs- KYUMBU [1984] KLR 441**. Chesoni, J. (as he then was) stated as follows in the said case:

“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 and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. Before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”

8. A party must take steps to prosecute his case expeditiously. In the instant case there was a delay of about **13 months** after the suit was dismissed on the **19/6/2018**. The court must inquire as to whether that delay is inordinate and unexplained.

9. The supporting affidavit exhibits a Notice of Appeal vide which the applicant states that he preferred an appeal against the ruling of the Hon. Justice Mary Kasango delivered on **16/6/2011**.

10. The applicant avers that he never knew of the dismissal of his suit until sometime in the year **2018** when he was evicted from his home. Upon perusal of the file his advocate found that the suit had been dismissed on **19/6/2017**. He asserts that his advocates were never served with the notice of hearing for **19/6/2016**. He exhibits a copy of the hearing notice which he states that he obtained from the court file. I have perused that notice. There is indeed no evidence on the face of that notice to the effect that the same was served upon Ashford & Co Advocates to whom it is addressed. The plaintiff’s advocates are referred to by that name. However their stamp is not reflected on the notice to show that they received the document. There is no copy of certificate of postage to them. There is also no affidavit of service showing that a process server effected service of the hearing notice on them. In the absence of a clear record of service, it can not therefore be said for certain that they were aware of the hearing date appearing on that notice. The court must have inadvertently overlooked this fact while dismissing the suit.

11. In this case the plaintiff’s claim is that the defendants colluded to have his land charged to secure a loan to the 2nd defendant. He maintains that he never applied for any loan on his own behalf nor guaranteed any loan to the 2nd defendant. Those are weighty allegations which would nevertheless have to be established by way of evidence at the hearing of the main suit.

12. The important points to note in this litigation are as follows: if the plaintiff was never served, he would not know of the hearing date and it may be true that he only came to know of the dismissal after his eviction; secondly, the though the dismissal occurred on **19/6/2017**, the eviction is said to have taken place in **2018**. The parties do not provide the date of eviction in their affidavits.

13. I have taken note of the response by the 1st defendant’s averment that it is not prudent that a litigant should allow his suit to remain unprosecuted for a long period as happened in this case; that may be so, but it must be recalled that the procedure that has been provided for in the Civil Procedure Rules is meant to enable a party who has demonstrated such lethargy to be aware that his suit runs the risk of dismissal if he does not show cause why it should not be so dismissed, and to avail him the opportunity to show such cause. If these two factors are ignored, then litigants may find themselves gravely prejudiced.

14. From the foregoing it is clear that the application dated **14/9/2018** must succeed.

15. I therefore allow the application and order as follows:

(a) The order of dismissal of this suit made on the 16th September 2018 is hereby set aside and this suit is hereby reinstated for hearing on the merits.

(b) The costs of the application shall be in the cause.

Dated and signed at Kitale this day of 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered in open court at Meru this 31st day of October 2019.

HON. LUCY. N. MBUGUA

ELC JUDGE

JUDGE

ENVIRONMENT AND LAND COURT, MERU