



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO. 77 OF 2010

GERALD MWIRIGI M'MBUI.....PLAINTIFF/APPELLANT

VERSUS

STANLEY MWORIA MUTHAURA....DEFENDANT/ RESPONDENT

RULING

1. The applicant vide a notice of motion dated 20/12/2018 brought pursuant to provisions of Section 1A, 1B, 3 & 3A of the Civil Procedure Act, order 45 of the Civil procedure rules and, Article 10 (2), (b) and Article 159 of the constitution of Kenya, is seeking for orders to review, vary or set aside the order of 3/11/2018 dismissing the suit for want of prosecution and to reinstate this suit for hearing and disposal.
2. The application is supported by the grounds set out on the face of the application and on the supporting affidavit of Gerald Mwirigi, the applicant who avers that the matter came up for mention before this court on 24/7/2018 where an order was made for typing of proceedings and that the lower court file be availed. Thereafter on 8/11/2018, there was a further mention but the file had not been availed. He later learnt that his case was dismissed for want of prosecution on 13/11/2018. Neither himself, or his advocate was served with a hearing notice for 13/11/ 2018, however other advocates were served save for them. That it is unfair, unjust and against the rules of natural justice to dismiss his case without the proper notice for hearing.
3. The applicant in his submissions argued that he was absent in court on the day the matter was slated for hearing due to the mistake of the court registry as they failed to issue the proper notice. The applicant stands to suffer irreparable damage if the suit is not heard and determined on merit as he would stand to lose the suit property.
4. The respondent did not file any Replying asffidavit as directed by the court on 6.5.2019, but he has filed submissions. He argues that the this application is 2 years old and the applicants never bothered to have an affidavit sworn by the registry official to explain why the hearing notice was not served on them and that the counsel for the applicant cannot allege a mistake by the registry without providing evidence. Additionally, the applicant herein has no case against the respondent as the suit land does not exist as the respondent sold it to 3rd parties in 2010 having obtained a valid court decree evicting the applicant.
5. I have considered all the arguments raised herein including the submissions of the parties. The issue for determination is ***“whether the applicant has satisfied the principles for reinstatement of a suit?”***
6. A party seeking to have the suit reinstated must demonstrate good faith and bring the application for reinstatement without unreasonable delay. In **Simion Waiti Kimani & Three others vs Equity Building Society (2010) eKLR** Koome J in Paragraphs 4 and 5, held thus;

“The courts have discretion generally to reinstate a suit which is dismissed for non attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay.”
7. The key points resonating from the above cited case is good fiath and unreasonable delay.
8. A perusal of the record reveals that when the suit was dismissed on 13.11.2018, the present application was filed thereafter on 29.1.2019 which is a period of 2 months and 16 days. This period constitutes a delay and the applicant doesn't explain when they made the discovery that the suit was dismissed. I would however not consider the delay as unreasonable in view of the cirucumstances surrounding this case.
9. The memorandum of appeal was filed on 27.7.2010 contemporaneously with an application where applicant/appellant sought an order of inhibition on the suit land No. Abothuguchi/Katheri/2908 and an order restraining the respondents form evicting him. On 28.7.2010, the court granted orders to have status quo maintained and the applicant and his family were to remain in occupation and possession of the suit land without interruption by respondent.

10. Apparently this order was not complied with prompting the applicant to bring forth an application seeking leave to institute contempt proceedings against the respondent and others which application was filed on 26.10.2010.

11. Thereafter, the applicant filed another application dated 10.11.2010 to have the respondent and others committed to civil jail on account of breach of the court orders. The prosecution of this application of 10.11.2010 remained live and active until 18.9.2017, the day I handled the file for the first time. On that day I gave directions for the application to be abandoned. It is therefore quite apparent that although the appeal was filed many years ago in 2010, the pendency of the application dated 10.11.2010 took a toll on the entire matter, somehow stalling the prosecution of the case in what I would call the first phase in the lifespan of this suit.

12. Again on 18.9.2017, I gave directions for the Record of Appeal to be filed within a month and I directed matter to be mentioned before the Deputy Registrar on 1.11.2017 for pre-trial conference to ensure that matter was ready for admission.

13. On 13.12.2017, the file was mentioned before the Deputy Registrar who gave directions as follows:

“The file to be taken back to the lower court for purposes of typing the proceedings....”.

14. On 13.2.2018, the Deputy Registrar noted that **“the lower court file is not yet back”** and similar records were made on 19.3.2018.

15. On 24.7.2018 the matter was mentioned before this court where I gave the following directions;

“Mention for directions on 8.11.2018. Date to be served. Lower court file to be availed plus the Records of Appeal”.

16. The first anomaly I note is that there is no coram for the date of 8.11.2018. The next date that matter was in court (as from 24.7.2018) was on 13.11.2018 when this case was dismissed. The other anomaly is that even as the file was placed before the visiting Judge, Judge Cheronu, the lower court file doesn't seem to have been availed as yet. And finally, I note that the matter doesn't seem to have been certified as ready for admission.

17. It follows then that the unavailability of the lower court file took the second phase of the delay in this matter. To date that file has not been availed.

18. The delay in the 1st and 2nd phase of this suit can surely not be attributed to any indolence on the part of the applicant.

19. In the case of **Mwangi S. Kimenyi vs Attorney General & another (2014) eKLR, Gikonyo J**, stated that:

“But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable”.

20. I have already carefully evaluated the major cause of delay in this case. I am therefore inclined to find that this application was made in good faith.

21. In the circumstances the application dated 20.12.2018 is allowed, this suit is reinstated and each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 27TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutuma holding brief for Kiome for appellant/applicant

Appellant

HON. LUCY. N. MBUGUA

ELC JUDGE