



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 239 OF 2011

BANTUS INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA WILDLIFE SERVICE..... DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 13/1/2017. It is brought under Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya Order 12 Rule 7 of Civil Procedure Rules, Article 50 of the Constitution of Kenya, 2010 and the inherent power of the court.

2. It seeks orders;

a) Spent

b) That the Honourable Court be pleased to set aside and/or review the orders made on 31/8/2016 and 22/11/2016 dismissing the Plaintiff's suit and all other consequential orders thereto.

c) That consequently the Honourable Court be pleased to reinstate the Plaintiff's suit and extend the time within which the Plaintiff may comply with order 11 of the Civil Procedure Rules.

d) That costs of and incidental to this application do abide the result of the suit.

3. The grounds are on the face of the application and are listed as paragraph 1-15. I do not need to reproduce them here.

4. The application is supported by the affidavit of Charles Waweru Gatonye, the Plaintiff's Advocate, sworn on the 17/1/2017. There is another affidavit sworn by Kiarie Kariuki, Advocate sworn on the 17/1/2017.

5. The application is opposed. There is a replying affidavit sworn by Jenipher Catherine Ombonya, the Defendant's Advocate sworn on the 10/3/2017.

6. On the 19/10/2017 it was agreed between the parties that the application be disposed by way of written submissions.

7. THE PLAINTIFF/APPLICANT'S SUBMISSIONS.

The Plaintiff's suit raises triable issues. They have put forward the case of **Jomo Kenyatta University of Agriculture And Technology –vs- Mussa Ezekiel Oebah, Civil Appeal No 17 of 2009.**

8. That the Plaintiff/Applicant's livelihood depends entirely on the suit property as it has established and runs as restaurant business that the directors depend on for a living. The Plaintiff will be condemned unheard and will be greatly prejudiced.

Further that the delay in prosecuting this suit is justified and has been well explained by the Plaintiff. They have also put forward the case of **Komarock view Estate Limited –vs- Bank of Baroda (K) Limited And Another (2013) eKLR, Gibson Kamau Kuria –vs- Rachael Wambui Kamau (2015) eKLR.**

9. That the delay in prosecuting the suit herein arose due to an oversight on the part of an advocate who had not communicated to the Plaintiff's Advocates the directions given by the court on 31/8/2016. The Plaintiff has not been indolent. They have also relied on the case of

10. It is the Plaintiff's further submissions that the Defendant will not be prejudiced in any way should the suit be reinstated.

They have put forward the case of *Gibson Kamau Kuria –vs- Racheal Wambui Kamau (2015) eKLR*, which cited with approval the Court of Appeal decision in the case of *Philip Chemwolo & Another –vs- Augustine Kubede 1982-85 KAR103* where Apaloo J A (as he then was) held as follows;

“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 broad equity approach to this matter is that unless there's fraud or intention to over reach, 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.”

11. Article 159 of the Constitution encourage the court to consider substantive justice and not be clogged by procedural technicalities. Further that the Plaintiff is willing to abide by any conditions the court may place in granting the application.

12. THE DEFENDANT/RESPONDENT'S SUBMISSIONS

The Plaintiff has been indolent. They have relied on the case of *Shah –vs- Mbogo (1967) EA 116.*

The Plaintiff demonstrates casualness in the conduct of this case calculated to delay justice and the court ought not to entertain this application at all.

13. That bringing this application under Order 12 Rule 7 of the Civil Procedure Rules is wrong as the suit had not been set down for hearing. That in an application for review an applicant must exhibit a copy of the Order sought to be reviewed and that failure to exhibit is fatal to the application.

They have also relied on the cases;

Nakuru HCCC No 219 of 1999 Mea Limited –vs- Gititu Coffee Growers Cooperative, Nairobi HCCC No 586 of 2001

Agriculture Syndicate Limited –vs- Paramount Bank Limited.

14. Further that the conditions set out under Order 45 Rule 1 have not been satisfied. The Plaintiff has not given a reasonable explanation as to why the suit should be reinstated.

15. I have considered the Notice of Motion and the supporting affidavit. I have also considered the Replying affidavit, the submissions of counsel and the authorities cited.

The issue for determination is whether the Plaintiff's suit ought to be reinstated.

16. The principles that guide the court in setting aside an ex parte judgment or order were laid out in the case of *Shah –vs- Mbogo & Another (1967) EA 116* as follows;

“..... 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 course of justice.”

17. I have gone through the supporting affidavit of Kiarie Kariuki, Advocate sworn on the 17/1/2017. He has given an explanation. He has confirmed that the firm of M/s Waweru Gatonye Advocates were not informed of the court's directions given on 31/8/2016 due to an inadvertent mistake. I find that the delay in prosecuting this suit was due to an oversight on the part on an Advocate who failed to communicate to the Plaintiff's Advocate the directions given by the court on 31/8/2016. This confirms that the Plaintiff has not been indolent.

18. In the case of *Mwangi S. Kaimenyi –vs- The Attorney General And Another (2014) eKLR*, J. Gikonyo held;

“But courts of law are courts of justice to all the parties. And as 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 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. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff. The balance thereof need not be symmetrical but the impulsion should come from the dictates of Justice and where need be, the suit should be sustained.”

19. I am guided by the above authority in finding that the Plaintiff herein deserves another chance. The court is now enjoined to do substantial justice to the parties.

Article 159 of the Constitution encourages the courts to consider substantive justice and not be clogged by procedural technicalities.

20. The Defendant has not demonstrated any prejudice it stands to suffer if the suit herein is reinstated. I am of the opinion that the Plaintiff's Advocates have offered a reasonable excuse for their failure to attend court on 31/8/2016 and/or to comply with the directions of 31/8/2016. They have also explained the delay in bringing the present application.

21. I find merit in this application and I grant the orders sought namely;

a) That the orders of the court dated 22/11/2016 dismissing the suit are hereby set aside and the suit is hereby reinstated subject to the Plaintiff paying the Defendant throw away costs of Kshs25,000 to the Defendant within twenty one(21) days from the date hereof.

In default the Plaintiff's suit shall stand dismissed with costs.

b) The Plaintiff do set down the suit for hearing on a debate to be granted at the registry on a priority basis.

c) The Plaintiff do bear costs of this application.

It is so ordered.

Dated, signed and delivered at Mombasa on the 8th day of February 2018.

L. KOMINGOI

JUDGE

8/2/2018