



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC.NO.824 OF 2017

KASAMA KIMANI.....PLAINTIFF/APPLICANT

-VERSUS-

JANE WANGECHI KIMANI.....DEFENDANT/RESPONDENT

RULING

Coming up for determination is the *Notice of Motion* application dated **30th November 2015**, brought by the plaintiff/applicant herein under **Order 51 Rules 1, 10 &15, Order 9 Rules 7&8 of the Civil Procedure Rules, 2010** and **Sections 1, 1A and 3A of the Civil Procedure Act** together with all the enabling provisions of law. The applicant has sought for the following orders:-

- 1) Spent.**
- 2) That this Honourable Court be pleased to reinstate the Plaintiff's case and Order it to be heard on priority.**
- 3) Any other and further Orders this Honourable Court may issue in the interest of Justice.**

The application is premised on the following grounds:-

- a) That the matter had been fixed for hearing on the 16th March, 2015.**
- b) That the advocate for the plaintiff on record did not appear in court hence suit was dismissed for want of prosecution.**
- c) That the plaintiff was shocked as the Advocate had delayed this matter ever since 2010.**
- d) That the plaintiff filed a notice of change of Advocate dated 16th March, 2015 to act in person since he was not happy with the conduct of the Advocate.**
- e) That the plaintiff is keen on prosecuting his matter until its logical conclusion.**
- f) The matter relates to purchase of land and the plaintiff herein had paid the whole purchase price.**
- g) This matter has not proceeded for hearing on previous occasions at the instance of both parties.**
- h) Unless the said Orders are granted, the plaintiff shall be condemned unheard and great miscarriage of justice will occur.**
- i) The controversy between the parties herein still subsists and it is in the interest of justice that the Orders sought be granted.**
- j) That the Plaintiff/Applicant stands to suffer irreparable loss and harm if his case is not reinstated.**
- k) No prejudice will be suffered by the Defendant if the Orders sought are granted.**

l) No party to a suit ought to be condemned unheard.

m) That the mistakes of advocates should not be visited upon innocent litigants.

n) The application has been brought in good faith and without delay.

The application is also premised upon the **supporting affidavit** of the applicant herein **Kasama Kimani**, which was sworn on **3rd November, 2015**, and which reiterated most of the contents of the grounds in support of the application. He further averred that the suit herein relates to purchase of land and that he had paid the **whole purchase price** as is evident from **annexure kk2**, a copy of the sale agreement. Further that the controversy between the parties herein still subsists and it is in the interest of justice that the orders sought should be granted. He urged the court to allow the application.

The Respondent, **Jane Wangechi Kimani**, though served with the instant **Notice of Motion** application as is evident from the **affidavit of service** of **John Mieri, a process server** filed on **19th January, 2016**, failed to enter appearance nor file any response to the said application. Consequently, the court directed that the said **Notice of Motion** application be canvassed by way of written submissions which the applicant complied by filing his written submissions on **11th March, 2016**.

In the submissions, it was submitted that though the Respondent was served with summons to enter appearance, she failed to do so but the applicant's advocate failed to take any steps towards prosecution of this suit. That the said failure prompted the court to issue **Notice to Show Cause** under **Order 17 Rule 2(1) & (2) of the Civil Procedure Rules**. He further submitted that his advocate did not inform him about the **Notice to Show Cause** and also did not appear in court. Consequently, the suit was dismissed for want of prosecution and he only got to know about the said dismissal when he sought legal advice on the way forward. It was his further submissions that he is still interested in the prosecution of this suit and he urged the court to allow his application. The applicant relied on the case of **Chieni Enterprises Limited vs. Attorney General & Another Milimani HCCC No 1947 of 1999**, where the court held that:

“As I stated before, I have wide discretion and I am of the view that the same ought to be exercised in favour of the 1st Defendant especially because I am of the view that there are certain issues raised in the defence, which ought, in the interest of justice, be heard inter parties”.

He further relied in the case of **Commercial Bank of Africa Ltd vs Martin Fares Miyesa, Milimani HCCC No. 1250 of 2002**, where the court also held that:

“.....I ask myself whether a litigant who has duly instructed an advocate in these circumstances, should be penalized because of the default of his advocate. In my view, cases belong to the parties. In normal circumstances, it would be strange justice if the sin of Advocates were visited on the parties. This is not intended to be a general proposition to be applied all the time. I am aware that there are circumstances in which an advocate's mistake will be visited on his client. I am however, satisfied that this is not one of those cases.....”

The applicant also submitted that the court should exercise its discretion in his favour so that substantive justice can be served. He therefore, relied on the case of; **Patel vs. E. A Cargo Handling Services Ltd (1974) E. A page 76**, where the court held that:

“I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

This court has now considered the instant **Notice of Motion** and the pleadings in general. The court has also considered the court records herein. There is no doubt that this suit was filed in court on **9th August, 2010**. Summons to enter appearance were served on the Defendant/Respondent on **28th August, 2010** as per the **affidavit of service** filed by **Ambrose Muthama, the court process server**. The defendant did not enter any appearance nor file defence. As required, the request for interlocutory judgment was filed in court on **1st October, 2010**.

Further, from the court record, it is clear that the matter came up for hearing on **20th December, 2011** wherein the plaintiff and his advocate were absent. The matter was adjourned and no other action was taken until **May 2015**, when **Notice to Show Cause** under **Order 17 Rule 2(1) & (4)** was taken out. The matter came for **Notice to Show Cause** on **25th May, 2015**, and since the plaintiff and his advocate were absent, the suit was dismissed under **Order 17 Rule 2(1) of the Civil Procedure Rules**. Thereafter the plaintiff filed this application on **3rd November, 2015**, and averred that the failure to prosecute this case was not due of his own deliberate intention but the mistake of his advocate.

It is trite that the court has discretion to reinstate a suit that has already been **dismissed under order 17**. However, the said discretion must be exercised judicially.

The court has considered the explanation given by the applicant which explanation has not been refuted by the respondent. As the court determines whether to allow the instant application or not, it will be guided by the findings in the case of **Films Role International Ltd vs Cannon Film Sales Ltd (1986) All ER 772** where **Justice Hoffman** stated as follows:

“A fundamental principle is ... that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong”

Further the court will also take into account the findings in *Patel vs E Africa Cargo (supra)* where the court held:

“The main concern of the court is to do justice to parties and the court will not impose conditions on itself.....”

Indeed if the plaintiff’s advocate failed to take any steps to prosecute the case, the said mistakes of the advocate should not be visited on the party (plaintiff herein). See the case of *Ahmed vs Highway Carriers (1986) LLR 258 (CAK)*, where the Court of Appeal held that:

“...a litigant should not suffer for his advocate’s mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant’s rights”.

This court has no reasons to doubt the applicant’s averments that the delay in prosecution of this case was caused by his former advocates and not himself. This court should be interested in doing justice to parties herein without being fettered by rules.

After a thorough consideration of the circumstances herein, the court finds that it would best exercised its discretion in allowing the application herein. See the case of *Shah vs Mbogo 1968 EA 693*; where the court held that:

“The exercise of discretion of the court to set aside ex parte orders is to avoid an injustice or hardship resulting from accident, inadvertence an excusable mistaken error and not otherwise to delay justice”.

Having now carefully considered the instant application, the court finds it merited and it is ***allowed entirely*** in terms of ***prayer no 2*** with ***costs being in the cause***.

Further, the plaintiff is directed to set the suit down on hearing ***within a period of 45 days from the date hereof***. Failure to do so the orders issued herein will automatically lapse and the suit will stand dismissed for want of prosecution.

It is so ordered.

Dated, Signed and Delivered at Thika, this 9th day of March 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in absence of the stated advocates for the parties and the parties too.

L. GACHERU

JUDGE

9/3/2018