



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 69 OF 2017

(FORMERLY KERUGOYA ELC NO. 275 OF 2013)

LEAH NJOKI KIBOKO.....PLAINTIFF

VERSUS

JUSTUS KIBOKO MURIUKI.....DEFENDANT

RULING

1. By a notice of motion dated 15th November 2016, the Plaintiff sought the following orders;

a. That this honourable court be pleased to grant the applicant leave to act in person.

b. That this honourable court be pleased to set aside the orders made on the 26th day of September 2016 for the dismissal of this suit and the suit be reinstated for hearing and determination.

c. That the costs of this application be provided for.

2. The grounds of the application were stated on the face of the motion which was supported by an affidavit sworn by the Plaintiff on 15th November 2016 together with the annexures. In a nutshell, it was stated that the Plaintiff's suit was dismissed for want of prosecution under Order 17 Rule 2 Civil Procedure Rules due to her advocate's fault.

3. It was the Plaintiff's contention that having instructed and paid the firm of S.W. Ndegwa & Co Advocates to file suit on her behalf in 2013 she trusted that her advocates would diligently prosecute the suit to its logical conclusion. She, however, came to learn much later that her suit was dismissed for want of prosecution on 26th September 2016. She, therefore, contended that the mistake of counsel should not be visited upon her as the litigant.

4. The Defendant filed a 19-paragraph replying affidavit in opposition to the Plaintiff's said application. He stated that a notice to show cause dated 19th August 2015 was issued by the court requiring the parties to appear in court to show cause why the suit should not be dismissed for want of prosecution. On 3rd December 2015, the Plaintiff's counsel requested for one (1) month to file an affidavit showing cause. The Plaintiff was said to have been personally present in court. This latter averment was never controverted by the Plaintiff.

5. The Defendant further stated that the Plaintiff did not file any affidavit as intimated and when the matter eventually came up for notice to show cause on 26th September 2016, the court had no choice but to dismiss the suit for want of prosecution since no explanation was offered for the delay in prosecuting the suit.

6. The court has carefully considered the Plaintiff's said application, her submissions in support and the Defendant's submissions in opposition thereto. The court record indicates that the Plaintiff's advocate sought time to file an affidavit in response to the notice to show cause on 3rd December 2015. The record further shows that no such affidavit had been filed by 26th September 2016 when the suit was dismissed by the Hon. Justice B.N. Olao in the presence of the Plaintiff's counsel.

7. The main question for consideration is whether the Plaintiff has shown good cause within the meaning of **Order 17 of the Civil Procedure Rules**. The court was not satisfied that good cause had been shown on 26th September 2016 because no affidavit had been filed. The Plaintiff has now filed an application and affidavit purporting to explain the delay in prosecuting her suit.

8. The only explanation given by the Plaintiff is that he had left the matter entirely at the hands of her advocate. Is that a good explanation for the delay? The court is not persuaded by the reason advanced by the Plaintiff. She was accorded more than 10 months by the court to show cause and give an explanation through an affidavit. She did not file any. The Plaintiff must understand that it was her duty to follow

up with her advocate and ensure that the suit was fixed for hearing. A diligent litigant cannot simply instruct an advocate and expect him to prosecute a suit to its logical conclusion.

9. The Plaintiff has urged the court to hold that a mistake of counsel should not be visited upon the litigant. The court is of the view that the Plaintiff was not blameless either. There is no evidence on record that she actively followed up with her advocate on the prosecution of her suit which had been pending for about 3 years at the time of its dismissal.

10. In the case of **Ivita Vs Kyumbu [1984] KLR 441**, the court quoted Lord Denning MR in the case of **Fitzpatrick Vs Batger & Co Ltd [1972] ALL ER 657** as follows;

“...It is the duty of the Plaintiff’s adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition... It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

11. Although the court agrees that it has a wide discretion to set aside a dismissal order, such discretion must be exercised judiciously and upon some reason. It cannot be exercised arbitrarily, capriciously or upon sympathy. See **CMC Holdings Ltd Vs Nzioki [2004] 1KLR 173**. The court is not satisfied that the Plaintiff has offered any good reasons to enable the court to exercise judicial discretion in her favour.

12. The upshot of the foregoing is that the court finds no merit in prayer (2) of the Plaintiff’s notice of motion dated 15th November 2016 and the same is hereby dismissed with costs. The prayer for leave to act in person is, however, granted.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17th day of MAY, 2018

In the presence of Mr Musungu holding brief for Mr Muchiri for the Defendant and the Plaintiff in person.

Court clerk Muinde.

Y. M. ANGIMA

JUDGE

17.05.18