



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2204 OF 2007

STEPHEN MURIUKI CHIURI..... PLAINTIFF

=VERSUS=

ALICE MWANIKI.....1ST DEFENDANT

JOHN KIAGO.....2ND DEFENDANT

THE NAIROBI CITY COUNCIL.....3RD DEFENDANT

RULING

1. On 26/1/2012 Honourable Nyamweya J dismissed this suit on the ground of want of prosecution on part of the plaintiff. Through an application brought in May 2012, the plaintiff pleaded for the setting aside of the dismissal order, contending that there was an inadvertency on the part of his advocate. The application was opposed by the defendants who contended that reinstatement was prejudicial to them.
2. In a ruling delivered on 14/7/2017, this Court (Eboso J) granted the plea for reinstatement on the following terms:

19. Consequently, I make the following orders in disposing the plaintiff's Notice of Motion dated 15/5/2012:

(a) The order made on 26/1/2012 by Honourable Justice Nyamweya dismissing this suit is hereby set aside and the suit is reinstated.

(b) Parties are directed to file and exchange, within 45 days, bound, paginated and indexed bundles containing pleadings, witness statements, documents and statement of issues;

(c) The court shall give further directions at the time of delivering this Ruling; and

(d) The Plaintiff shall pay each of the defendants throwaway costs of Kshs15,000. The same shall be paid within 45 days and in default the order herein shall stand vacated and the suit shall stand dismissed.

3. There was no compliance with the ruling of 14/7/2017 and the suit automatically stood dismissed. Subsequently, on 21/11/2017, the plaintiff brought a Notice of Motion dated 20/11/2017, seeking reinstatement of the suit and enlargement of the time within which to comply with the Order of 14/7/2017. This ruling relates to that application. The application is supported by an affidavit sworn by the plaintiff's advocate, Magdalene Nyokabi Waiganjo. She deposed that she was out of the office for a long time attending to her mother in hospital. She further contended that before she left the office, she prepared cheques on 4/8/2017 for Kshs 15,000 each to the defendants' advocates together with pre-trial compliance bundles and requested her clerk, Michael Njonjo, to deliver the cheques and file and serve the bundles. She added that when she resumed work on 4/9/2017, she realized that her court clerk had neither delivered the cheques nor filed the bundles. She pleaded that her mistake be excused.

4. The application is opposed by the defendants. They contend that this suit was previously dismissed for want of prosecution. They add that the plaintiff stayed for three years before bringing an application for reinstatement. She thereafter took four years to prosecute the application for reinstatement. The defendants further contend that letters which they wrote to the plaintiff's advocates drawing her attention to the order of 14/7/2017 did not attract any action on part of the plaintiff.

5. The court has considered the application together with the rival affidavits and submissions. The guiding principle whenever our courts are invited to set aside a dismissal order such as the present one is that this discretionary jurisdiction is intended to prevent injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain, the discretionary jurisdiction is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice (see **Mbogo & Another v Shalu EALR 1908**). **Madan J in Belinda Murai & Others v Amos Wainaina (1978)** outlined the approach to be followed when exercising the jurisdiction and emphasized

that the door to the court of justice should not be shut because of the mistake of a lawyer. **Apaloo JA in Philip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103** emphasized that the broad equity approach in dealing with an application such as the present one is that, unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs.

6. Informed by the above jurisprudence and taking into account the explanation tendered by counsel for the plaintiff, the court, for the umpteenth time, does exercise discretion in favour of the plaintiff and reinstates this suit on the following terms:

a) The plaintiff shall comply with the orders of 14/7/2017 within 15 days from today;

b) The plaintiff shall pay a further sum of Kshs 15,000 as additional throw away costs to each of the defendants through their respective advocates, within 15 from today; and

c) In default of either (a) or (b) above, the suit herein shall stand dismissed.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JUNE 2018.

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B M EBOSO

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr Miano holding brief for Mr Osiemo for the 1st Defendant

Mr Kimani for the 2nd defendant

Ms Halima Abdi - Court clerk