REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 229 OF 2017

FORMERLY EMBU CIVIL CASE NO. 92 OF 1997

PETER NDEKE MATE.....PLAINTIFF

VERSUS

ZAKARIA NKUNE & 8 OTHERS.....DEFENDANTS

RULING

1. This application is dated **27th April, 2018** and seeks orders:

    1. That service of this application be dispensed with in the first instance as the object of this application and of the suit will be defeated if the respondents proceed to operate and thereafter alienate, or in any manner whatsoever deal with the suit land.

    2. That this honourable court be pleased to set aside, vary, vacate and / or review the dismissal orders granted on 21st March, 2018 and reinstate the suit for hearing.

    3. That the suit as was E & L No. 229 of 2017 be reinstated.

    4. That cost of this application be provided for.

2. The application is supported by the affidavit of Peter Ndeke Mate the applicant which states:

    i. That the matter was dismissed on 21st March, 2018 for want of prosecution.

    ii. That the matter had previously been filed in Embu and the plaintiff was at all times intent at prosecuting his suit as elucidated in his supporting affidavit attached hereto.

    iii. That the dispute giving rise to the suit had since taken off for arbitration between the elders of the community but the process was stalled as a result of acts of God such as death.

    iv. That indeed the applicant is desirous of having his suit heard and concluded on its merits and had in fact filed with this honourable court his list of documents to be relied on as his final compliance documents in readiness for hearing his suit save to add that by then he had fully complied.

    v. That no appeal has been preferred against the said order.

    vi. That this application has been made without unreasonable and / or undue delay.

    vii. That in the interest of justice, the said order ought to be reviewed and the process of its execution stayed.

    viii. That no prejudice will be occasioned to the defendants/respondents if this suit is reinstated.

    ix. That the applicant is justifiably apprehensive that the respondents are determined to cause his eviction from a land he is in occupation of and depends on for his livelihood.

3. The application is supported by the applicant's affidavit which states as follows:

I, PETER NDEKE MATE a resident of Chuka of P. O. Box 37- Chuka do hereby make oath and state as follows:

1. That I am the applicant herein well versed with all the issues pertaining to this matter hence being competent to swear this affidavit.

2. That I instituted a suit against Zakaria Nkuene, Dominic Zakaria, Joseph Zakaria, Kirimi Zakaria, Mbaka Njue, Michael Nyaga, Njeru Paskala and Mbogo Magana same being Civil case No. 92 of 1997 at the High Court of Kenya in Embu on 30th September, 1997. Annexed is a plaint marked "PNM 1".

3. That defendants filed their defence on 29th January, 1998 and after that the suit went before the learned judge for directions on how parties would proceed in the same. Annexed is the said defence marked "PMN 2"

4. That sometime in the year 2002 elders of the community took over this matter and started arbitrating it all in the interest of justice but the same would later stall as a result of acts of God through death of some of the arbitrators and the then defendants.

5. That indeed peace had prevailed within the surroundings of the community and the areas surrounding the suit land until recently when my suit was dismissed for want of prosecution. The defendants and a group of goons have been causing unrest in the area claiming that they can now evict me and my vast family and dependants a thing that has caused blood-shed in the recent past.

6. That I was at all times eager to prosecute my suit but forces beyond my control prevailed over me thus delay to bring the subject suit to its logical conclusion.

7. That my zeal to prosecute the subject suit can be fetched back to the 7th day of April, the year of our lord 2004 when I wrote to the Chief Justice intimating to him the delay of this suit which has its roots back in the year of 1966 when it was first filed at the land adjudication committee and thereafter at the African District Court at Chuka in 1970'S. Save to add that at all instances judgment was in my favour. Annexed is my letter showing my zeal to have this matter concluded.

8. That upon filing of this suit I obtained orders stopping any one from interfering with the suit land until the logical conclusion of this suit and annexed is the said order marked PNM 3.

9. That at the time of dismissal I had complied with order 11 and as such was ready to have my suit heard. Annexed are my latest documents filed on 15th March, 2018 only 6 days before ill-fate befell my suit and the same eventually dismissed on 21st March, 2018. Marked "pnm 4".

10. That I crave for this honourable court's mercy and keen eye for justice to allow my suit be reinstated so that it can be heard on its merits as I will greatly be prejudiced if the defendants acts go unchecked and subsequently proceed to execute the decree thereof.

11. That this application has been made without unreasonable and/or undue delay on the plaintiff's part.

12. That it is therefore important that this honourable court sets aside its order so that the plaintiff is granted chance to prosecute his merited suit.

13. That further, unless this honourable court reviews and sets its order made on 21st March, 2018, the plaintiff will suffer great loss and prejudice in terms of costs which the defendant may opt to pursue.

14. That I aver further that no appeal has been preferred against the said order of this honourable court aforesaid.

15. That I swear this affidavit in further support of the prayers sought in the application filed herein for review of the order made on 21st March, 2018 and reinstatement of the suit E & L No. 229 of 2017.

16. That what I have deponed to hereinabove is true to the best of my knowledge save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief the grounds whereupon have been given.

4. The application was responded to through the affidavit of Joe Kathungu which states:

I JOE KATHUNGU of P. O. Box 1637-60100 Embu within the Republic of Kenya do hereby make oath and state as follows:-

1. That I am an advocate of the High Court of Kenya having conduct of this matter on behalf of the defendants hence I am competent to swear this affidavit.

2. That the plaintiff's application dated 27th April, 2018 is bad in law, has no merit, is an afterthought and an abuse of court process which ought not to be entertained by this honourable court.

3. That on 15th March, 2018 the matter came up for notice to show cause why the same should not be dismissed for want of prosecution.

4. That cause having not been shown, the suit was subsequently dismissed on 21st March, 2018.

5. That the plaintiff has not explained why he had not fixed his suit for hearing since 28th May, 2015 when it was last in court.

6. That it is not true that this matter was subject of arbitration by elders of community whoever they are.

7. That the plaintiff's claim that the suit was the subject of arbitration is misplaced and unfounded since there was no court order of stay of proceedings pending the alleged arbitration.

8. That the plaintiff had not complied with pre-trial procedures since 17th February, 2014 when he was given time to do so by the court which inaction portrays a litigant disinterested in the prosecution of his case.

9. That the plaintiff only filed his list of documents on 15th March, 2018 after and in reaction to the notice to show cause dated 21st February, 2018 to give illusion that he was still interested in prosecuting the suit.

10. That the plaintiff has not demonstrated that there is sufficient reason to warrant the setting aside, varying ad / or reviewing the dismissal orders.

11. That during the 3 year period before the suit was dismissed, the plaintiff was dormant and did not substitute the deceased defendants even after court gave him 30 days to do so in **27th January, 2015**.

12. That the delay in setting down the suit for hearing and prosecuting the case was a deliberate attempt to obstruct or delay the course of justice.

13. That defendants will suffer prejudice if the application is allowed since this suit was first filed 21 years ago and has continued to hang over them indefinitely.

14. That granting the orders sought by the plaintiff would highly prejudice the defendants in that he was granted orders of inhibition against the defendants' parcel of land way back on 2nd July, 2001 pending the determination of this suit and he has been taking advantage of those orders for the last 17 years to the detriment of the defendants.

15. That whatever is deponed to herein is true to the best of my knowledge, information and belief.

5. The application was canvassed by way of written submissions.

6. The applicant's written submissions are reproduced herebelow:

APPLICANT'S SUBMISSIONS ON APPLICATION DATED (SIC)

"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule……"

Belinda Murai & others vs Amoi Wainaina (1978), Madan J

Your Lordship,

On behalf of the applicant, we elect to submit as hereunder;

1. INTRODUCTION

Your lordship, the entire suit was dismissed for non-prosecution on the 21st day of March, 2018. The applicant through a new firm of advocates filed the instant application dated 27th April, 2018 seeking the suit to be reinstated as he was determined to have the suit prosecuted.

Among other grounds in support of his application, it was pleaded that the non-prosecution was occasioned by;

i. An arbitration process that was going on but the same was affected by the death of different members of the arbitration committee (Community Elders)

ii. The death of some of the defendants who ought to have been replaced.

iii. The conduct of the previous advocates on record for the plaintiff.

That at the time the matter came up for hearing, the respondents opposition was hardly a day old as it was served on counsel for the applicant only the previous day, never-the-less directions were granted to the effect of disposing off the matter by way of written submissions which directions we have since complied with by a copy of these submissions being on record.

2. <u>THE LAW</u>

It is now settled law that setting aside the dismissal of suit and its subsequent reinstatement as envisaged under order 10 Rule 11 of the Civil Procedure Rules 2010 rests on the courts inherent powers under the equivalent of section 3A of the Civil Procedure Act. The same position was considered in the case of Rawal while Vs Mombasa Hardware Ltd [1968] EA 392, by the Court of Appeal of East Africa. The Court of Appeal of East Africa considered such exercise of the court's inherent powers and held that the court has jurisdiction to set aside the dismissal of a suit under that rule and subsequently order its reinstatement.

Your Lordship,

The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be found in Article 159(2) (b) of the Constitution that justice shall not be delayed. Equally, section 3A of the Civil Procedure Act gives this honourable Court unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Under section 63 (e) of the same Civil Procedure Act, which is the statutory basis for all interlocutory applications, this honourable court is assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

This honourable court is also empowered by sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

The procedural underpinning to the above substantive provisions of the Constitution and the law is order 17 Rule 2 of the Civil Procedure Rules which allows this honourable court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution. We hastily add that such notices were indeed served on the previous advocates for the plaintiff but no such communication was allowed to the plaintiff thus his decision to change advocates who would pursue his cause.

In ET Monks & Company Ltd Evans [1985] 584 the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in Agip (K) Ltd V Highlands Tyres Ltd [2001] KLR 630. Visram J (as he then was) stated:

"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IV1 Rule 5 of Civil Procedure Rule (sic)."

The above decision by Visram J (as he then was) no doubt echoes the provisions of Article 48 of the Constitution that access to justice should not be impeded, as well as Article 50 (1) of the Constitution on the right to a fair hearing.

Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita V Kyumba [1984] KLR 441 espoused that:

"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse from the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

From the above decision, it is trite that the application before this honourable court shows all determination for the plaintiff to have his case heard and determined and further elucidates that the power to dismiss a suit or an action is a discretionary one which discretion must be exercised judiciously.

In the current application the court has been moved to set aside the dismissal on the grounds that arbitration had commenced, there was miscommunication and/or reluctance on the part of the former advocates firm on record for the applicant hence leading to the dismissal. It would be an injustice for the court to allow conduct of the former advocates on record for the applicant to be born (sic) on him and as such the consequences of the same to be suffered by (the innocent litigant) applicant with all the hallmarks of injustice to stand.

We hence submit that this is a good and proper case for the court to exercise its inherent powers to set aside the dismissal and reinstate the suit herein for it to be heard expeditiously on its own merits.

MENTATIONS

Indeed your lordship,

We further submit that this suit can be reinstated under the inherent powers of the court preserved by section 3A of the Civil Procedure Act. The reinstatement of the suit is a matter of the courts discretion which must be exercised judiciously as there are two matters with a bearing on whether this court should exercise discretion in favour of setting the dismissal and reinstating the suit to wit;

Whether the applicant has explained away sufficiently his failure to have the matter prosecuted.

The applicant herein cannot emphasize enough that he was never updated of the progress of his case up until the point it was dismissed, such facts are well elucidated in his supporting affidavit dated 27th April, 2018. No wonder and in the pursuit of justice he has since contracted the current firm on record to pursue his case.

Whether in fact there is anything still outstanding in the suit as framed capable of going for trial upon its reinstatement?

The answer to the question is equally in the affirmative, the genesis of this suit is hinged on a land brawl where justice can only be delivered if the suit is granted a chance to proceed for trial on its merits.

CONCLUSION

We thus conclude by urging this honourable court and its keen eye for justice to allow the suit be reinstated for hearing on its merits as no prejudice will be carried on the defendants. It is further well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act comparable only to the proverbial "sworn of the Damocles."

We humbly pray the suit be reinstated.

We so humbly submit.

DATED AT MERU THIS 9TH DAY OF JULY, 2018

MUTUMA GICHURU & ASSOCIATES ADVOCATES

ADVOCATES FOR THE APPLICANT

7. The respondent's written submissions are reproduced herebelow:

RESPONDENT'S SUBMISSIONS ON THE APPLICATION DATED 27TH APRIL, 2018

Your Lordship,

The Applicant filed the Application dated 27th April, 2018 seeking the following orders:-

1. Spent

2. That this Honourable Court be pleased to set aside, vary, vacate and/or review the dismissal orders granted on 21st March, 2018 and reinstate the suit for hearing.

3. That costs of this Application be provided for.

The Respondents through their advocate on record filed their response vide a Replying Affidavit sworn on 14th June, 2018 and filed on 19th June, 2018. We wish to rely wholly on the said Replying Affidavit and further submit as follows:-

The Application lacks merit, is an afterthought and an abuse of the process of court as the Applicant had long lost interest in his case. The delay in setting down the suit for hearing and prosecuting the case was inordinate and the Applicant has not explained such delay satisfactorily to warrant the court to exercise its discretion in his favour.

No good reasons have been advanced by the Applicant for not fixing the matter for hearing. His claim that the suit was the subject of an arbitration process is both untrue and misfounded. The Applicant has not attached evidence of any such arbitration process such as minutes of those arbitration proceedings or more importantly a court order for stay of proceedings pending the alleged arbitration.

The other reason proffered by the Applicant for not prosecuting his case is that some of the Defendants passed on and that they ought to have been substituted. Your Lordship, that assertion is self defeating and most absurd in light of the fact that it was the

Applicant's duty to substitute any deceased Defendant. It is worth noting that the Honourable Court had issued an order on 27th January, 2018 that the Applicant do substitute the deceased Defendants within 30 days. He failed to do so.

Your Lordship, the Applicant has also blamed his inaction n the conduct of his previous advocates

We submit that not only is this an afterthought seeing as the issue was neither brought up in the Application nor in the affidavit in support of the same but also that a suit belongs to a litigant and not his advocate and as such, a litigant has a duty to pursue the prosecution of his case. In any case, the Applicant has simply thrown a general statement about the so called conduct of his previous advocates. He has avoided stating in what way their conduct caused him not to persecute his case and has failed to annex any evidence of the same such as the efforts he made to communicate with them.

On this issue the Court of Appeal in the case of **RAJESH RUGHANI VS FIFTY INVESTMENTS LIMITED & ANOTHER (2016) eKLR** had this to say:-

> ***"…The above line of thinking no longer holds water and in my view it is the duty and right of any litigant to put pressure on his counsel to have the suit prosecuted earliest possible. If counsel can't rise to the task, the Plaintiff has the power and the right to dismiss such an advocate and get the services of another. It must always be remembered it is the Plaintiff's suit, not the Advocate's which risks dismissal for want of prosecution. Put differently, it is not acceptable for a Plaintiff to hide behind his counsel's inaction, for such a defence is tantamount to an admission or collusion with his advocate, not to prosecute the suit as required by law.***
>
> ***In the present case, the delay is unquestionably unexplained other than that counsel on record took no action. I have expressed myself on that lame excuse"***

Your Lordship, we submit that it would be a travesty of justice for the court to exercise its discretion in favour of the Applicant especially since his past conduct portrays lack of candor in the matter and blatant disobedience of court orders.

The Court will note from the record that on 17th February, 2014 an order was made that the Applicant herein complies with pre-trial procedures He failed to do so and only filed his list of documents on 15th March, 2018 after and in reaction to the notice to show cause dated 21st February, 2018 to give illusion that he was still interested in prosecuting the suit.

It is further our submission that if the Application is allowed, the Respondents herein will suffer prejudice.

This suit was first filed 21 years ago and it has continued all the while to indefinitely hang over them. Your Lordship, justice is justice to both parties and justice delayed is justice denied.

As very rightly pointed out by the Applicant in his submissions, Article 159 (2) (b) of the constitution requires expediency in the prosecution of civil suits and that justice shall not be delayed.

Further as already stated, this suit has been in court for the past 21 years. Some of the parties are now deceased and there is more likelihood of prejudice owing to the inevitable disappearance of human memory with the passage of time which could potentially weaken the Respondents' case.

The Applicant herein obtained orders of inhibition against Respondents' parcel of land way back on 2nd July, 2001 pending the determination of this suit. He has been taking advantage of those orders for the past 17 years and it is therefore no wonder that he is intent on obstructing and/or delaying the course of justice.

Lastly on costs, we urge this Honourable court to dismiss the Application with costs to the Respondents as the Applicant is the author of the current state of affairs.

We so submit.

DATED AT EMBU THIS…….DAY OF……..2018

……..

JOE KATHUNGU & CO.

ADVOCATES FOR THE DEFENDANTS/

RESPONDENTS

8. I have considered the pleadings and the submissions filed by the parties in support of their veritably incongruent assertions. I have also considered the authorities proffered or cited by the parties in support of their positions. I note that the applicant did not annex any authority. I opine that the cases of **Rawal While Versus Mombasa Hardware Ltd [1968] EA 392, E.T. Monks Company Versus Evans [1985]584 R, the case of Agip (K) Ltd Versus Highlands Tyres Ltd [2001] KLR 630** and the case of **Ivita Versus Kyumbu [1984] KLR 441** are good authorities that in proper facts and circumstances, a court of law can set aside its dismissal of a case.

9. The respondent proffered the **Court of Appeal Case No. 80 of 2007 at Nairobi** [2016] eKLR. The case is a good authority concerning the principle that where a litigant has been indolent, a court should not exercise its judicial discretion to reinstate a case. The case quotes the case of Ivita Versus Kyumbu (op.cit) as having opined:

> ***"The test of whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."***

10. This suit was dismissed after the court summoned the parties to come to court to show cause why the suit should not be dismissed for want of prosecution. During the day cause was to be shown, Mr. Muyondi, the plaintiff's advocate, was represented by advocate M/S Kithaka. The defendant and / or his advocate failed to show cause why the suit should not have been dismissed.

11. This suit was filed in the High Court at Embu way back in 1997. On 2nd July, 2001, pending the hearing and determination of the suit, the plaintiff obtained orders of inhibition against the respondents. He has been enjoying those orders for the last 17 years. I am persuaded by the defendants' submissions that the plaintiff has taken advantage of those orders and that for that reason he has been intent on obstructing and / or delaying the course of justice.

12. This case has remained unheard and undetermined for the last 21 years. Among excuses that the applicant has given in an effort to persuade the court that the suit should be reinstated are:

a) That part of the delay was caused by an arbitration process being conducted by community elders. I find this excuse nebulous. No proceedings have been provided. There is no evidence of a court order sanctioning such a process.

b) That some of the defendants have died. This excuse does not satisfy me that this suit should be reinstated. It is always the litigant's duty to ensure that the necessary substitution is done.

c) The applicant then blames his former advocates. I once again opine that it is the litigant's duty to ensure that his case is prosecuted diligently.

13. The submissions filed by the plaintiff do not persuade me to issue an order to reinstate the suit twenty one years after this suit entered the hallowed precints of the judicial pipeline. I wholly agree with the defendants'/respondents' submissions.

14. In the circumstances, this application is dismissed.

15. Costs are awarded to the defendants/respondents.

16. It is so ordered.

Delivered in open Court at Chuka his 19th day of September, 2018 .

in the presence of:

CA: Ndegwa

M/s Kiai h/b Kathungu for the defendants

John Zakaria – 4th defendant

Mutuma Gichuru for the Applicant - absent

Peter Ndeke Mate – plaintiff - present

P.M. NJOROGE

JUDGE