REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE 215 OF 2013

FESTUS ANENE ANENE.....PLAINTIFF/APPLICANT

VERSUS

WILFRED MAKOMERE KULATI

JOHN AMBALE AMIMO.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 4th June 2018 and is brought under section 1A, 1B and 3A of the Civil Procedure Act and order 51, 45 of the Civil Procedure Rules seeking the following orders;

1. That the orders made by the Honorable Court on 22nd May 2018 dismissing the suit for want of prosecution be reviewed and or set aside.

2. That this suit being a land matter, be set down for hearing when parties can be heard on both the claim and counterclaim before a final determination can be reached.

3. The costs of this application be provided for.

The Applicant's principal ground is that on the 22nd May, 2018 (when the case was dismissed for want of prosecution) the Applicant/Plaintiff was actually in court with his witness. The Counsel for the Applicant/Plaintiff was, however not in court because he was unwell and his brief was held by Counsel who stated this position to court.The Counsel for the Respondent/Defendant was also in court with the Respondent/Defendant himself. This Counsel informed court that she was ready to proceed and that this was an old case.

It was on the basis of the above submissions by both Counsels that the Honourable Court made a decision to dismiss this case for want of prosecution.

Our submissions. If the Honorable Court was not satisfied with the reason for applying for an adjournment, the court would have rejected the application for an adjournment and allocated the case time at which the hearing would commence and accordingly inform the Plaintiff/Applicant of this direction. Only afterthe Plaintiff/Applicant would have failed to start prosecuting his case, or failed to turn up altogether, would the court then go ahead to dismiss the case for want of prosecution. The Applicant/Plaintiff who was actually in court with one witness, was never called up to take the witness stand and, start testifying.

The application is opposed through thereplying affidavit sworn on 2nd July, 2018. The orders the plaintiff/applicant seeks are discretionary orders and it behoved him to not only come to court with clean hands but also satisfy the court as to the merits thereof which he has failed to do.

To begin with, the plaintiff/applicant has not only attempted to lie in theaffidavits in support of his application but he has also deliberately concealed from court material particulars. From 30th October, 2007, when this suit was filed over ten years ago, the plaintiff has never taken any or any tangible step to have this suit heard and determined.When this suit came up for hearing on 22nd May, 2018. Ms Ashitsa advocate who held brief for Mukavale advocate applied for adjournment which was denied as the plaintiff had already previously been granted a last adjournment in this case and he knew or ought to have known that the case would not be adjourned. Ms. Ashitsa, advocate was then asked to proceed with the hearing of the case but she stated that she was not in a position to proceed with the hearing and having declined or failed to proceed with the hearing as ordered the court then dismissed the case, and rightly so as the plaintiff had failed or refused to comply with the order to proceed with the hearing. It is therefore dishonest and mischieveous on the part of the plaintiff to now claim that the court erred by dismissing the case and failed to accord him an opportunity to be heard yet the court had granted him an opportunity to present his case which he failed to do.

Secondly, Mr. Mukavale advocate for the plaintiff/applicant had in the evening of 21st May, 2018 telephoned Ms. Siminyu advocate for the defendants assuring her that he and the plaintiff would be ready to proceed with the hearing of this case on 22nd May, 2018. It is not clear why counsel for the plaintiff would call and give that assurance and also fail to notify counsel for the defendants even in the morning of 22nd May, 2018 of his indisposition, if at all. There is definitely lack of candour. Being cagey disentitles the plaintiff/applicant to the discretionary remedies he seeks. Finally, the dismissal of the plaintiffs suit has no bearing on the defendant's counter-claim which he intends to proceed with.

This court has considered the application. This application seeks for orders that this honourable court's order made on 22nd May, 2018 dismissing this case for want of prosecution be set aside and/or reviewed so that this case is re-instated and heard and determined on merit. This application is supported by the affidavit of the applicant sworn on 4th June, 2018 and filed on the 5th June, 2018. It is further supported by the affidavit of counsel for the applicant sworn on 4th June, 2018 together with the annextures. The applicant's prayer is that the order made by this honourable court on 22nd May, 2018 dismissing the applicant's case for want of prosecution be set aside and/or be reviewed so that the case is heard and determined on merit. This is a 2013 matter, the final adjournment was given way back in July 2017. The hearing date was taken by consent and on the material date the plaintiff's advocate was said to be indisposed. It is evident that there is no ground established by the plaintiff or any error apparent on the face of the record or any new material placed before this court to warrant a review or setting aside of this court's orders of 22nd May, 2018. Being on a last adjournment, the plaintiff and his counsel ought to have made arrangements for another advocate with instructions to proceed to attend court if Mr. Mukavale advocate was not available.

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441,Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. Be that as it may, the plaintiff will be given one last chance to prosecute this matter on condition that he obtains a hearing date within the next 30 days. Cost of this application to the defendants/respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE