



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 131 OF 2017

JULIUS SILVESTOR MWAURA.....PLAINTIFF

VS

JOHN MWAURA KABURU.....DEFENDANT

RULING

1. The Applicant filed the Notice of Motion dated 4/5/18 under Order 45 Rule 1, 2, 3(3); Order 51 rule 1 of Civil Procedure Rules and Section 80 of the Civil Procedure Act and Section 19 of Environment and Land Court Act. It sought that orders made on 2/5/18 be set aside and/or reviewed and the suit be reinstated.
2. The Plaintiff has deposed that he got late in attending Court on the material date of the hearing. That he was held up in traffic caused by an accident on the way to Court. Thus arriving at 9.15am by which time the matter had been dismissed. He informed the Court that on the very day his Counsel was indisposed hence was absent at the hearing. He urged the Court to reinstate the matter as the Defendant does not stand to suffer any prejudice other than the costs for the day for which he is prepared to meet.
3. The Respondent opposed the application vide Replying Affidavit filed on 17/5/18 and deposed that the application is frivolous, vexatious, incompetent, bad in law and should be dismissed with costs. That the date was taken jointly by the two law firms representing the parties on the 2/5/18. That both parties were fully aware of the hearing date hereto. On 2/5/18 the Plaintiff and his Advocate were absent in Court when the suit was dismissed. That the Applicant has not produced any evidence to show that his Advocate on record was indisposed as he averred in his Supporting Affidavit. That he neither produced evidence to show that he was stuck in a traffic jam arising from a road accident. That the matter has been lying in Court for over one year without prosecution and this shows that the Applicant has lost interest in the matter.
4. Parties filed written submissions which I have considered.
5. The Applicant submitted that he is ready to compensate the Respondents with costs as may be imposed by the Court. That the Applicant having filed his application for reinstatement promptly and without any inordinate delay on 4/5/18 demonstrates that he is interested in prosecuting his case to the final conclusion. He pleaded that mistakes are to human and the Applicant should not be shut out from litigation. He urged the Court to exercise its discretion under Order 12 rule 7 to grant the application in the interest of justice.
6. The Respondent in his submissions faulted the Applicant for filing the application under Order 45 rules 1, 2, 3 & 51 of the Civil Procedure Rules and not Order 12 rule 7. He urged the Court to dismiss it for being defective.
7. Further the Respondent submitted that the Applicant did not adduce evidence to prove the existence of the accident referred to which is alleged to have caused the delay in going to Court. He submits that the accident was a clear excuse. That neither did he table evidence to support his averment that his Counsel was indisposed. That if indeed his Counsel was indisposed he would have sent a clerk or another Advocate to hold his brief in the norm which Advocates who find themselves indisposed on the day of hearing. That the conduct of the Applicant and his Counsel is such that they have no interest to prosecute the matter. The matter having had no activity for one year is a clear case for dismissal.
8. This suit was filed on 6/1/17 in Environment and Land Court Kerugoya vide ELC No 2 of 2017, Kerugoya seeking a transfer of the suit lands in his name or in the alternative judgement be entered for the Plaintiff against the defendant for the sum of Kshs. 487,775/=. It should be noted that it is on record that Order 2 rule 5 was fully complied by the claimant on filing suit.
9. On 2/2/17 the Defendant duly entered appearance in person and filed his statement of defence through his Advocates Magee wa Magee & Co. Advocates. On the 13/2/17 and on 17/2/18 filed the attendant documents in compliance to Order 7 rule 5.
10. On the 16/1/17 the file was transferred to Murang'a Environment and Land Court for hearing and determination.

11. On 5/10/17 the matter was certified ready for hearing by this Honourable Court and hearing was fixed ex parte for 14/11/17. Come the 14/11/17 the Plaintiffs' Counsel sought an adjournment which was granted to serve the Defendant with compliance documents. The Court gave directions and the hearing was fixed by consent on 19/12/17. It is not clear from the record what happened on 19/12/17 but the matter came up before the Deputy Registrar on 12/3/18 when the Plaintiffs' Counsel was absent and the party present was directed to fix a hearing date before the Environment and Land Court Judge. Parties finally fixed a hearing date for 2/5/18.

12. Come the hearing date on 2/5/18 neither the Advocate nor the Plaintiff were present when the matter was called out in Court. The Defendant having not admitted any liability and noting that the Defendant had no Counterclaim, the Court in pursuance to Order 12 Rule 3 of the Civil Procedure Rules dismissed the case for want of prosecution/non-attendance.

13. The provisions of 12 Rule 7 of the Civil Procedure Rules on setting aside judgement or dismissal states as follows:-

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

14. The power to set aside judgment is a discretionary power and going by the decision of **Mbogo vs Shah [1968] EA 93**, the principles to be applied before setting aside judgement were stated by **Duffus J** as follows ;

“.....the Principles that the Courts discretion to set aside on ex parte judgement is intended to be exercised to avoid injustice or hardship resolving from accident inadvertence or excusable mistake or error; but not to assist a person who has deliberately sought to obstruct or delay or cause the case of justice”.

15. It is not in dispute that the Applicant and his Advocate were aware of the hearing date. The Applicant has not tabled evidence to persuade the Court that firstly his Counsel was indisposed. He has explained that he himself was prevented by an accident enroute to attend Court on time. I have no reason to disbelief him. In the interest of justice and given that the Court is satisfied that the conduct of the Plaintiff was not intended to delay or obstruct justice, I grant him the benefit of doubt. The Defendant has not explained how he stands prejudiced if the orders are set aside to pave way for the matter to be heard on its merits. The Court is inclined to allow the application and set aside the dismissal orders.

16. The parties to fix this matter for hearing in the next 14 days in default, the suit shall stand dismissed.

17. The applicant shall pay the Defendants costs of the application in the sum of Kshs. 5000/- payable before the next hearing date.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF OCTOBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mbugua HB Kirubi for the Plaintiff

Defendant – Absent.

Irene and Njeri, Court Assistants