



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 168 OF 2012**

**PAUL KERORO OKEMWA.....PLAINTIFF**

**VERSUS**

**DORA NYAKINYUA MATANDI.....1<sup>ST</sup> DEFENDANT**

**GIBSON NGIGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This matter was listed on 30<sup>th</sup> March 2017 for Notice to Show Cause why it should not be dismissed for want of prosecution. There being no appearance for any of the parties, and the court being satisfied that the matter was ripe for dismissal, dismissed the suit for want of prosecution with no order as to costs. Being aggrieved by that order, the plaintiff filed Notice of Motion dated 12<sup>th</sup> July 2017 in which he sought reinstatement of the suit.

2. The application was supported by an affidavit sworn by Amos Andama, learned counsel having conduct of the matter on behalf of the plaintiff. He deposed that when the matter was called out and dealt with on 30<sup>th</sup> March 2017, he was held up in a hearing in Nakuru HCCC No. 152 of 2012 and was therefore unable to attend to this matter. He urged the court not to visit mistake of counsel on the client. He added that the suit involves a claim for land and should therefore be determined.

3. The application was opposed by the defendants through a replying affidavit sworn by the 1<sup>st</sup> defendant. She deposed that plaintiff had not prosecuted the matter since its filing and had not offered any reason as to the failure to prosecute the suit.

4. The application was heard by way of written submissions. The applicant filed submissions on 24<sup>th</sup> July 2018 while the respondents filed submissions earlier on 13<sup>th</sup> April 2017. I have considered the application, the affidavits and the submissions.

5. The applicant seeks to set aside an order that was made following due service of a notice to show cause. When dealing with an application application seeking to set aside an order made after due service, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

*From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).*

6. The court therefore has unfettered discretion in determining whether or not to set aside the order of dismissal in this matter. Needless to state, discretion must be exercised judiciously. The reason offered for failure to attend court is that the advocate handling the matter, though aware that the matter was coming up, was held up in another court. No details are offered as to which particular court the advocate was before. The cause list of that particular court was not annexed either. Similarly, no reasons have been given as to why another advocate could not be deputised to deal with this particular matter. I am therefore not persuaded that valid reasons have been offered for failure to attend

court.

7. It must also be remembered that the matter was listed for notice to show cause under **Order 17 rule 2** of the **Civil Procedure Rules** why the matter should not be dismissed for want of prosecution. The rule provides:

*2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

*(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

8. Assuming that counsel for the plaintiff was in court on 30<sup>th</sup> March 2017, he would have been expected to offer reasons as to why the suit should not be dismissed. It logically follows that he should have offered such reasons in the affidavit supporting the current application. He did not do so even after being prompted by the replying affidavit. An attempt was made to offer factual explanations in the submissions. That is unacceptable as submissions do not constitute evidence.

9. All in all, I am not persuaded that valid reasons have been offered to enable me exercise discretion in favour of the applicant. Notice of Motion dated 12<sup>th</sup> July 2017 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 23<sup>rd</sup> day of November 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kimani holding brief for Mr Mutai for the plaintiff/applicant

Mr Musili holding brief for Mr Orege for the defendants/respondents

Court Assistants: Gichaba & Lotkomoi