



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 401 OF 2017

JOHN MWAURA NGUGI.....PLAINTIFF

VS

GEORGE WAWERU MWANGI..... DEFENDANT

### RULING

1. The Plaintiff filed a Notice of Motion on the 11/9/18 seeking reinstatement of the suit dismissed on the 21/2/18. The application is based on the grounds that the hearing date of 21/2/18 was taken by the Plaintiffs Advocate on the 18/1/18. That the Plaintiff and the Advocate of the Defendant were not aware of the hearing date as they had not been served hence their absence in Court on the 21/2/18.

2. The application is supported by the supporting affidavit of Richard Nganga Kamiro Advocate where he deposed that he is in conduct of the matter on behalf of the Plaintiff. That his office erred in not diarizing the matter for hearing on 21/2/18 and therefore failed to inform the Plaintiff and the Advocate for the Defendant about the hearing of the matter.

3. The Defendant was served with the application on the 5/10/18 but did not file any response. The application is therefore undefended.

4. I have considered the application, the supporting affidavit of Counsel for the Plaintiff and the key issue is whether the Court can exercise discretion to reinstate the suit.

5. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court judiciously. The exercise of judicial discretion is dependent upon the factual circumstances of the case.

6. In the case of **Mbogo & Another v Shah [1968] EA 93** the Court held that;-

“.....the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

7. For my proper exercise of judicial discretion, it is important to look at the conduct of the parties in the suit as well as the factual circumstances of the case. This case was filed on the 14/6/17. By the 9/10/17 both parties had fully complied and the matter was certified ready for hearing. The hearing was fixed ex parte on the 20/11/17 by the Plaintiff's Advocate on record. The Court ordered the Plaintiff's Advocate to serve the Defendant. Come the 20/11/17, the Plaintiff's Advocate on record informed the Court that he had not served the Defendants and sought another hearing date to enable him to serve. Another hearing date was fixed ex parte for 18/1/18 with orders that he serves the Defendant. On the 18/1/18 the Plaintiff's Advocate had not served the Defendant and the case could not proceed. The Court ordered the Advocate to pay Court Adjournalment Fees and serve the Defendants for hearing on the 21/2/18. Come the 21/2/18 neither the parties nor their counsels were present in Court and in accordance with order 12 rule 1 the Court dismissed the suit.

8. From the above it is clear that there has been delay in prosecuting this matter. The Advocate has admitted failure to comply with service of the hearing dates on the Defendant for three consecutive times. He has admitted that in his supporting affidavit as well as the submissions. He also admitted failure to serve the Plaintiff, the substantive stakeholder of the suit.

9. Section 1A (3) of our Civil procedure Act provides as follows

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

10. One of the purposes of the overriding objective is the timely disposal of suits that throng our Courts day in day out. An instructed Advocate has a duty of professional care to his client. He equally has a corresponding duty to the Court in which he practices and even to the opposite side. Equally the Court expects the Advocate in his discharge of duties to the tripartite parties to do so diligently and with deference. In **Re Jones [1870], 6 Ch. App 497** in which **Lord Hatherley** communicated the Court’s expectations this way:

‘...I think it is the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’

11. The Court is unable to understand why the Advocate in this matter did not serve the Defendant and his client as well with the hearing date. He did not offer any reason other than to say that it was an inadvertent omission which omission was repeated three times in a row. This conduct borders on abuse of the process of the Court by an officer of the Court, the Learned Counsel.

12. It would be noted that the application for reinstatement is being made about 8 months later. This amounts to inordinate delay . As stated above it is equally the responsibility of the party, the Plaintiff herein to follow up their case with the Counsel that they have instructed. It is not enough to instruct counsel and put one’s head in the sand only to emerge and lay blame to the counsel when there is distress arising from situations where the Counsel has neglected his duties. In this case it is noted that the Plaintiff has not filed any affidavit to support the reinstatement of the suit. I associate myself with the decision of the Court of Appeal in the case of **The Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

13. It is clear from the record that the Plaintiff and his Advocate have been indolent in prosecuting this case and the Court does not find it judicious to exercise its discretion in his favour, inordinate delay and the persistent dereliction of duty on the part of the Plaintiff and his counsel in the expeditious disposal of the suit.

14. The application is dismissed with costs.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 22<sup>ND</sup> NOVEMBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ajulu HB for Kamiro for the Plaintiff/Applicant

Defendant/Respondent - Absent

Irene and Njeri, Court Assistants