



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC. CIVIL APPL. NO. 34 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF LAND PARCEL NO. NJIA/BURIERURI/2502, 733 AND 654

BETWEEN

M'ERIMBA M'ARUCHIU GEORGE..... APPLICANT

VERSUS

SENIOR PRINCIPAL MAGISTRATE MAUA

CHARLES NYAGA

RICHARD KAMENCHU.....RESPONDENTS

RULING

1. This matter relates to a Notice of Motion dated 22nd September 2017 brought under ***Order 17 Rule 2, Article 159 (2) (d), 50 (1) and all other enabling provisions of law.*** The applicant seeks the reinstatement of the suit which was dismissed on 30/6/2017 among other orders.
2. The grounds upon which the Motion is grounded are set out in the body of the Motion and supporting affidavit of M'erimba M'aruchiu George sworn on 22nd September 2017. The suit, (Judicial Review Motion dated 25th May 2010) was dismissed on 30th June 2017 for non-attendance and want of prosecution. Applicant contends that the failure to attend court was not intentional but a failure on the part of the advocate who had not informed him of the date.
3. Applicant avers that he should not be shut down because of an error on the part of his advocate and he desires that the suit be heard on merits.
4. The application was opposed vide the replying affidavit of Hellen Muthoni sworn on 24th November 2017. She deponed that the application was dismissed for non-attendance and want of prosecution as the suit had been in court for seven years since filing. Hellen contends that the applicant has moved the court severally in respect of the subject matter but all the attempts were found not to be meritorious, and that the present application is only intended to deny the 2nd respondent fruits of her judgment.
5. This matter was canvassed by way of written submissions. The AG for the senior Principal Magistrate Maua did not file any response to the application or submissions. The applicant submitted that he was unaware of the date of the notice to show cause as he was unwell and his advocate elected not to attend. The applicant seeks leniency of the court as he is over 80 years old always in and out of hospital. It is further submitted that the right of hearing before any decision is made is a basic right and cannot be taken away. That justice will be served if he is given a chance to be heard as denial of the same amounts to condemning him unheard because of a mistake of his advocate whom he changed. He submits that there would be no prejudice suffered by the respondents if the application is allowed. He relied on the cases of ***Dickson Ngigi Migugi v Commissioner of Lands Civil Appeal No. 297 of 1997*** and ***Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others [2013] eKLR.***
6. The 1st respondent submitted that the applicant has not come to court with clean hands and has not given substantial and justified reasons as to why he was absent from court. The applicant claims to be unwell but has not furnished the court with medical records to support his claim. Further, that this application is an afterthought as 7 years had lapsed from the time the suit was filed and this illustrates the applicant's indolence and lack of interest in his suit. He relied on the case of ***Eric Oluoch Olele v Kenneth O. Obae [2013] eKLR*** and ***Fran Investments***

Limited v G4S Security Services Limited [2015] eKLR.

7. The issue for determination before this court is **whether or not to reinstate the suit.**

8. This Judicial Review suit was filed more than 10 years ago on 26.5.2010 but on 30th June 2017 the same was dismissed for non-attendance and want of prosecution.

9. I have not only considered the arguments advanced herein for and in opposition to the application, but I have thoroughly perused the entire record of this file. It seems that on 11th December 2012 the court was informed that 2nd Respondent was dead. The court allowed for a legal representative to be appointed for the 2nd respondent, and a guardian *ad litem* to be appointed for the 3rd respondent. Thereafter, about two and a half years later, the matter came back to court on 15th June 2016 where nothing had been done by the applicant to further prosecute his suit.

10. The applicant states that this callousness of handling his suit was as a result of the advocate he had then appointed who never informed him of what was happening. Consequently, he should not be punished for the mistakes of his advocate. The Court of Appeal in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR expressed as follows;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

11. Courts power to excuse the mistake of counsel is not automatic and counsel’s duty is not only to the client but to the court as well. The mistakes should not affect the justiciable, expeditious and holistic disposal of a matter. See section **1B of the Civil Procedure Act** and **the Article 159 of the Constitution.**

12. In the case of Fran Investments Limited Vs G 4 S Securities Limited [2015] eKLR, Gikonyo J. expressed himself as follows;

“Again, if the Applicant was as vigilant as it claims to be, it is irreconcilable that they discovered the suit had been dismissed on 17th day of February 2014 – four years since the defence had been struck out. Such delay is not inadvertent as alleged by the Applicant; it is deliberate, as a party is expected to prosecute their cases without delay. The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate the suit and let it lie in peace in its judicial grave. The amount of time which has passed by will not allow any, and is not conducive to having a fair trial in this matter”.

13. Further in Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. (Emphasis added)

14. When this matter was stood over generally on 11th December 2012 no further steps were taken to facilitate the disposal of the matter. The case belongs to the applicant who alleges that advocate failed him. When such allegations are made it is prudent for the court to ascertain if the applicant demonstrated the steps he took to facilitate the prosecution of his suit. For example writing to his advocate inquiring about the status of the case.

15. I pose the question; **If the court was to allow this suit to be reinstated, are there chances of it being prosecuted in a timely manner?** The answer is certainly in the negative. The file would revert back to the status as at 11.12.12 when the court was informed that 2nd defendant was dead while 3rd defendant was of unsound mind. In essence, the suit against 2nd Respondent abated many years ago. There being no indication that this matter stands a chance of being prosecuted timeously, then I see no good reason to have the same reinstated.

16. From the foregoing, I am of the view that the application is unmeritorious. The application is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8TH NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Janet/Galgalo

Ashaba H/B for Mutembei for applicant

Kiongo for 1st respondent

Maamu for 2nd & 3rd respondents

HON. LUCY. N. MBUGUA

ELC JUDGE