



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 141 OF 2014

HON. BASIL CRITICOS.....PLAINTIFF

VERSUS

THE THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION

GROUP COMPANY LIMITED.....DEFENDANT

RULING

1. The Application before court is the Notice of Motion dated 18th December, 2017 brought by the Plaintiff under Order 12 Rule 7, Order 17 Rule 2(2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The Plaintiff is asking the court to set aside the order issued on 27th October 2017 (sic) in which this suit was dismissed. The Application also prays for reinstatement of the suit. The order for dismissal was actually made on 16th October 2017.

2. The Application is premised on the grounds set out in the face of the motion and supported by the affidavits of Greg Karungo, Advocate for the plaintiff sworn on 13th October 2017 and on 18th December, 2017 and a further affidavit sworn by Fred Adhoch, Advocate on 16th May, 2018. It is deponed that on 9th October 2017, the firm of Walker Kontos Advocates who have the conduct of the matter on behalf of the Plaintiff received a notice to show cause from the court dated 27th September 2017 and coming up for hearing on 16th October 2017, 2017. That on 12th October 2017 the said firm prepared a replying affidavit in response to the aforesaid Notice to show cause and forwarded it to Ms. Ameli Ingangu & Partners Advocates with instructions to hold their brief on 16th October when the matter was scheduled for hearing of the notice to show cause and that Mr. Fred O. Aluoch Advocate did attend court on 16th October, 2017 in readiness to handle the matter before court, but could not trace Environment and Land Court Case No.666 of 2014 on the day's cause list. The Plaintiff avers that as a consequence for the said confusion, counsel could not attend the hearing of the Notice to show cause despite being on the court premises. It is the Plaintiff's contention that failure by his Counsel to attend the hearing was not deliberate and/or intentional as counsel could not trace the matter in the registry or the court which had the conduct of the matter despite all reasonable and due diligence. That the said failure is not only honest but excusable.

3. It is further deponed that upon further inquiry of the status of the matter at the Registry thereafter, the Plaintiff's Advocates discovered that upon the transfer of this suit from Nairobi, the case number was changed from the original number ELC Case No.666 of 2015 to ELC Case Number 141 of 2014. The Plaintiff's Advocate avers that they were no aware of the said changes in the case number of the suit. It was upon discovering that the suit had been dismissed for want of prosecution on 16th October 2017 that necessitated the present application.

4. It is further argued that the plaintiff had a valid and good grounds against the dismissal of the suit and that the plaintiff continues to suffer loss and damage which continues to accrue on a daily basis as the defendant has unlawfully trespassed and illegally occupied the Plaintiff's Land Reference Number 10287- Taita. That the defendant has further illegally commenced mining of ballast on the said land without the Plaintiff's express or implied consent and without payment of compensation and/or royalties to the plaintiff. It is further averred that the Plaintiff has for the years 2015, 2016 and 2017 been ill and had been compelled to seek medical attention abroad. It is further stated that the plaintiff is keen to prosecute the suit and the Court has been urged to accord him an opportunity to ventilate his case against the defendant.

5. The Application is opposed by the defendant through a Replying Affidavit sworn by Gregory Omusolo sworn and filed on 3rd May, 2018. It is the Defendant's contention that the application is devoid of merit and ought to be dismissed inter alia on the grounds that the defendant is from the outset non-suited by dint of the fact that the Plaintiff neither served the defendant with any court summons or any pleadings. That the defendant only became aware of the existence of this suit on 29th March, 2018 when the present application was served upon them. according to the defendant, the grounds advanced by the Plaintiff are not credible, the suit having been initiated together with a notice of motion dated 28th May 2014 brought under certificate of urgency yet the plaintiff did not take any steps ever since.

6. I have considered the application, the affidavits on record and the submissions made. I should think the question whether summons to enter appearance were served on defendant or not is not a matter for determination in this application. The only question for determination is whether the court should set aside the order issued on 16th October, 2017 dismissing the Plaintiff's suit herein and have the same reinstated.

7. The plaintiff admits that notice of dismissal of this suit was given under Order 17 rule 2 of the Civil Procedure Rules. What remains is for me to determine whether the reason for non-attendance during the hearing of the notice to show cause on 16th October, 2017 and whether the delay herein is inordinate and unexplained.

8. According to the plaintiff, his counsel instructed Ms. Ameli Inyangu & Partners Advocates to hold their brief on 16th October, 2017 when the matter was scheduled for hearing of the Notice to show cause and that Mr. Fred O. Adhoch duly attended court but could not trace ELC No.666 of 2014 on the day's cause list. The letter that gave instructions to Ms. Ameli Inyangu & Partners Advocates had quoted the case number as ELC No.666 of 2014. The case was initially filed in the High Court at Nairobi as ELC No.666 of 2014 before it was transferred to this court and given a new number. The Plaintiff attributes the confusion in the case number for failure by counsel to attend court during the hearing of the notice to show cause. The plaintiff further submitted that the delay was caused by his ailment which necessitated seeking medical treatment abroad and that he has been and is still desirous of prosecuting this case.

9. The law governing dismissal of suits for want of prosecution is well settled. Some of the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution are i) whether there has been inordinate delay on the part of the plaintiff in prosecuting the case, ii) whether the delay is intentional, contumelious, and, therefore inexcusable, iii) whether the delay is an abuse of the court process; iv) whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant; v) what prejudice will the dismissal occasion the plaintiff? vi) whether the plaintiff has offered a reasonable explanation for the delay; and vii) even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

10. In the case of Mwangi S. Kimenyi –v- Attorney General & Another (2014)eKLR, Gikonya, J stated that:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; explanation given for the delay; and so on and so forth.”

11. The decision whether a suit should be reinstated for trial is a matter of justice and is depends on the facts of the case. The Plaintiff's explanation for the delay is that he was unwell. The matter, which was initially filed in Nairobi was transferred to this court and given a new number. The plaintiff's advocates instructed counsel to hold their brief when the matter was scheduled for hearing of the notice to show cause on 16th October 2017. That is an indication that he has been keen on this case.

12. Dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just things to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the substance of the suit will only breed extreme prejudice to the defendant. It must also weigh the prejudice the dismissal will cause the plaintiff.

13. Looking at the material before me and the explanation offered, the delay in prosecuting the suit is not inexcusable, or contumelious. I think the explanation given is reasonable. A further re-consideration of the circumstances of the case also reveals that the delay herein has not given rise to substantial risk to fair trial or resulted into grave injustice to the defendant.

14. I admit it was necessary for the plaintiff to have taken steps to advance his case, including thoroughly scrutinizing the cause list for 16th October 2017 because the case number was bound to change upon the transfer. That notwithstanding, I am persuaded the circumstance of this case justifies giving the plaintiff another chance which is not only the feasible but also the just thing to do. I accept the explanation for the delay.

15. Accordingly, I set aside the order issued on 16th October, 2017 dismissing this suit. The suit is reinstated. Costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Mombasa this 19th day of December, 2018.

C. K. YANO

JUDGE