REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 65 OF 2009 (OS)

HILLARIONE KABUTENI.........................1ST PLAINTIFF

MARGARET KABUTENI...........................2ND PLAINTIFF

VERSUS

GEORGE KIRUKI MWAMBIA.............1ST DEFENDANT

MUKETHA MUNGANIA........................ 2ND DEFENDANT

RULING

This ruling arises from the applicant's application dated 15th August 2018. That application is brought under section 1A, 1B, 3 and 3A civil procedure acts and order 12 rule 7 civil procedure rules. The applicant is seeking to set aside the dismissal of this suit for non-attendance by the plaintiff and for want of prosecution. The application is supported by the affidavits of both applicants sworn on 15.8.2018. The second applicant deponed that when she woke up on 27/9/2017 she was feeling unwell and she went to seek medication. She attached a copy of treatment notes dated the same date. The first defendant on the other hand stated that she came to court but mistakenly went to a different court. The respondent filed a replying affidavit on 27.9.2018 opposing the said application. In paragraph 5 of their replying affidavit, the respondents contend that it took the applicant's a whole year for them to bring this application which is an indication that they have lost interest in the case.

In their submissions counsel for the plaintiffs/applicants stated that this Hon. Court has discretion to reinstate a suit which discretion must be exercised judiciously. The learned counsel cited the case of **Shayona Timber Limited vs Kenya National Highways Authority (2018) eKLR.** In conclusion counsel submitted that this being a dispute involving land ownership and land being an emotive issue in Kenya, the applicants be granted another chance to prosecute their case as no prejudice will be suffered by the respondents.

On the other hand the respondents through the firm of L. Kimathi Kiara & Co. Advocates submitted that the application to set aside the dismissal order came by way of certificate of urgency one year later. The delay has not been explained. Counsel submitted that justice delayed is justice denied.

I have considered the application and the material placed before me both in support and in opposition thereto. The record shows that ever since this suit was filed in 2009, no steps were taken by the plaintiff or their advocate to prosecute the same. On 7th July 2015, this matter was fixed for notice to show cause where the plaintiffs who were represented by one M/s Mutinda expressed their desire to prosecute the case. The matter was then rescheduled to 5.9.2015 for fixing a hearing date. No steps were taken since then until the court on its own motion fixed this matter for hearing on 27/9/2017.

Counsel for the plaintiffs were present. The plaintiffs were absent. The applicants have taken a whole year to bring this application to set aside the dismissal order. This court has pronounced itself on the principles for setting aside dismissal orders.

In the case of **Ivita vs Kyumbu (1984) KLR** at page 441 the court held as follows;

> ***"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court".***

Again in **Macharia vs Macharia (1987) KLR 61** the court held as follows:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

The factors that must be considered when exercising this discretion include the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factors …..

Discretionary power should be exercised judicially meaning it should be exercised in a selective manner and not arbitrarily”.

In the recent amendment brought under the statute law (miscellaneous amendment act no. 6 of 2009) the powers of this court were further enhanced by the incorporation of an overriding objection in section 3A and 1B of the civil procedure act cap 21 laws of Kenya. The overriding objective provides that the courts discretion is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The application of that principle was put into perspective by the court of appeal in **HUNKER TRADING COMPANY LIMITED VS ELF OIL KENYA LTD** where it was held as follows:

“In the case of **Mradula Suresh Kantaria andSurech Nanillah Kaptaria civil appeal no. 277 of 2005** (unreported) this court observed:-

“In this regard we believe one of the principal purposes of the double OO principle is to enable the court to take case management principles to the center of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap”.

In conclusion we wish to observe that “O_2 Principle” which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the “right side”. In the circumstances of this matter the applicant is clearly on the “wrong side” and for this reason the principle must work against it”.

The plaintiffs in this case filed this suit in the year 2009. No steps were taken to prosecute the same until the court ‘**suo moto’** fixed the same for hearing and served the parties. The plaintiff failed to attend court and no reasonable explanation was given. Though the applicants have now attached some treatment notes, the application cannot be taken in isolation from the circumstance of the case and the previous conduct of the parties. The failure by the plaintiffs to attend court on 27.7.2017 must be seen in totality of the way they have conducted themselves since they filed this case in the year 2009.

The sum total of the plaintiffs conduct in the prosecution of this case places them on the wrong side of the overriding objective principle. In the result the application dated 15th August 2018 is not meritorious and the same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

Ms. Munga for plaintiff/applicant

Mr. Muthomi holding brief for Kimathi Kiara for respondent

CC: Janet