



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 18 OF 2017

(FORMERLY KERUGOYA E.L.C. NO 164 OF 2013)

JACOB NYAGA NJERU.....PLAINTIFF/APPLICANT

VERSUS

NJERU KINANDA.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 22nd November 2016 and filed on 23rd November 2016, the Plaintiff sought the following orders which I reproduce below:

- a. That there be stay of execution or any sub-sequential orders issued by the honourable court pending hearing and determination of this application.*
- b. That the honourable court be pleased to enlarge time for the Plaintiff/Applicant to comply with the orders of the court vide the ruling delivered on 22nd October 2013.*
- c. That the honourable court be pleased to issue any order.*
- d. That the costs of this application be in the cause.*

2. The background to the said application is that on or about 19th June 2013 the Defendant filed a notice of motion dated 18th June 2013 seeking dismissal of the Plaintiff's suit for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules on the basis that the Plaintiff had failed to take steps to prosecute his suit for more than one year immediately preceding the filing of the application.

3. The said application was heard by the Hon. Justice Boaz Olao who found that there was inordinate and inexcusable delay by the Plaintiff in prosecuting his suit. The court, nonetheless, did not dismiss the suit for want of prosecution but accorded the Plaintiff another chance to prosecute it. The court consequently directed the Plaintiff to comply with all pre-trial procedures in 30 days and fix the suit for hearing in default of which the suit would stand dismissed with costs to the Defendant. The Plaintiff was also ordered to pay the Defendant costs of the said application within 30 days. That ruling was delivered on 22nd October 2013.

4. It is apparent that the Plaintiff failed to comply with the aforesaid orders within 30 days or at all in consequence whereof the suit stood dismissed with costs on or about 21st November 2013. The record indicates that on 2nd July 2014, the Defendant filed his bill of costs for taxation seeking a sum of Ksh 129,330/-.

5. The Plaintiff or his advocate does not appear to have taken any steps for reinstatement of the dismissed suit other than filing written submissions to the Defendant's bill of costs in which it was submitted that Kshs 51,400/- all inclusive was sufficient. It would appear from the record that the Defendant's bill of costs was taxed and allowed in the sum of Ksh 129,330 as prayed. The Plaintiff's advocates then filed a notice of objection to taxation under section 11 of the Advocates (Remuneration) Order seeking a review of the taxation. The said notice was filed on 10th June 2015.

6. The Defendant applied for execution on 27th October 2015 in consequence of which a notice to show cause why the Plaintiff should not be arrested and committed to civil jail for failure to settle the taxed costs was issued on or about 27th October 2015. Nothing appears to have taken place in the next one year apart from some abortive dates for hearing of the notice to show cause.

7. According to the record, the Plaintiff changed his advocates on or about 16th September 2016 when a notice of change of advocates was filed by the firm of Nyangito Associates & Co to replace the firm of Eddie Njiru & Co Advocates. It is doubtful if the said notice was validly filed in view of the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** which require that leave for change of advocate after judgement be obtained.

8. The Plaintiff then filed the instant application on 23rd November 2016 seeking the orders reproduced in paragraph 1 hereof. The said application was based upon several reasons including the following;

a. That the Plaintiff's advocate never informed him of the ruling of 22nd October 2013 hence he was unable to comply.

b. That the said ruling was delivered in the absence of his advocates.

c. That the subject matter of the suit is land which is an "emotive issue"

d. The mistakes of counsel should not be visited upon the client.

9. The said application was supported by the affidavit of the Plaintiff sworn on 22nd November 2016 which basically reiterated the grounds stated in the application and blamed the firm of Eddie Njiru & Co Advocates for his woes. The Plaintiff therefore asked the court to allow his application and enlarge time for compliance with the orders of Hon Justice Boaz Olao made on 22nd October 2013.

10. The said application was opposed by the Defendant who filed a replying affidavit sworn on 15th December 2016. The Defendant contended that the Plaintiff's said application was an afterthought and an abuse of the court process since the Plaintiff had not explained the delay of over 3 years in filing the application. The Defendant further stated that since the suit was dismissed over 3 years ago, the proper prayer to seek was an order for reinstatement and not just enlargement of time.

11. The Defendant further stated that the Plaintiff's former advocates had participated in fixing dates for the notice to show cause; that the Plaintiff had not demonstrated his interest in the suit by visiting his advocate's chambers for briefing on the progress of the case; and that it was the Plaintiff's duty to prosecute his suit and not his advocate's. The Defendant finally stated that he would be prejudiced if the orders sought were granted and that it would serve the interests of justice to dismiss the application.

12. When the advocates for the parties appeared before me on 13th April 2017, they consented to dispose of the said application through written submissions with the option of highlighting the same on 14th June 2017. The Plaintiff's submissions were filed on 25th April 2017 whereas the Defendant's submissions were filed on 10th May 2017.

13. It is true that this court has a wide discretion to grant an order for enlargement of time or to reinstate a suit which has been dismissed. However, like all judicial discretion it must be exercised judiciously and

upon some reason. It cannot be exercised arbitrarily, capriciously or upon sympathy. For instance, in the case of **CMC Holdings Ltd Vs Nzioki [2004] 1KLR 173** it was stated that;

“That discretion must be exercised upon reasons and must be exercised judiciously... In law, the discretion that a court of law has, in deciding whether or not to set aside an ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”

14. So has the Plaintiff in this suit demonstrated such excusable mistake, inadvertence, accident or error to warrant the exercise of judicial discretion in his favour? The Plaintiff has stated that he failed to comply with the orders of 22nd October 2013 because his previous advocate did not inform him about the ruling. For a period of over 3 years, the Plaintiff was just sitting pretty waiting for his advocate to brief him. That is surely not a good explanation. Even assuming that there was no such court order requiring the Plaintiff to prosecute his suit within a specified period, why didn't he take steps to progress his matter given that he was not aware of its dismissal?

15. It is well settled in law that a litigant who initiates legal proceedings in court has a duty to prosecute and progress his case. A Plaintiff cannot simply throw the entire blame for failure to prosecute his suit expeditiously upon his advocate. There is no evidence on record that he ever followed up on his case with his advocates. There is evidence on record that long after dismissal of the Plaintiff's suit his advocate participated in the taxation of the Defendant's bill of costs and even filed an objection thereto.

16. It is also recognized in our law that it is not every mistake of counsel which would entitle a party to indulgence by the court. In the case of **Savings and Loan Ltd v. Susan Wanjiru Muiritu Nairobi (Milimani) HCCC No. 397 of 2002 Kimaru J** made the following observations;

“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 a dismissal of a suit on the sole ground of a mistake by counsel 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. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant...”

17. I think the above dictum accurately captures the instant situation and the conduct of the Plaintiff. He was not diligent in the prosecution of his case from the word go. Having filed suit in 2011 he simply sat pretty and waited for time to pass by. The Hon. Justice Boaz Olao found as a matter of fact that the initial delay in prosecuting the suit was inordinate and inexcusable but nonetheless granted the Plaintiff another chance to prosecute the suit. The Plaintiff did not take advantage of the opportunity. He was apparently woken up from his comfort zone when the notice to show cause was issued for execution more than 3 years after dismissal of his suit. The court is not satisfied that a good reason or explanation has been shown to warrant the exercise of judicial discretion in favour of the Plaintiff.

18. The suit herein was filed in 2011 which is about six years ago. The court is not satisfied that a fair trial can be had after such passage of time without occasioning prejudice to the Defendant.

19. The upshot of the foregoing is that the court is not satisfied that there is merit in the Plaintiff's notice of motion dated 22nd November 2016 and the same is hereby dismissed in its entirety with costs to the

Defendant.

20. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **JULY, 2017**.

In the presence of Ms Ndorongo for the Defendant and in the absence of the Plaintiff.

Court clerk Leadys/Njue

Y.M. ANGIMA

JUDGE

18.07.17