REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 2204 OF 2007

STEPHEN MURIUKI CHIURI.....PLAINTIFF

VERSUS

ALICE MWANIKI.....1ST DEFENDANT

JOHN KIAGO.....2ND DEFENDANT

THE NAIROBI CITY COUNCIL.....3RD DEFENDANT

R U L I N G

1. On 26/1/2012, Honourable Nyamweya J dismissed this suit, suo motto, on the ground of want of prosecution on part of the plaintiff. Through a Notice of Motion dated 15th May 2012, the plaintiff seeks to set aside the dismissal order. The Application is premised on the ground that, although the plaintiff's former advocates were served with a notice to show cause why the suit should not be dismissed for want of prosecution, they inadvertently failed to diarize the notice, culminating in their failure to attend court to show cause as required. The question to be answered in this Ruling is whether, in the circumstances of this case, the court should invoke its judicial discretion to reinstate the suit.

2. In a supporting affidavit sworn on 15th May 2012 the plaintiff contends that failure by his former advocates to attend court on the day the notice to show cause, came up for hearing was occasioned by inadvertence on the part of his former advocates. He deposes that the staff who received the notice to show cause, Peris Wanjiru Ng'anga, was a new employee of the firm and was not conversant with the procedure of diarizing court notices. Upon receipt of the notice to show cause, she simply filed the notice away. The said staff swore an affidavit on 15th May 2012 deposing the same.

3. The plaintiff contends that he is the bonafide owner of the suit property where he built a permanent house in 1999. He contends that the 1st and 2nd defendants trespassed on the suit property claiming ownership thereof. The alleged trespass triggered this suit. He pleads with the court to reinstate the suit. He urges the court not to punish him for the mistake of his previous advocates and contends that he is ready to abide by the conditions this court may impose.

4. The application is opposed by the 1st defendant through her replying affidavit sworn on 23rd July 2012. The 1st defendant also filed a replying affidavit sworn on 29th November 2012 in response to the plaintiff's belated affidavit showing cause why the suit should not have been dismissed. The 1st defendant states that she was allocated the suit property by the 3rd defendant in the year 2001 and subsequently sold the same to the 2nd defendant. She contends that since filing this suit in 2007, the plaintiff never prosecuted the suit, culminating in the court's issuance of a notice to show cause why the suit should not be dismissed. The 1st defendant contends that the issues raised by the plaintiff in his

affidavit are inconsequential as they do not explain the reasons for non-prosecution of the suit.

5. On his part, the 2nd defendant states that the plaintiff only made an attempt to fix the suit for hearing on 26th January 2009 and no other step was taken for a period of three years. He further deposes that the plaintiff's compliance documents were filed on 2nd February 2012 after the suit had been dismissed and may have been tailored for the purpose. The 2nd defendant contends that a reinstatement of this suit would be prejudicial and would force him to anxiously wait for its determination while incurring extra legal fees.

Submissions

6. The application was canvassed by way of written submissions. The plaintiff in submissions dated 19th November 2013 reiterates the averments in the supporting affidavit and contends that the issues in the suit will not be resolved unless the suit is heard and determined on merits. Counsel submits that the plaintiff previously invited the defendant for date-fixing on several occasions and that any mistake which subsequently occurred should not be visited upon the plaintiff. He argues that the duty of the court is to do justice.

7. The 1st defendant filed submissions dated 11th October 2013 in which she submits that the plaintiff's cause of action against his advocate for non-attendance lay elsewhere. The 1st defendant refers the court to the case of **Rajesh Rughani Vs Fifty Investments Ltd & anther Nairobi HCCC No. 3038 of 1996** where the court stated that a plaintiff who hides behind his counsel's inaction should not expect leniency from the court when he had failed to push his advocate to comply with the obtaining provisions.

8. The 1st defendant argues that the filing of witness statements and list of documents by the plaintiff do not show progress in prosecution of the suit since they were filed when the suit had already been dismissed. She relies on the case of **Werrot & Company Ltd & 3 others Vs Gregory & 2 others(2004) eKLR.** Counsel argues that the plaintiff's delay to prosecute the suit was inordinate and inexcusable. The 1st defendant contends that the present application is a hindrance to the administration of justice.

9. The 2nd defendant in submissions dated 21st February 2014 argues that the provisions of Order 17 Rule 2 were tailored to ensure a party who files a case takes all necessary steps towards its speedy conclusion. Counsel contends that the laxity shown by the plaintiff is a clear indication that he had lost interest in the suit and that any adverse effects on the plaintiff is self-inflicted. He relies on the case of **Safina Ltd Vs Jamadas Ltd (2006) eKLR** where the court allowed an application by the defendant seeking dismissal of a suit for want of prosecution. He also cited the case of **Peter Mwenda Muinami Vs Barclays Bank Ltd HCCC No. 1046 of 1999** where the court stated that if there was any injustice, the same was self-inflicted.

Determination

10. The issue for determination is whether there is a basis for the court to exercise its discretion to set aside the order made on 26th January 2012 dismissing the suit herein for want of prosecution.

11. The plaintiff's advocate admitted that a notice to show cause why the suit should not be dismissed for want of prosecution was duly served. He contends that his previous advocates' failure to attend court to show cause was due to an inadvertent mistake on part of the office attendant who received the notice to show cause. The office attendant failed to diarize the notice. He contends that his previous advocate had no knowledge of the notice to show cause and did not attend court on the day the notice to show cause came up for hearing, leading to the dismissal of the suit. The plaintiff's previous advocates learnt that the suit had been dismissed after receiving a notice of taxation from the 2nd defendant's advocates.

12. The defendants' objection to the application is primarily that the plaintiff has delayed the prosecution of this suit. The plaintiff's allegations that the defendants have not filed their documents and witness statements was not rebutted. I have perused the court file and I do not see any such documents filed by the defendants. As at the date this suit was dismissed, it was not ready for hearing since parties had not filed

their documents and Order 11 of the Civil Procedure Rules had not been complied with. The defendants had an option of applying for the dismissal of the suit under Order 17 Rule 2 of the Civil Procedure Rules but opted not do so.

13. Section 3A of the Civil Procedure Act gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties.

14. The guiding principle in the court's exercise of its judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908** at page 13. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

15.In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake.

> **"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule……"**

16. **Apaloo** JA outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103.**

> **"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".**

17. In my view, delay should not automatically lead to the shutting of the door to the court seized of a dispute. The court's overriding objective is to do justice. Before the door of justice is closed on a plaintiff, the defendant must satisfy the court that he will be prejudiced by the delay and that justice will not be done owing to the delay. I would add that the right to a hearing is secured under Article 50(1) of the Constitution of Kenya 2010. In exercising judicial discretion, courts are obligated to do all that is possible within their discretion to give effect to that right. The plaintiff and the 1st defendant lay claim to the same property. Ends of justice will be better served by allowing the suit to be heard and determined on merits. There is no evidence that the defendants will suffer prejudice which cannot be compensated by an award of costs.

18. In conclusion, I would say I am convinced the plaintiff has offered an excusable reason for his advocate's failure to attend court on 26th January 2012 and for the delay in bringing the present application. The inconvenience caused to the defendants by the delay and by the plaintiff's counsel's failure to attend court on the material day can be compensated by an award of modest costs.

Disposal

19. Consequently, I make the following orders in disposing the plaintiff's Notice of Motion dated 15/5/2012.

(a) The order made on 26/1/2012 by Honourable Justice Nyamweya dismissing this suit is hereby

set aside and the suit is reinstated.

(b) Parties are directed to file and exchange, within 45 days, bound, paginated and indexed bundles containing pleadings, witness statements, documents and statement of issues.

(c) The court shall give further directions at the time of delivering this Ruling.

(d) The Plaintiff shall pay each of the defendants throwaway costs of Kshs.15,000. The same shall be paid within 45 days and in default the order herein shall stand vacated and the suit shall stand dismissed.

Dated, signed and delivered at Nairobi on this 14th day of July, 2017.

B M EBOSO

JUDGE

In the presence of:-

……..……...…….Advocate for the Plaintiff

…..…….…….....Advocate for the Defendants

.....…….....……Court clerk