



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO 39 OF 2008

MOHAMMED SALIM ALI MOHAMED JUMA.....1ST PLAINTIFF/APPLICANT

JUMA ALI MOHAMMED JUMA 2ND PLAINTIFF/APPLICANT

VERSUS

THE COMMISSIONER OF LANDS..... 1ST RESPONDENT/DEFENDANT

KWIK FIT TYRES AND AUTOCARE LTD..... 2ND RESPONDENT/DEFENDANT

VILLA MORAN LTD..... 3RD RESPONDENT/DEFENDANT

RULING

1. This is the Notice of Motion dated 23rd March 2016. It is brought under order 51 Rule 1 of the Civil Procedure Rules, section 1A, 1B 3A of the Civil Procedure Act and all other enabling provisions of the law

2. It seeks orders;

a) Spent

b) Spent

c) Spent

d) That the Honourable Court be pleaded to set aside the orders made on 27th February 2017, dismissing this suit for want of prosecution fully reinstate the suit and with leave of this Honourable Court herewith be admitted as a response to the 3rd defendant's application dated 17th October 2016.

e) That costs be in the cause.

3. The grounds on the face of the application set out as paragraphs 1 – 3. I do not need to reproduce them here.

4. The application is supported by the affidavit of Priscilla Onesmus the plaintiff's advocate sworn on the 23/3/2017 and another by Mohammed Salim Ali Mohammed Juma the 1st plaintiff sworn on the 23/3/2017.

5. The application is opposed. There is a replying affidavit sworn by James Kariuki, property manager of the 3rd defendant sworn on the 6/4/2017.

6. I have considered the application, the affidavits in support, the replying affidavit, written submissions of both counsels and the authorities cited.

The issue of determination is whether the plaintiff's application is merited.

7. It is the plaintiffs/Applicant submissions that this Honourable Court has discretionary powers to set aside *ex parte* judgement or orders and

that such discretion is unfettered.

They have put forward the case of **Richard Ncharpi Leiyagu Versus – IEBC And 2 others Civil Appeal Number 18 of 2013** where it was held that “the courts discretion to set aside an ex parte judgement or an order is intended to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake or error but not to a person who deliberately seeks to obstruct or delay justice”. They also relied on the case of **Philip Kepto Chemwolo And Another –Versus- Augustine Kubende (1986) eKLR.**

8. That Article 159(2) of the Constitution, section 1A, 1B of the Civil Procedure Act oblige courts to do justice to all without undue regard to procedural technicalities. That this application has been brought without unreasonable delay.

That the delay in prosecuting this case has been explained and that it is in the interest of justice that this suit is heard and determined on merit. Lastly that the status quo ought to be maintained pending the hearing and determination of this suit.

9. The 3rd defendant/respondent submits that the plaintiff has displayed lack of seriousness in prosecuting this case. That the delay in prosecuting this case is inexcusable. They have relied on the case of **Josephat Muthui Muli –Versus- Ezeetec Limited (2014) eKLR** which quoted the case of **Shah –Versus- Mbogo.** That the delay herein is inexcusable and intentional as the matter has been dragging in court for nine (9) years.

They have also relied on the case of **Kenya marine contractor EPZ Limited Verses- Kenya Engineering Workers Union (2017) eKLR.**

They pray that the plaintiff’s application be dismissed with costs to the 3rd defendant/respondent.

10. I have gone through the court record. This is indeed an old matter. On 14/10/2015 the plaintiffs were given ten (10) days to file additional documents and to set down the suit for hearing. This was not done. I have considered the reasons given by Miss. Onesmus advocate for the plaintiff for not filing a response to the 3rd defendant’s dated 17/10/2017.

She has given a detailed account of what took place after they were served with the 3rd defendant’s application. In the case of **Shah –versus- Mbogo (1967) EA 116.** the principles applied before setting aside of judgment were enunciated as follows; per Duffusp.

“Applying the principles that the court’s discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.

11. I am guided by the above principles. I have also considered the reasons given by Miss Onesmus in her sworn affidavit. I find that failure to file a response to the 3rd defendant’s application dated 17/10/2017 constituted an excusable mistake. A mistake which ought not be visited in the plaintiffs. No material has been presented before the court for the court to come to the conclusion that the plaintiffs have deliberately sought to obstruct or delay the course of justice.

12. I have considered the circumstances prevailing in this suit and find that this court’s discretion sought to be exercised in favour of the plaintiffs to avoid injustice or hardship.

This is a matter that ought to be determined on its merits.

I hereby avail the plaintiffs an opportunity to present their case. An opportunity which they must not squander.

13. I find merit in this application and I grant the orders sought namely;

- a) That the orders made on 27th February 2017, dismissing this suit for want of prosecution be and are hereby set aside.
- b) The suit is reinstated.
- c) The 1st plaintiffs affidavit filed herewith is hereby admitted as a response to the 3rd defendant’s application dated 17th October 2016.

On condition that the plaintiff’s do pay to the 3rd defendant/respondent thrown away costs of Kshs.10,000/= to be paid written fourteen (14) days from the date hereof.

It is so ordered.

L. KOMINGOI

JUDGE

10/10/2017

Ms. Kaguri – I seek leave to appeal. We also seek typed copies of ruling.

Court – Leave to appeal granted. To issue upon payment.

L. KOMINGOI

JUDGE

10/10/2017