



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 25 OF 2013

STEPHEN KIPSANG RUTTO T/A

SPRINGWOOD COLLEGE.....PLAINTIFF

VERSUS

TANUI KIPKURUI.....1ST DEFENDANT

MERCY JEBET CHELASHAN.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

This ruling is in respect of the plaintiff's application dated 4th July 2017. The said application was brought by way of Notice of Motion pursuant to sections 1A, 1B, and 3A of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules as well as Articles 40, 47 and 50 of the Constitution of Kenya 2010. The application seeks to set aside the court's order for dismissal of the suit for non-attendance made on the 28th February 2017.

The application is based on the grounds stated on the face of the Notice of Motion and the plaintiff's supporting affidavit sworn on the 4th July 2017. In his affidavit the plaintiff avers that the non-attendance of his former advocate on the hearing date was as a result of inadvertence on the part of his former advocate. He further states that his former advocate never informed him of the hearing date and he only learnt of the dismissal when he went to peruse the court file on the 5th June 2017. He avers that his suit raises triable issues which ought to be determined by the court.

On the other hand, the defendant/respondent has opposed the application through his Replying affidavit sworn on the 28th August 2017. In essence he states that the plaintiff had not taken any steps to move the court necessitating the defendant to fix the case for hearing. The Plaintiff's former advocate was served with a hearing notice but both him and the plaintiff failed to attend court on the 28th February 2017 when the case came up for hearing. He further states that since the plaintiff instituted the suit in 2013, he has not been keen on prosecuting it and his application is therefore an abuse of the process of the court as it is merely intended to delay the cause of justice.

The main issue for determination is whether the order for dismissal of the plaintiff's suit ought to be set aside and the suit reinstated for hearing.

The principles governing the setting aside of an order for dismissal of a suit for want of prosecution are enunciated in the case of **Mwangi S. Kimenyi V Attorney General & Kenya Institute for Public Policy and Research 2014 eKLR** where in citing the case of **Utalii Transport Co & 3 Others V NIC Bank & Another (2014)eKLR** the court laid down the following principles:

- 1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case*
- 2. Whether the delay is inordinate contumelious and therefore inexcusable*
- 3. Whether the delay is an abuse of the process of the court*
- 4. Whether the delay gives rise to substantial risk to affair trial or causes serious prejudice to the defendant*
- 5. What prejudice will the dismissal occasion to the plaintiff?*

6. Even if there has been delay what does the interest of justice dictate: lenient exercise of discretion by the court.

I admit that a party must take steps to prosecute his case expeditiously and in the instant case there was a delay of about ten months before the suit was set down for hearing on 28th February 2017. I do not think that this delay is inordinate. It must be noted that dismissal of a case without hearing it on the merits is a draconian act which drives the plaintiff from the judgment seat. It is therefore a matter of the courts discretion which should be exercised judiciously. Looking at the plaintiff's conduct in totality and applying the above principles I find that his explanation for his failure to attend court is reasonable.

It has not been stated that the delay herein has given rise to substantial risk to a fair trial or caused serious prejudice to the defendant. In the above cited case the court observed as follows:

“For reinstatement of a suit to give rise to substantial risk to a fair trial or result into grave injustice to the defendant, the defendant must show that he suffered some additional prejudice which is substantial and results to i) impeding justice; ii) aggravated costs; iii) specific hardship to the defendant; iv) It must also show that the delay has worsened the defendant's position in the suit.

It will not be sufficient to make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out hereinabove. This thought derives legitimacy as a principle of law drawing upon the Constitution of Kenya with regard to promoting access to justice; enforcing the principles of justice especially on substantive justice in Article 159 of the Constitution and achieving the just resolution of disputes field in court through a fair and public hearing in accordance with Article 50”

Consequently, from the above legal analysis and the material placed before me, I find that the application has merit.

Accordingly, I set aside the order issued on 28th February 2017 dismissing the suit and direct the suit be set down for hearing within 45 days from the date hereof.

Since the plaintiff has occasioned inconvenience to the Defendant, he shall bear the costs of this application.

Dated, signed and delivered this 3rd day of November 2017

J.M ONYANGO

JUDGE

In the presence of :

Miss Ngetich for Mr Kamau for the Plaintiff/Applicant

Mr Oboso for Orina for the Defendant/Respondent

Court Assistant Rotich