



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC SUIT NO. 106 OF 2007

GLADYS NJERI KIRUGUMI.....PLAINTIFF/APPLICANT

=VERSUS=

LANGATA DEVELOPMENT CO.LTD.....1ST DEFENDANT/RESPONDENT

MOSES WAITHANJE MWIHURI.....2ND DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated **30th September 2015**, the plaintiff/applicant herein **Gladys Njeri Kirugumi** has sought for various orders against the Defendants/Respondents herein. The application is premised under **Section 3A of the Civil Procedure Act, Order 10 Rule 11, Order 36 Rule 10, and Order 51 Rule 1 of the Civil Procedure Rules 2010**, and all other enabling provisions of the law. The prayers sought are:-

1. Spent

2. That this Honourable Court be pleased to set aside the order made on the 29th September 2015, in open Court by Hon. Justice Gacheru, dismissing the Plaintiff/Applicant's suit.

3. That the suit be reinstated and be heard on merit.

4. That the costs of this application be provided for.

The application is based on the following grounds:-

a. That the order made by this honourable Court on the 29th September 2015, dismissing this suit prejudices the interests of the Plaintiff/Applicant herein.

b. That dismissing the suit for non-appearance by counsel for the plaintiff/applicant amounts to condemning the Plaintiff /Applicant unheard and/or visiting the mistake of a counsel upon innocent Applicant/Plaintiff herein.

c. That the non-attendance by counsel for the Plaintiff/Applicant was not intentional either was deliberate as counsel was attending matters within the court house and was unfortunately overtaken by the reading out of the cause-list.

d. That it is in the interest of justice that this unit be reinstated and heard on merit.

e. That the Defendant/Respondents will not suffer prejudice whatsoever if the suit is reinstated.

Further the application is supported by the Affidavit of ***Gladys Njeri Kirugumi***, the Plaintiff herein. In her affidavit the deponent averred that this matter was scheduled for full hearing on the ***29th September 2015***, before the ***Hon. Lady Justice Gacheru***. She alleged that her advocate was not present in Court but was before another court for hearing of three other matters. She further averred that she was informed by her advocates on record that the mistake, error, or inadvertence on the part of a Counsel should not be leveled against the innocent plaintiff herein. She urged the Court to issue an order that the matter be reinstated and be heard on merit. She also alleged that the defendants will not suffer prejudice whatsoever if the suit is reinstated. It was her contention that the non-appearance by her counsel was not an intentional omission. The deponent urged the Court to allow her application.

Mr Nyamai Davies also swore a supporting affidavit dated ***30th September 2015*** and averred that he is the advocate in conduct of the matter herein on behalf of the Plaintiff. Further that this matter was scheduled for full hearing on the ***29th September 2015***, before the ***Hon. Lady Justice Gacheru***. He alleged that unfortunately he was not present in court when the matter was mentioned in the cause list of the day as he arrived late and was therefore overtaken by events. He also alleged that he was in another court for three other different matters. He averred that the mistake, error, or inadvertence on the part of himself should not be leveled against the innocent plaintiff herein. Further that his non-attendance was not intentional neither was it deliberate. He urged the court to set aside its order dismissing the suit and further issue an order that the suit be reinstated and heard on merit. He also averred that the defendants would not suffer any prejudice whatsoever if the suit is reinstated. Further that dismissing the suit prejudices the interest of the plaintiff herein since abiding by such order is tantamount to condemning the plaintiff unheard and/or visiting the mistake of advocate upon the innocent plaintiff. He urged the Court to allow the application.

The application is opposed. The 1st Defendant filed grounds of opposition dated ***15th October 2015***, and states that;-

- 1. That this matter was dismissed for non-attendance of both Counsel and Plaintiff and not just Counsel as alleged.***
- 2. That the explanation given by Counsel for failure to attend court has no merit as the other matters referred to are subordinate Court matters.***
- 3. That it is the responsibility of Counsel on record to prosecute matters where Counsel is on record and failure to do so cannot be excused.***
- 4. That reinstatement of this matter which has been pending for 8 years is prejudice to the 1st Defendant which has been diligent in attending to this matter and was the one that had fixed the hearing date.***
- 5. That in the event the Court is inclined to allow the plaintiff's application then the plaintiff should be ordered to pay the 1st defendant's getting up fees for the date the suit was dismissed.***

The 2nd Defendant/Respondent also swore his Replying Affidavit on ***26th October 2015***, in opposition to the instant Notice of Motion and averred that the case came up for hearing on the ***29th September 2015***, when all the parties

were informed and were aware of the hearing date. He further averred that when the matter was called out for hearing in the court, it was only him and the advocate for the 1st Defendant who were present. He therefore requested the court to dismiss the case for non-attendance by the plaintiff and her advocates.

Further that if the plaintiff herself was in court then the court could not have dismissed the case. It is therefore not true that the plaintiff was in court with her witness as the court would have noted that. He

also alleged that it was not true that he would not be prejudiced by the reinstatement of this case as the case has been hanging over his shoulders for nine years. Further that when the case was dismissed, he was temporarily relieved as what remained was to apply for the eviction of the plaintiff from his plot.

He alleged that the plaintiff has not been desirous of prosecuting her case as she is enjoying illegal occupation of the plot and he would be greatly prejudiced if this suit was reinstated. He also alleged that in case the court is obliged to grant the orders sought, he would be asking for throw away costs. He therefore requested this Honourable Court to dismiss the application with costs as it lacks merits. He urged the Court to dismiss the instant Notice of Motion.

The application was canvassed by way of written submissions. The Law Firm ***Khaminwa & Khaminwa Advocates*** for the Plaintiff/Applicant filed their written submissions on **8th December 2015**, and urged the court to allow their application. They relied on various decided cases and submitted that the Plaintiff should not suffer due to the mistake and errors of her advocate. Further that the mistake of the advocate was genuine and excusable as he was in another court when the matter was called out.

The Law Firm of ***Riunga Raiji & Co. Advocates*** for the 1st Defendant filed their written submissions on **16th June 2016**, and urged the Court to dismiss the plaintiff's application. However they submitted that in the event the court is inclined to give the plaintiff another opportunity, then in the interest of justice, the Plaintiff should be ordered to pay getting up fees in terms of schedule **VI A2 of the Advocates (Remuneration Order)**. He relied on the case of **Iraru Holding Ltd Vs Canadian Foodcrains Bank & Others Nairobi HCCC No.1475 of 2000** where the court ordered the plaintiff to pay the Defendant costs and getting up fees when he sought for an adjournment.

The Law Firm of ***Mbichi Mboroki & Co. Advocates*** for the 2nd Defendant filed their submissions on **17th December 2015**, and urged the Court to dismiss the application herein.

The Court has considered the instant Notice of Motion and the court record. There is no doubt that the Law Firm of ***Riunga Raiji & Co. Advocates*** for the 1st Defendant fixed this matter for hearing on **15th December 2014**. The suit was scheduled for hearing on **29th September 2015**, wherein the Plaintiff and her Advocate failed to turn up in Court though a hearing Notice had been served. **Mr Kiura** for the 1st Defendant who was the only advocate present sought for dismissal of the plaintiff's suit for want of prosecution. The Court observed that this was a **2007** and the plaintiff and her advocate were not in court though served with a hearing Notice. The suit was consequently dismissed for want of prosecution on **29th September 2015**.

Subsequently on **8th October 2015**, the Plaintiff filed the instant Notice of Motion seeking reinstatement of the suit. The same has been opposed. The issue now for determination is whether the Plaintiff is deserving of the Orders sought.

The application herein is brought under **Section 3A** of the **Civil Procedure Act** which invokes inherent power of the Court to do substantive justice. The principles to consider on whether to reinstate a suit for trial were laid in the case of **Ivita Vs Kyumbu (1984) KLR 441** where the court held that;-

“The test is whether the delay is prolonged and inexcusable and if it is, can just be done despite such delay. Justice is justice to both the plaintiff and the Defendant, so both parties to the suit must be considered and the position of the judge too”.

The suit herein was dismissed by the Court's own motion under **Order 12 Rule 3(1)** which states that;-

“If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court”.

It is evident that on **29th September 2015**, only the 1st Defendant advocate attended court. The Plaintiff and her advocate were absent and therefore the court dismissed the suit for want of prosecution. The Plaintiff has given reasons as to why the suit should be reinstated.

Order 12 Rule 7 grants the court discretion to set aside or vary any Order made to dismiss the suit for non-attendance by the plaintiff. In deciding whether to allow or not to allow the instant application, the Court will also be guided by the findings in the case of **Shah Vs- Mbogo** where the Court held that;-

“The exercise of the discretion of the Court to set aside ex-parte order is to avoid an injustice or hardship resulting accident, inadvertence or excusable mistake or error and not otherwise to delay Justice”.

Further in the case of **Shanzu Investment Limited Vs- The Commissioner of Lands ,Civil Appeal Number 100 of 1993** quoted in the case of **Rose Wanjiku Kamau Vs- Tabitha N. Kamau & 3 Others (2014) eKLR**, the Court held that.

“The Court has a wide discretion to set aside Judgment and there are no limitations and restriction on the discretion of the Judge except if the Judgment is varied, it must be done on terms that are just”.

Further is the case of **Lochab Brothers Limited -vs- Peter Kaluma T/a Lumumba Mumma & Kaluma Advocates and 2 Others (2013) eKLR** the Court also held that;-

“ the main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to settle the wide discretion given to it by rules.”

In the exercise of its discretion the court will also be guided by the words of Justice Hoffman in the case of **Films Rove International Ltd Vs- Cannon Film Sales Ltd (1986) All ER 772**, where he held that;-

“..... A Fundamental principle is that.....the Court should take whichever course that appears to carry the lower risk of Injustice if it should turn out to be wrong.”

The Plaintiff has alleged that if the dismissal of her suit is allowed to remain, the effect of the same will prejudice her as it will amount to being condemned unheard.

The Court has considered the reasons given by the Plaintiff and her advocates in their affidavits and finds the said reasons not convincing. Indeed the Plaintiff was not in Court when the suit was called out because she could have responded. The advocate could not give priority to matters at the Sub-ordinate Court at the expense of a matter fixed for hearing at the superior court. The explanations tendered are not believable.

This is a 2007 matter and it ought not to be in the cause list by now. However, the court finds that this application was filed without delay and that the mistake of the advocate should not be visited on the Plaintiff herein. Further if the dismissal is allowed to remain, the effect therein will be prejudicial to the Plaintiff as she will miss an opportunity to present her case. The Court finds that this is a matter where the court should exercise its discretion and allow the instant application.

However, the Plaintiff/applicant will be condemned to pay costs of this application and getting up cost of **Kshs. 30,000/=** to the Defendants.

The Plaintiff/Applicant to ensure that the suit is fixed for hearing within the next 6 months from the date of this Ruling. Failure to do so, the suit will stand dismissed as earlier ordered by the Court.

Having now carefully considered the Plaintiff's/applicant's Notice of Motion dated **30th September 2015**, the Court finds it merited and allows it in terms of prayers number **2 and 3** with costs to the Defendants herein to be borne by the Plaintiff/applicant and further;-

i. Applicant/Plaintiff to pay getting up cost of Kshs 30,000/= to the Defendants.

ii. The Plaintiff/Applicant to ensure the suit is set down for hearing within the next 6 months from today's date and failure to do so, the suit will stand dismissed as earlier directed by the court.

It is so ordered.

Dated, Signed and Delivered this 16th day of December, 2016

L.GACHERU

JUDGE

In the presence of :-

None attendance for the Plaintiff/Applicant

Mr Kinyua holding brief for **Mr Kiura** for the 1st Defendant/Respondent

Mr Kinyua for the 2nd Defendant/Respondent

Court Clerk : Hilda

Court: Ruling read in open Court in the presence of the above stated advocates and absence of Plaintiff and her advocate.

Mr Kinyua: We can set the matter down for hearing . We will serve the plaintiff with the hearing Notice.

Court: Matter to be heard within the service week. Hearing **27th April 2017**.

Hearing Notices to issue.

L.GACHERU

JUDGE