



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CASE NO. 1886 OF 2007**

**PETER NDUNGU JOSEPH NJOROGE.....PLAINTIFF**

**VERSUS**

**LAZARO MUGO MUNYI .....DEFENDANT**

**RULING**

**The Application**

The application before this Court for determination is a Notice of Motion dated 23<sup>rd</sup> April 2013 brought by the Plaintiff under Order 12 Rule 3 and 7 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application seeks to set aside orders made on 27<sup>th</sup> January 2012 dismissing this suit, and to reinstate the same for hearing. The application is supported by an affidavit sworn by the Plaintiff's advocate, Mr. Maina Njuguna, on 23<sup>rd</sup> April 2013.

The Plaintiff's advocate has stated that they were summoned to attend court on 27<sup>th</sup> January 2012, through a notice to show cause why the suit should not be dismissed for want of prosecution dated 7<sup>th</sup> December 2011. It is the averment of Counsel that he sent his clerk to court to request an advocate to hold his brief and seek another date for hearing, for reasons that he was attending a hearing in another matter.

Counsel averred that although an advocate held his brief as requested, the court refused to grant the prayers sought and proceeded to dismiss the suit for lack of prosecution. Further, it is contended that the Plaintiff has always been desirous of proceeding with this suit expeditiously. According to Mr. Maina, learned Counsel for the Plaintiff, the dismissal was occasioned by his non attendance and he urged the court not to visit his mistake on the Plaintiff. Lastly, Counsel averred that the Plaintiff has a strong and meritorious case against the Defendant and further, that no prejudice will be suffered by the Defendant if the suit is reinstated.

The application is opposed by the Defendant who filed grounds of opposition dated 19<sup>th</sup> September 2013. According to the Defendant, the Plaintiff last moved the court in 2010 when the suit was fixed for hearing and further, that since then, the Plaintiff has not made reasonable steps to prosecute the suit. It is the Defendant's contention that the Plaintiff has been indolent in pursuing his claim and is therefore not deserving of the discretionary orders sought. The Defendant has averred that the instant application was filed on 6<sup>th</sup> May, 2013, which is a period of 15 months after the suit was dismissed on 27<sup>th</sup> January 2012 and therefore, that the Plaintiff is guilty of laches and the delay is inordinate.

**The Submissions**

Parties were directed to file written submissions and the Plaintiff in submissions dated 20<sup>th</sup> December 2013 argued that under Order 12 Rule 7 of the Civil Procedure Rules, where judgment has been entered or the suit has been dismissed, the court may set aside or vary the judgment or order upon such terms as the court may deem fit. Counsel reiterated the facts and submitted that the suit was dismissed due to non-attendance on his part and the court was urged not to visit the advocate's mistake upon the Plaintiff.

It was argued that the Plaintiff's advocate was unavailable since he was attending a hearing in **City Council of Nairobi -vs- Oss-Chemie K Ltd, Civil Suit No 280 (A) of 2009**. Counsel submitted that his clerk requested another advocate to hold his brief and request another date, but that the court refused to grant the prayers sought and proceeded to dismiss the suit. The Plaintiff relied on the case of **Edward Juma Malovi -vs-Peter Ndirangu (2006)eKLR** where it was held that the court has unfettered discretion to set aside a dismissal order and further, that such discretion ought to be exercised judiciously to avoid injustice. The court was also referred to the case of **Chemwolo & anor -vs- Kubende(1986)KLR 492** where it was held that in determining whether to set aside an interlocutory judgment, the court must consider facts and circumstances of the case prior and after entry of judgment.

It was submitted for the Plaintiff that the suit involves a dispute of land ownership and therefore, that land being an emotive issue in Kenya, the suit should be allowed to proceed as it raises serious and triable issues which can only be determined if the dismissal order is set aside. It was argued that failure to set aside the dismissal order would go against the Plaintiff's constitutional right to own property as guaranteed under Article 40 of the Constitution.

In further submission, Counsel for the Plaintiff stated that the Defendant would not suffer any prejudice if the suit is reinstated and can be compensated by way of costs. Lastly, the Plaintiff stated that he had approached the court with clean hands and that any delay caused has not been deliberately meant to delay the trial or otherwise obstruct the case.

The Defendant filed submissions dated 6<sup>th</sup> March 2014 where he argued that the Plaintiff had last moved the court 2010 when the matter came up for hearing and further, that the Plaintiff had not made any effort in prosecuting the matter. Counsel submitted that due to the Plaintiff's indolence, the Defendant was continuously prejudiced and that it was only just that the suit be dismissed. The Defendant relied on the case of **Ceres Estate Ltd -vs- Kieran Day & 4 Others(2013)eKLR** where the court declined to exercise its discretion in favour of the Plaintiff due to the Plaintiff's inordinate delay in prosecuting the matter.

Counsel for the Defendant made reference to a maxim of equity which states that equity aids the vigilant and not the indolent, and submitted that for the Plaintiff to now seek a remedy for his indolence was bad in law and an afterthought since the court rightfully exercised its discretion in dismissing the suit for non-attendance. Further, it was submitted that the application for reinstatement was filed 15 months after the dismissal of the suit and Counsel contended that this was a greater illustration of the Plaintiff's indolence and lack of interest in his suit. Counsel relied on the case of **Omar Said -vs- Attorney General (2005)eKLR** where the court found that there was inordinate delay where the application for reinstatement was brought after not less than 14 months.

It is the Defendant's submission that the Plaintiff had not furnished any plausible reasons under Order 12 Rule 3(1) to enable the court vacate its earlier discretionary order. In further submission, it was contended that the Plaintiff's argument that he had previously not caused unnecessary delays and that he had indulged the Defendant, does not show cause why his commitment to prosecute the suit began fading from 2010. Counsel for the Defendant stated that the Plaintiff had not demonstrated the efforts he made in pushing for the prosecution of the suit. It was argued that it was much the duty of the Plaintiff as it was his advocate's to keep record of the suit's status and further, that the delay only proved lack of interest by both.

Lastly, it was submitted that the suit was properly dismissed and it had not been shown that the court's discretion was not exercised properly, and reliance was placed on the case of **Hotwax Hotels Ltd -vs- Nairobi City Council (2005)eKLR** in this regard.

## The Issues and Determination

I have carefully considered the pleadings filed and submissions made by the Plaintiff and Defendant. The issue for determination is whether there has been inordinate delay in prosecuting the suit herein for which no reasonable explanation has been offered, to render the suit liable for dismissal. The Notice to Show Cause that is the subject of this ruling was issued under Order 17 Rule 2 of the Civil Procedure Rules which provides for dismissal of suit for want of prosecution as follows:

**“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay. A perusal of the court record in this suit shows that prior to the issuance of the notice to show cause, this suit was last in court on 24<sup>th</sup> July 2009 when directions as to the hearing of the Originating Summons were agreed upon by the parties. At the time of the hearing of the Notice to Show Cause on 27<sup>th</sup> January 2012, there had been a delay in prosecuting this suit of over three years, which rendered the suit herein liable for dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

Under Order 17 Rule 2(2) of the said Rules, where cause is shown to the satisfaction of the court, the court may make such orders as it thinks fit to obtain expeditious hearing of a suit, which has been dismissed for want of prosecution. However, in the instant application this Court finds that no cause has been advanced by the Plaintiff in support of the application for reinstatement. The Plaintiff's Advocate in his advocate's affidavit only gives reasons why he did not attend court on 27<sup>th</sup> January 2012 when the notice to show cause why suit should not be dismissed for want of prosecution was scheduled for hearing. Further, his reason is not borne by the court record which clearly shows that there was no appearance for either parties on 27<sup>th</sup> January 2012 when the Notice to Show Cause was heard.

In addition his application which is brought under Order 12 Rule 3 and 7 of the Civil Procedure Rules which relate to dismissal of a suit for non-attendance is also defective, as the suit herein was dismissed for want of prosecution and not for non-attendance. He has in this regard also not given any justifiable reason why no steps were taken to prosecute the suit herein for over 3 years.

The Plaintiff's contention that he has always indulged the Defendant and his counsel whenever they have been unable to proceed to defend the suit cannot also suffice. In the case of **Ivita vs Kyumbu [1984] KLR** the court cited with approval the case of **Mukisa Biscuit Manufacturing -vs- West End Distributors (1969) EA 969**, where the court stated that it is the Plaintiff's duty to bring the suit to early trial and he cannot absolve himself of this primary duty by stating that the Defendant consented to the position.

The Plaintiff's Notice of Motion dated 23<sup>rd</sup> April 2013 therefore fails for the foregoing reasons, and the Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_8<sup>th</sup>\_\_\_\_ day of \_\_\_\_April\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**