



REPUBLIC OF KENYA

Civil Suit 254 of 2009

UMBISA MOSES GWEHONA.....PLAINTIFF/APPLICANT

VERSUS

**SEVENTH DAY ADVENTIST CHURCH OF EAST AFRICA UNION (SUED ON BEHALF OF
KAHAWA WEST SDA CHURCH.....DEFENDANT/
RESPONDENT**

RULING

The Plaintiff filed a Notice of Motion application dated 21/9/2012 seeking orders that the Court be pleased to set aside the orders made on 2/2/2012 and 19/7/2012 dismissing the Plaintiff's suit for want of prosecution, the Plaintiff's suit dated 29/5/2009 and filed on the same date be duly reinstated for hearing and such other or further order the Court may deem fit in the interest of justice.

The application is premised on the grounds that the advocate seized of the matter, Sherwin Mbogo Njoroge attended court on 2/2/2012 but failed to abide by the Court's directions given on the said date and also failed to brief the principal of the firm after issuance of the notice for dismissal of the suit for want of prosecution and the orders of the court on 2/2/2012. That the case was dismissed due to the mistake of the Advocate who was seized of the matter and the dismissal was only discovered when a consent settling the matter was forwarded to the Defendant's advocate for execution, only for them to write back informing the Plaintiff's advocates that the matter had already been dismissed. Therefore, the mistake upon the advocate should therefore not be visited upon the Plaintiff. That there would be no prejudice occasioned to the Defendant if this application is allowed and if any prejudice would be occasioned, the same can be remedied by an award of costs.

The application is supported by an affidavit sworn on 21/9/2012 by Grace N. Mugo who deposed that she is an advocate of the High Court practicing as such in the name and style of G.N. Mugo & Co. Advocates, which firm has the conduct of this matter on behalf of the Plaintiff. She deposed that the suit was filed on 29/5/2009 alongside an application for injunction. That the application for injunction was heard on 13/7/2009 and a ruling thereto issued on 30/9/2009 granting the Plaintiff an injunction against the Defendant pending the hearing and determination of the suit. It was her disposition that the firm moved offices sometimes in 2011 and inadvertently misplaced the file in respect of the matter, which was later found. The deponent stated that the advocate in conduct of the matter, Sherwin Mbogo Njoroge, briefed her from time to time on the developments in the matter and that to the best of her knowledge the said

advocate informed her that negotiations with the Defendant were at an advanced stage and the matter was likely to be settled amicably between the parties. She deposed that on 16/4/2012 the said advocate wrote to the Defendant's advocate enclosing a consent in triplicate for their execution and return and a follow up letter on 11/5/2012 requesting the duly executed consent for further action. She deposed that the said advocate in August of 2012 left the firm to pursue other interests and indicated in her handing over report that the matter was near settlement and that the consent was yet to be signed by the Defendant's advocates. That pursuant to the said report, she wrote to the Defendant's advocate on 28/8/2012 following up on the consent. That in response to her letter of 28/8/2012, the firm received a letter from the Defendant's advocate to the effect that as far as they were concerned, the Plaintiff's suit was dismissed for want of prosecution, and therefore, the matter and been brought to a close.

The deponent stated that she instructed another advocate to peruse the Court file to ascertain the position which was done on 14/9/2012. That in the Court file, there was a notice to show cause why the suit should not be dismissed for want of prosecution was issued on 21/12/2011 and the suit was listed for hearing on 2/2/2012. Further that when the matter came up for hearing on 2/2/2012, the advocate, Sherwin Mbogo Njoroge attended court on behalf of the Plaintiff and was ordered to list the matter for hearing within 30 days failure of which the same shall stand dismissed. That on 20/5/2012 the Defendant's advocate filed an application seeking dismissal of the suit as the Plaintiff had failed to comply with the Court's directions of 2/2/2012 to which application the advocate, Sherwin Mbogo Njoroge filed a Replying Affidavit in response thereto and attended court on 19/7/2012 when the application came up for hearing. That the Court (Mwilu J.) ruled that the matter stood automatically dismissed at the expiry of 30 days from 2/2/2012. It was the deponent's disposition that she was not made aware of all these developments and that the dates were never diarized in the officer diary or her personal diary.

The deponent stated that in view of the information received upon perusal of the file, and not being aware of the developments in the file, she prayed that the Plaintiff be afforded a second chance as he was still desirous of prosecuting his claim. She deposed that an advocate's mistake should not be visited upon the Plaintiff and in any event the Defendant would not suffer any prejudice if the orders sought in this application were granted. Finally that it was only fair and just that the Plaintiff's suit be reinstated. The application was opposed when the matter was argued orally in Court. Counsel on behalf of the Defendant submitted that the Plaintiff delayed in prosecuting the matter and therefore the Defendant rightly applied for the matter to be dismissed. Counsel submitted that they did not negotiate the consent that was forwarded since the suit as is already been dismissed as the Plaintiff failed to adhere to the order of the Court. Counsel submitted that the Plaintiff should not be excused on the basis that an Advocate left the firm, and that the firm should have exercised due diligence to have the matter prosecuted expeditiously. Counsel referred the Court to the decisions in **Naftali Opendo Onyango v National Bank of Kenya (2005) and Allan v Alfred (1968) 1 All ER**. It was their submission that the Plaintiff ought to show that the delay was inordinate. Counsel submitted that it had been one year after the file was found and therefore the delay was not excusable, thus the Defendant was prejudiced by the delay. Counsel stated that S. 3A of the Civil Procedure Act gave the Court inherent powers to uphold justice and prevent abuse of the Court Process. Further that failure to prosecute the matter for one year was an abuse of the Court Process. Counsel prayed that the status quo remains which in effect is that the matter stays dismissed. The Plaintiff outlines in his application the circumstances that led to his suit being dismissed. The Court on its own motion invited the parties to show cause why the matter should not be dismissed. At the hearing thereof on 2/2/2012, Plaintiff's counsel was pardoned and directed to set down the matter for hearing within 30 days, which the said counsel failed to comply. When the Defendant filed an application to have the matter dismissed for want of prosecution, the Court stated that the matter stood dismissed for reasons that the Plaintiff had failed to comply with its earlier order. G. N. Mugo, the counsel who swore the supporting affidavit lay the blame upon the Sherwin Mbogo Njoroge who was in conduct of this matter for failing to keep be candid and keep her informed of the developments in the file. G.N. Mugo alleged that Sherwin Mbogo Njoroge advised that the matter was in progress and in fact wrote letters to the defendant forwarding consents for execution on their part. G.N. Mugo claims that this in turn made her to make poor judgment on the matter and as a result the same was dismissed. As to whether the Plaintiff should be suffer because of a mistake made by his advocates is well stated by Azangalala J. in **Commercial Bank of Africa Ltd v Martin Fares Miyesa Civil Case No. 1250/2002**

(as he then was now Court of Appeal Judge) *“I ask myself whether a litigant who has duly instructed an Advocate in these circumstances, should be penalized because of the default of his Advocate. In my view, cases belong to the parties. In normal circumstances, it would be strange if the sins of Advocates were visited on the parties. This is not intended to be a general proposition to be applied at all time*”

In ***Ivita vs Kyumbu [1984] KLR 441***, at page 448 Chesoni J. (as he was then) set out the test to be considered by the court in determining whether a party had been guilty of inexcusable delay. He stated: *“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”*

The Plaintiff has given an explanation as to the delay in prosecuting his matter and in my opinion, the poor judgment made by counsel is the reason for the delay and therefore the blame is squarely on her. It would be unjust for the Court to punish the Plaintiff on the mistake of counsel. Secondly, the Defendant has not shown what prejudiced it shall suffer if the suit were to be reinstated. That said, I hereby order that the suit be reinstated and be heard on merit. The Plaintiff shall however pay the throw away costs of this application to the Defendant. This court shall however not entertain any further delay in the prosecution of this case. I hereby direct that the parties do comply with the provisions of O.11 of the civil procedure rules within 30 days from the date of the ruling and further that the Plaintiff to set down the suit for hearing within 60 days thereof.

Orders accordingly.

Dated, signed and delivered this 19th day of March 2013.

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

..... Court Clerk