Bantus Investment Limited v Kenya Wildlife Service (Environment & Land Case 239 of 2011) [2023] KEELC 197 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 197 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 239 OF 2011

NA MATHEKA, J

JANUARY 26, 2023

BETWEEN

BANTUS INVESTMENT LIMITED ..... PLAINTIFF

AND

KENYA WILDLIFE SERVICE ..... DEFENDANT

RULING

1 The application is dated August 8, 2022 and is brought under Article 50 of the *Constitution*, Section IA, 1B, 3 & 34 of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules seeking the following orders;

1. The Application be certified as urgent.
2. The Orders of November 2, 2018 be set aside and the suit be ordered to proceed on merits.
3. The costs of the Application be provided.

2 It is based on the grounds that No notice was served on the Plaintiff/Applicant to attend Court on November 2, 2018. The dismissal without notice violates the right to fair trial and breaches the principles of natural justice.

3 The Respondent states that this suit was filed on August 10, 2011 which is over 11 years ago and the same has never been set down for hearing even once. That the Plaint dated August 10, 2011 filed simultaneously with a Notice of Motion application dated August 10, 2011 filed under. a Certificate of Urgency was accompanied by the requisite statutory documents including a verifying affidavit and a witness statement both in the name of Alessandro Torriani as director. Attached and marked "BM 1" are true copies of the Verifying Affidavit, Witness Statement, Certificate of urgency and the Court Order issued on August 11, 2011. That the KWS filed and served their Statement of Defence on September 16, 2011 and thus Pleadings closed 14 days thereafter which is also over 11 years ago. That

though KWS filed their Replying Affidavit in the name of Joycelyn Makena in Court on September 30, 2011 in response to the Plaintiff's Notice of Motion application dated August 10, 2011 the Plaintiff never relisted their Notice of Motion Application dated August 10, 2011 and filed under Certificate of Urgency for hearing and final determination as directed in the Court Order issued on August 11, 2011. That soon after filing this suit under a Certificate of urgency the Plaintiff Company went to sleep for over 5 years and that is when the Court *suo moto* on August 2, 2016 issued a Notice to Show Cause (NTSC) upon the Parties and to which NTSC the Plaintiff Company through its lawyer Charles Waweru Gatonye swore an affidavit on August 25, 2016. Attached and marked "BM2" is a copy of the Notice to Show Cause, and the top page of the said Notice to Show Cause Affidavit.

4 That on August 31, 2016 the Court inspite of stiff opposition from KWS proceeded to set aside the Notice to Show Cause on terms to be complied with by the Plaintiff/Applicant within 45 days therefrom which compliance the Plaintiff failed to adhere to resulting in the case being dismissed for non-compliance vide the Court's Order of August 31, 2016. Attached and marked "BM 3" is a true copy of the said Court Order evidencing the fact that the dismissal order was made in the presence of the Plaintiff's lawyer Mr Kiarie for Waweru Gatonye & Co Advocates, and therefore the Plaintiff was duly represented in Court, and that the Court after listening to the Plaintiff's Lawyers plea/explanation or otherwise still went ahead to dismiss the cases after finding that the explanations/excuses lacked merit. That on January 18, 2017 the Plaintiff's lawyers filed an application dated January 13, 2017 seeking a review of the Orders of the Court made on August 31, 2016 and November 22, 2016, dismissing the Plaintiff's suit wherein it was expressly admitted that there was non-compliance of the Court's Orders of August 31, 2016. Attached and marked "BM 4" is a copy of the Notice of Motion application only. That they strongly resisted the Plaintiff's Notice of Motion application dated January 13, 2017 by filing a replying affidavit on March 13, 2017 a copy of its top page only is attached and marked "BM 5". That on March 8, 2018 the Court allowed the Plaintiff's Notice of Motion application dated January 13, 2017 in effect reinstating the Plaintiffs Suit.

5 That once again the Plaintiff Company returned to sleep and only woke up 4 years later when vide a letter dated April 27, 2022 the firm of Mogaka Omwenga & Mabeya Advocates wrote to Waweru Gatonye Company Advocates their letter dated April 27, 2022 appearing as No 2 in the Plaintiff's current application's exhibits. That it is clear that it is in the year 2022 that the Plaintiff's new lawyers stumbled across the fact that the Suit had been dismissed on November 2, 2018. For the past 4 years from March 8, 2018 to April 27, 2022 the Plaintiff had once again lost interest in the Suit and it therefore matters not that the Suit was dismissed on November 2, 2018 purportedly without notice to them because they were at any rate not keen on prosecuting their Suit.

6 That on October 12, 2018 the Court once again issued a Notice to Show Cause (NTSC) to the parties why this suit should not be dismissed for want of prosecution. The Notice to Show Cause (NTSC) come up on November 2, 2018 as per copy of the said document which we duly received through the post office as can be seen from the exhibit attached and marked as "BM 6" being a copy of the NTSC and posted envelope.

7 That it has taken the Plaintiff over 3 years from the time the dismissal order of November 2, 2018 was made to file this application. It is instructive to note that {though filed on August 24, 2022 the Plaintiff's Notice of Motion application dated August 8, 2022 and Notice of Change of Advocates bearing the same date were both served on their Advocates on October 6, 2022 which was 43 days later. Attached and marked "BM 7" are top copies of the said documents. That the Plaintiff Company has not shown any proof of their interest in following up their case with any of their previous lawyers say through letters/emails enquiring on the progress of their case or even their representatives attendance at their lawyers offices enquiring on the progress of their case. Indeed Mr Torriani has described himself

as a resident of Diani within Kwale County which is not far from Mombasa City which should have made it easy to visit their lawyers. Not even a telephone enquiry is alluded to.

8 This court has considered the application and the submissions therein. I have perused the court record and find that on October 12, 2018 the Court issued a Notice to Show Cause (NTSC) to the parties why this suit should not be dismissed for want of prosecution. The Notice to Show Cause (NTSC) come up on November 2, 2018 and the suit was dismissed as both parties were absent. This application to set aside those orders was filed on August 24, 2022 and the Plaintiff's Notice of Motion application is dated August 8, 2022 this is over 3 years from the time the dismissal order of November 2, 2018 was made to file this application. In the case of Ivita vs Kyumbu(1984) KLR 441 the court held as follows:

9 The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".

10 In the case of *Mwangi S Kimenyi vs Attorney General and Another*, Civil Suit Misc No 720 of 2009, the court restated the test as follows:-

> "1 When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
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> 2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

11 In the case of *Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another* (2014) eKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In *Ivita vs Kyumbu* (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the Plaintiff and the Defendant. In *Essanji & Another vs Solanki* (1968) EA 218 it was observed:

> "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights."

12 In the present case one would ask whether this error or blunder by the advocate on the delay be visited upon the client. The courts have adopted an equitable approach in addressing this issue. In the case of *Philip Chemwolo & another vs Augustine Kubede* (1982-1988) KAR 103, the stated that;

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

13 In *Belinda Murai & 9 others vs Amos Wainaina* (1979) eKLR, the court stated that;

> The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

14 The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit. In the instant case it appears that there was some miscommunication between the Applicant and their former advocate hence the change of advocates. From perusal of the court records there is no evidence of service to the previous advocates and it would be possible the notice was not served. Land matters are emotive and I find the excuse for the delay plausible and justice should be done despite the delay. I find this application has merit and I grant it as prayed. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE