



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO 1269 OF 2014

GEOFFREY KIPYEGON MOI.....PLAINTIFF

VERSUS

LINET MINAGI MSHAMBA.....1st DEFENDANT

CHIRAG BUILDERS LIMITED.....2nd DEFENDANT

RULING

Introduction

1. Before this Court for determination are two applications being the Plaintiff's Notice of Motion application dated 13th September, 2021 and the 2nd Defendants' Notice of Motion application dated 30th September, 2021.

2. In the Plaintiff's application dated 13th September, 2021, the Plaintiff is seeking for the following orders:

a) That this Honourable Court be pleased to issue an order setting aside the orders of dismissal of this suit issued on the 27th January, 2020.

b) That this Honourable Court be pleased to issue an order to reinstate this suit and the interim orders that were in force prior to its dismissal on the 27th January, 2020.

c) That the costs of this Application be in the cause.

3. The Plaintiff's application is based on the grounds on the face of the Motion and supported by the Affidavit of Geoffrey Kipyegon Moi, the Plaintiff herein. The Plaintiff deponed that on 18th July, 2018, counsel for the 1st Defendant was granted leave to substitute the deceased 1st Defendant with the duly appointed Administrators, and amend the pleadings in that respect

4. It was deponed that the court further directed that the matter be placed before the Deputy Registrar on the 18th September, 2018 to confirm compliance; that on the material date, the file could not be found and his counsel was advised that a notice would issue once the file was traced; that the file was traced and placed before the Deputy Registrar on 10th July, 2019 and that his counsel was not served with a mention notice hence his non-attendance when the matter came up for mention on 10th July, 2019.

5. According to the Plaintiff, his counsel was equally not served with the Notice to Show Cause hence the non-attendance when the matter came up on 27th January, 2020 when it was dismissed and that he has always been keen on prosecuting the matter. According to the Plaintiff, the dismissal of the suit will adversely infringe on his constitutional rights as he has heavily invested in the suit property.

6. The Plaintiff deponed that the application has been brought without undue delay; that the Plaintiffs' suit has a prima facie case with a probability of success and that it is in the interest of justice that the suit be reinstated and determined on its merits. None of the Defendants responded to the Application.

7. The 2nd Defendant's application dated 30th September, 2021 is seeking for the following reliefs;

i. That the law firm of J.M Njenga & Co Advocates be granted leave to cease acting for the 2nd Defendant.

ii. That the costs of this Application be provided for.

8. The application is supported by the Affidavit of Victoria Wambua, an advocate practicing in the law firm of J.M Njenga Advocates who deponed that the aforesaid law firm has been on record for the 2nd Defendant since the institution of the suit.

9. According to the 2nd Defendant's advocate, after the matter was dismissed on 27th January, 2020, the firm, on the 2nd Defendants' instructions, instituted ***ELC No. E123 of 2020 Chirag Builders vs Geoffrey Kipyegon Moi*** and that the aforesaid matter was subsequently taken up by another law firm and the applicant's law firm no longer has instructions to act for the 2nd Defendant in respect of the suit property. There was no response to the application.

Analysis and determination

10. Having considered the applications and the pleadings in respect thereof, the following issues arise for determination;

i. Whether the firm of J.M Njenga & Co Advocates should be granted leave to cease acting for the 2nd Defendant?

ii. Whether the Plaintiffs Application dated 13th September, 2021 is merited?

iii. Whether there are sufficient reasons to warrant the reinstatement of the suit?

11. The firm of J. M Njenga and Co Advocates is seeking for leave to cease acting for the 2nd Defendant. According to counsel, after the dismissal of the suit on 27th January, 2020, they instituted a separate suit on behalf of the 2nd Defendant being ELC No 123 of 2020-Chirag Builders Limited Vs Geoffrey Kipyegon Moi and that the said matter was taken up by a new law firm. Consequently, he has no instructions to act for the 2nd Defendant in respect of the suit property herein.

12. **Order 9 Rule 13(1)** of the **Civil Procedure Rules** provides that: -

13(1) "Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this order, the advocate may on notice to be served on the party personally or by prepared post letter addressed to his last – known place of address, unless the Court otherwise directs, apply to the Court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the Court may make an order accordingly:

Provided that, unless and until the advocate has –

a. Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the Court may direct a copy of the said order; and

b. Procured the order to be entered in the appropriate Court; and

c. Left at the said Court certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."

13. It is clear from the foregoing that the only requirement for an Advocate wishing to withdraw from acting for a party is to give notice to all the affected parties. Once the court is satisfied that this requirement has been met, it has no reason to decline granting leave.

14. The record shows that the 2nd Defendant was served with the application vide its email: chiragbuildersltd@gmail.com on 15th October, 2021 as evidenced by the Affidavit of Service of Bilha Kimani sworn on 22nd October, 2021. Indeed, service by electronic mail is now recognized as a competent form of service pursuant to **Order 5 Rules 22B of the Civil Procedure Rules**. There has been no response by the 2nd Defendant. There has equally been no opposition to the application by counsel for the Plaintiff and the 1st Defendant who were equally served with the application.

15. In view of the foregoing, the court is satisfied that the applicant has properly expressed his firm's wish to cease acting for the 2nd Defendant in accordance with **Order 9 Rule 13(1)** of the **Civil Procedure Rules**.

16. In respect to the application dated 13th September, 2021 to reinstate the suit, the court notes that prior to the filing of the present application, the Plaintiff filed an application on 15th of September 2020 seeking to reinstate the suit. The said application is identical to the present application in almost all respects save that the present application is supported by an Affidavit sworn by the Plaintiff whereas the previous application was supported by an Affidavit sworn by counsel.

17. The record shows that when the matter came up for hearing on 14th December, 2020, only counsel for the 1st Defendant was present who urged the court to dismiss the earlier application and the application was duly dismissed.

18. Rather than applying for an order to reinstate the application dated 15th September, 2020 which had sought similar orders as the present

application, the Plaintiff filed the present application some nine months later. The Plaintiff did not bother to mention to this court that he had made a similar application which was dismissed by the court for non-attendance.

19. The court opines that this constitutes abuse of court process which was defined by the court of Appeal in the case of **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR** as follows:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”

20. It is generally accepted that the court is entitled to protect itself from abuse, as persuasively stated by the court in **Stephen Somek Takweny & Anor vs David Mbutia Githare & 2 Others Nairobi (Milimani HCC No. 363 of 2009)** as follows:

“...The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”

21. Having filed an earlier application which is similar to the present application, it is the finding of this court that the filing of the application dated 13th September, 2021 is an abuse of the process of the court, and the same is dismissed. Notwithstanding the above, the court will determine the merits of the application for purposes of completion.

22. The Plaintiff seeks to have this suit reinstated after its dismissal on 27th of January, 2020 pursuant to a Notice to Show Cause issued by the court. **Order 17 Rule 2 Civil Procedure Rules** provides as follows:

“(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.”

23. It is clear from the foregoing that a court may dismiss a suit for want of prosecution *suo motto* or on application. It is trite that the decision of whether or not to reinstate a suit is the discretionary of the court. The principles upon which the court exercises its discretionary jurisdiction are well settled. Although the court’s discretion is unfettered, it must be exercised judiciously. This was expressed by the Court of Appeal in the case of **Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR** who stated thus:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

24. The record shows that when the matter came up for hearing of the Notice to Show cause on why the suit should not be dismissed, only counsel for the 2nd Defendant was present. The Plaintiff asserts that the failure to attend court on the date the Notice to Show Cause was scheduled for hearing was due to lack of service of the date thereof.

25. According to the Plaintiff, the last time his counsel was in court was on 18th July, 2018 on which date the court ordered that the matter be placed before the Deputy Registrar on 18th September, 2018; that the file could not be traced on the aforesaid date and counsel was informed that he would be issued with a notice once the file was traced and another date issued and that his counsel was never issued with any other dates.

26. The court has perused the record. Indeed, on 18th June, 2018, the matter came up in court wherein the parties consented to the substitution of the deceased 1st Defendant. The court directed that the file be placed before the Deputy Registrar on 18th September, 2018 for compliance. On 19th September, 2018, the matter was placed before the Deputy Registrar. However, both parties were absent. The Deputy Registrar directed that a Notice to Show Cause why the suit should not be dismissed be issued to the parties.

27. On the 27th January, 2020, counsel for the 2nd Defendant was present and urged that the suit be dismissed.

28. Whereas there is no mandatory form of notice ascribed in the issuance of a Notice to Show Cause, the court notes that on the copy of the notice are the names and addresses of the firms representing the Defendants which acknowledged receipt by stamping on the copy thereof. The said notice does not show service upon counsel for the Plaintiff.

29. The above notwithstanding, there is the crucial question of why this application has been filed more than one year after the dismissal of the matter in January, 2020, or why the Plaintiff did not attempt to fix the suit for hearing within one year from the time when the matter was last in court. Considering that no explanation has been rendered in this respect, it is the finding of the court that the Plaintiff's application is unmeritorious.

30. For those reasons, the Plaintiff's application dated 13th September, 2021 is dismissed with no order as to costs and the 2nd Defendant's application dated 30th September, 2021 is allowed with no order as to costs.

31. For avoidance of doubt, the suit stands dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF APRIL, 2022.

O. A. Angote

Judge

In the presence of:

Ms. Kiprop for Mutinda for the Plaintiff

No appearance for the Defendants

Court Assistant: John Okumu