



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 34 OF 2014

MILKA LUKA NDUNDA.....PLAINTIFF/APPLICANT

VERSUS

LUCAS MUNYAO NDUNDA.....1ST DEFENDANT

JOHN KALII WAMBUA..... 2ND DEFENDANT

RULING

1. The Applicant approached the court by Notice of Motion dated 28.9.2020 that was brought under sections **1A, 1B and 3A** of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules and what remains for determination is the prayer that this suit be reinstated after it was dismissed for want of prosecution.

2. The application is supported by the affidavit sworn by Milka Luka Ndunda on the grounds briefly that the application dated 22.7.2014 had been scheduled for ruling but which was not delivered. It was averred that the parties were never informed whether the ruling was ever delivered and later the applicant was surprised to discover that the case had been dismissed for want of prosecution and was later served with a bill of costs dated 14.6.2020 that was drawn by the defendants/respondents. The court was urged to allow the application in the interests of justice.

3. On record is a reply vide an affidavit dated 26.10.2020 deponed by John Kalii Wambua, the 2nd defendant. It was averred that the instant suit was dismissed on 29.11.2018 for want of prosecution and that the application did not meet the threshold to warrant grant of the orders sought. It was averred that the applicant slumbered on her rights as she had notice that the suit was to be dismissed for want of prosecution. The court was urged to dismiss the application.

4. In rejoinder, the applicant vide further affidavit took issue with the averment that the notice of dismissal was served on her and she averred that there was no evidence of such service.

5. The court directed that the application be canvassed vide written submissions. Learned counsel for the applicant in placing reliance on the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules and the case of **Alfred Oginga Igonyi & 62 Others v Ogembo Tea Factory (2017) eKLR** urged the court to allow the application.

6. In response, learned counsel for the 2nd defendant in placing reliance on the case of **Shah v Mbogo (1967) EA 166** submitted that there were no triable issues in the instant application and therefore the court was urged to dismiss the same.

7. Having considered the application and the submissions, I find the issues to be determined are whether the dismissal for want prosecution can be set aside and what orders may the court make. The dismissal of the suit was for want of prosecution and provision for the same is made under Order 17 rule 2(1) of the Civil Procedure Rules which provides as follows

“(2) 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

8. Having examined the record, I find that the steps taken by the plaintiff all the way up to 12.11.2014 were quite substantive as there is indication of compliance with Order 11 by the plaintiff and it would be unfair to disregard the same. In exercise of this Court's discretion and powers under section **3A** of the Civil Procedure Act I allow the application in terms of prayer 3 thereof.

9. With regard to the 2nd issue, I have noted from the record that on 11.11.2014, the Honourable Deputy registrar indicated that “*this is an ELC Matter. Date erroneously given in court 1...parties to take another urgent date*” and I see no reason to disagree with her as can be gleaned from the pleadings, the dispute relates to the use and occupation of land. It is trite law that in law no court or person assumes jurisdiction. Jurisdiction is a creation of statute. In Kenya, all courts derive their power from the Constitution under Article 159. The Constitution provides for the establishment of the Superior Courts under Article 162. Jurisdiction is specifically granted to each court by law.

10. The jurisdiction of the High Courts is laid out in **Article 165 of the Constitution**. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.

11. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters. Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

13 Jurisdiction of the Court

1) *The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

2) *In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-*

a) *relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.*

b) *relating to compulsory acquisition of land;*

c) *relating to land administration and management;*

d) *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and*

e) *any other dispute relating to environment and land.*

3) *Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.*

4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court*

5) *Deleted by Act No. 12 of 2012*

6) *Deleted by Act No. 12 of 2012*

7) *In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-*

a) *interim or permanent preservation orders including injunctions;*

b) *prerogative orders;*

c) *award of damages;*

d) *compensation;*

e) *specific performance;*

f) *restitution; or*

g) *declaration; or*

h) costs

12. As indicated earlier, the plaint speaks to the fact that certain proprietary interests are alleged to have been acquired by the plaintiff and that the same interests are also alleged to have been taken away by the defendants. In the premises, I find that it would be an error in law to clothe the court with jurisdiction in this suit as it would be improper in view of the absence of jurisdiction. There seems to have been an error in that the parties ought not to have been entertained by this court right from the moment the Deputy Registrar noted on the 11.11.2014 that the matter was an ELC one. The matter ought to have been transferred to the relevant court at the time. However, it seems the parties filed written submissions thereafter the same was reserved for ruling only for the same to be dismissed for want of prosecution and from there the 2nd defendant moved swiftly by filing a bill of costs now sought to be stayed. With the realization of the lack of jurisdiction by this court even though late in the day this court must down its tools and transfer the matter to the Environment and Land Court at Machakos for further orders.

13. The overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, **efficient disposal of business of the court, the efficient use of available judicial and administrative resources** and the timely disposal of proceedings at a cost affordable by the respective parties. I find it would be efficient to allow the case now pending before this court to be determined by the ELC Court. A transfer of the suit would be in the best interest of both parties as there is no prejudice to be occasioned as the ELC court is a stone throw away from this court while the parties are resident within Machakos.

14. The upshot is that this suit is hereby transferred to the **Environment and Land Court at Machakos** for determination.

It is so ordered.

Dated and delivered at Machakos this 28th day of January, 2021.

D. K. Kemei

Judge