



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 188 OF 2011

FREDRICK HEZRON AWUOR OSUMBA.....APPLICANT

VERSUS

KENYA NATIONAL ASSURANCE LTD.....1ST RESPONDENT

GARAM INVESTMENTS.....2ND RESPONDENT

MACAO PROPERTIES.....3RD RESPONDENT

GEOFREY NGUGI ALIAS GEOFREY NYAMBURA....4TH RESPONDENT

NAKURU DISTRICT LAND REGISTRAR.....5TH RESPONDENT

STEPHEN K KOECH.....6TH RESPONDENT

RULING

1. By his Notice of Motion dated **2nd December 2020** the applicant prayed for the following orders, that;

- a) This court does set aside its orders made on the 8th February 2017 dismissing the plaintiff's case for want of prosecution.**
- b) The court does reinstate the plaintiffs case and the same be set down for hearing.**
- c) There be a temporary injunction against the respondents from dealing adversely in any way with the structures as well as land parcel number Nakuru municipality /block 7/332 and or status quo be maintained on the said property.**

2. The applicant has also prayed for the costs of the application.

3. The application is based on the grounds on the face of the application as well as the applicants supporting affidavit sworn on the even date.

4. The main reasons raised by the applicant are that the suit was dismissed without his knowledge and that of his advocate then on record. He said that he had been unwell which in fact forced his wife to apply to substitute him instead.

5. The applicant has attached various medical documents in which the doctors have advised him not to engage in much strenuous activities. For this reason, he had been in and out of hospital and unable to follow up this case. To worsen his medical conditions, he was involved in a road traffic accident which necessitated that he spent much of his time on treatment and recuperating.

6. He said that he was never served with any eviction notice by the respondents and he has therefore been rendered destitute. He said that the eviction for all intend and purposes was unlawful. For these reasons he prayed that he be given a chance to prosecute his case to the logical conclusion.

7. The 1st and 2nd respondents through the replying affidavit of **Tabitha Mumbi Mwaniki** sworn on 9th February 2021 has vehemently opposed the application on several grounds the most significant being that the applicant has never been keen to prosecute this case and has simply bogged down the court by numerous applications some which have not been determined. The applicant according to her had even been warned by the court not to further delay this matter.

8. The application has been brought inordinately late in the day without any reasonable excuse. The argument that he was unwell is neither here nor there as he was represented all along. The whole application and the prayer for injunction is meant to harass and embarrass the respondent who has already legitimately disposed off the property to the 3rd respondent who should be left to enjoy the same.

9. The parties were then directed to file written submissions which they have done and the court has perused the same. The applicant reiterated what he swore in the supporting affidavit and submitted that he was condemned unheard. That there was no evidence of service which run contrary to the provisions of **Order 17 rule 2(1) of the Civil Procedure Rules**.

10. On the issue of delay, he submitted that it was due to his ill health that made him delay in prosecuting the matter and the failure on the part of his counsel to notify him. He argued as well that there would be no prejudice to be suffered by the respondents should the application be allowed.

11. The 1st and 2nd respondents in their submissions have argued based on the famous case of **Shah v. Mbogo (1967) EA** that the delay was completely inordinate and no reasonable explanation by the applicant has been given. That the respondents shall suffer great prejudice should the application be allowed as the witnesses may not be easily available.

12. The respondent's further submitted that there was nothing reasonable in the application since the applicant had slept on his rights for over 10 years.

13. Having perused the application as well as the pleadings herein, the court is of the considered opinion that the application is meritorious for the following reasons.

14. First of all, the application to dismiss the suit was not properly served upon the applicant's counsel. The affidavit of service dated 23rd of January 2017 by Peter Muchina indicates that service was effected by way of post. This in my view should not be the case especially where the offices of the parties or their representative are known who for this case were m/s R. M. Machage & co. advocates. There was no explanation why the process server chose to serve by post yet he knew their physical address and there was no evidence of any difficulty of assessing it.

15. The proper service is always personal and if it's difficult then the court can give directions whether it be by post or advertisement. There was no evidence that the applicant's then counsel was not reachable. The orders which the applicant sought from the court were drastic as it affected the survival of the case and the more reason why it was necessary to have a proper service.

16. The provisions of **Order 5 rule 8(1) and 2 of the Civil Procedure Rules** are worth reproducing here. The same states as follows;

17. Service to be on defendant in person or on his agent

1. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service."

18. It is also true that the matter has been inordinately delayed and that was the reason why the court was keen to dismiss it. The reasons of ill health however by the applicant have not been controverted. The documentary medical evidence including the serious road accident he was involved in demonstrates at least for now that he was unable to pursue his case. The element of his mental status and the desire to have his wife replace or substitute him is arguable as the application was abandoned.

19. This I find accords itself with the reasoning in the case of **Shah v. Mbogo (supra)** where the court went on to state that;

"The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

20. The prayer for injunction is nevertheless not merited. The suit property has passed on to third parties and it will not be viable to disturb the status quo. The saving grace however shall be the fact that the court shall be at liberty to order any compensation or any other such justifiable orders to return the applicant to the original position should he prove his case against the respondents.

21. On the question of whether the respondents shall suffer any prejudice as advanced by them, the reality is that this was a mortgage and the same was basically based on documents. I do not think that it would be too onerous for the respondents to procure their evidence.

22. The balance of convenience for now tilts in favour of the applicant. Let him approach the seat of justice for the second time. Let him prove to the court that he had and still has an arguable case against the respondents and the latter as well to demonstrate that the applicants claim is spurious and frivolous. Meanwhile let the respondents enjoy the use of the suit property pending the determination of this matter on merit.

23. In the premises the application is allowed as follows;

- a) The orders of this court dated 8th February 2017 together with all consequential orders be and are hereby set aside.
- b) The suit should be set down for hearing within the next 30 days from the date herein and in default the above orders are reinstated automatically.
- c) The first and second respondents shall have thrown away costs of Kshs. 20,000 payable by the applicant before the hearing date.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF JULY 2021.

H. K. CHEMITEI

JUDGE.