REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 37 OF 2013

MATUMBO COMPANY LIMITED.....PLAINTIFF

-VERSUS-

MARY WAHU KIHARA.....1ST DEFENDANT

VERONICA NYAMBURA.....2ND DEFENDANT

RULING

1. Before this court for determination are two (2) separate applications: the first is the Notice of Motion dated 13th June, 2019 ("the first application") brought by the 1st defendant and supported by the grounds laid out on its face and the facts stated in the affidavit of the 1st defendant. The following are the orders being sought therein:

(i) Spent.

(ii) THAT the plaintiff be permanently restricted from interfering with the 1st defendant's property known as L.R. NO. 209/138/164.

(iii) THAT the plaintiff be evicted from the suit premises viz L.R. NO. 209/138/164 forthwith.

(iv) THAT the officer commanding Central Police Station do ensure enforcement of the above orders.

(v) THAT costs of the application be provided for.

2. In her affidavit, the 1st defendant asserted that she is one of two legal representatives to the estate of Nicholas Njenga Kinuthia ("the 2nd deceased") who owned the property known as L.R. NO. 209/138/164 ("the suit property") and which property was bequeathed to the 2nd deceased by his father, James Kinuthia Njenga ("the 1st deceased").

3. The 1st defendant stated that despite dismissal of the instant suit by this court on 26th October, 2018, the plaintiff has continued to occupy the suit property and has refused to vacate the same.

4. It was the 1st defendant's averment that unless the orders being sought are granted, the beneficiaries of the estate of the 2nd deceased will continue to suffer irreparable loss.

5. In opposing the Motion, *Bernard Kanyi* swore a replying affidavit on behalf of the plaintiff and stated *inter alia*, that the suit was originally compromised by way of a consent dated 18th July, 2013 entered into between the parties before court.

6. The deponent asserted that since filing the consent, the parties herein lived peacefully for over six (6) years, thereby leading the plaintiff to believe that the dispute had been resolved.

7. The deponent urged that the first application be dismissed and the suit be reinstated for prosecution.

8. In rejoinder, the 1st defendant put in a supplementary affidavit in which she contended that the consent order being referred to by the deponent was in the interim and was intended to serve the purpose of reaching a consensus prior to the hearing and determination of the application dated 14th February, 2013 which was brought by the plaintiff. In that respect, the 1st defendant took the position that at no point was the suit finalized.

9. It was also contended by the 1st defendant that the plaintiff has been indolent in prosecuting its case, hence the dismissal order. The 1st defendant is of the view that it would be in the interest of justice for the orders being sought in the first application to be granted.

10. Soon thereafter, the plaintiff filed the Notice of Motion dated 15th July, 2019 ("the second application") and sought for an order to the effect that the order made by this court on 26th October, 2018 dismissing the suit be varied and/or set aside and that the suit be reinstated for hearing.

11. The second application stands supported by the grounds laid out therein and the facts deponed in the affidavit of *Bernard Kanyi* who averred that following the consent dated 18th July, 2013 the parties herein lived peacefully on the suit property for six (6) years before learning that the suit had been dismissed and not marked as settled as the plaintiff had believed.

12. The deponent stated that the 1st defendant has since been harassing the plaintiff through making false reports to the police and that all the while, the plaintiff's advocate also believed that the matter had been settled and yet did not diarize or inform the plaintiff of the notice to show cause which had been issued by the court.

13. According to the deponent, it is untrue that the 1st defendant has been denied her share of the rental income in respect to the suit property, and that in any event the 1st defendant does not stand to be prejudiced if the suit is reinstated.

14. To oppose the second application, the 1st defendant stated in her replying affidavit that the consent of 13th July, 2013 was an interim as opposed to a final order, and that it is the plaintiff who was indolent in prosecuting its case.

15. The 1st defendant is of the view that the plaintiff was served with a notice to show cause as to why the suit should not be dismissed and yet it failed to attend court on 26th October, 2018.

16. According to the 1st defendant, no good reasons have been given to warrant a reinstatement of the suit.

17. The two (2) applications were canvassed through written submissions. In respect to the first application, the 1st defendant argued that upon dismissal of the suit, the orders barring her from evicting the plaintiff lapsed and in any event, she has shown that she is the owner of the suit property through transmission. It is on this basis that the 1st defendant urges this court to grant the orders sought in the first application and she cited inter alia, the case of **Simon Parkoyiet Mokare v Peter Kokai & 3 others [2020] eKLR** where the court upon considering a similar application, allowed the same.

18. In response, the plaintiff submitted that the first application is a non-starter given that the suit had already been dismissed. The plaintiff further urged this court to disregard any insinuations on ownership of the suit property since the plaintiff is claiming 40% ownership of the said property pursuant to the partnership agreement entered into years ago.

19. It was the contention of the plaintiff that the orders sought in the first application cannot be granted unless and until the parties are heard on merit.

20. Concerning the second application, the plaintiff contended that the same has been brought without undue delay and that sufficient cause has been shown as to why the suit ought to be reinstated, as per the averments made in the supporting affidavit and cited *inter alia*, the case of **Python Waweru Maina v Thuku Magua CA 27/82** where the court held that a dismissal order can be set aside where the mistake is not attributable to the party.

21. The plaintiff further contended that no prejudice will be suffered by the 1st defendant but that unless the suit is reinstated and the first application is allowed, the plaintiff stands to loose joint ownership of the suit property.

22. The plaintiff is of the view that it has an arguable case against the defendants and should therefore be granted an opportunity to prosecute it on merit.

23. The 1st defendant responded by arguing that the plaintiff has not brought sufficient reasons to warrant a reinstatement of its suit since the notice to show cause was issued to its advocate, who did not attend court.

24. The 1st defendant went on to argue that she stands to be prejudiced in the process since the suit property was acquired through transmission and she will therefore experience great mental anguish should the order for reinstatement be granted.

25. From the record, the 2nd defendant neither participated at the hearing of the applications nor filed any documentation in response, despite there being evidence of service of the same.

26. I have carefully considered the grounds featured in the respective Motions; the facts deponed in the affidavits sworn in support of and in opposition thereto; and the contending written submissions and authorities cited.

27. I will begin with the second application which was filed by the plaintiff, since my determination on the same will guide my analysis of the first application.

28. It is clear that the substantive order sought is for the varying and/or setting aside of the dismissal order made by this court on 26th October, 2018 to pave way for the prosecution of the suit.

29. From the record, it is apparent that the parties were last in court on 26th November, 2013 for the hearing of the plaintiff's application dated 14th February, 2013 seeking temporary injunctive orders. As per the record, the application was dismissed on that date for failure by the plaintiff to prosecute the same.

30. Subsequently, the plaintiff filed the application dated 23rd December, 2015 and sought for similar orders but it is apparent that this application was equally not prosecuted, going by the record of 11th January, 2016.

31. The record shows that subsequently, the suit was listed for dismissal and in the absence of any response to the notice to show cause, the same was dismissed by this court on 26th October, 2018.

32. From my perusal of the record and proceedings, I established that the notice to show cause issued on 8th October, 2018 was received on 11th October, 2018 by the firm of Kimanga & Co. Advocates, who happen to be the advocates representing the plaintiff in the suit, to date. It is therefore clear by all accounts that the plaintiff's advocate was made aware that the suit had been listed for dismissal and yet there was no attendance.

33. The courts have held on the one hand that the mistake of an advocate should not be visited on the client. On this subject and in addition to the various authorities cited by the plaintiff, I will cite the case of **Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103** where the court determined thus:

> ***"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"***

34. On the other hand, it is imperative to keep in mind that whether or not to reinstate a suit lies purely with the court's discretion and does not arise as an automatic right. A party is required to show that reasonable steps were taken in prosecuting his or her case, as succinctly stated in the case of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR**. From my study of the record, there is nothing to show the steps, if any, taken by the plaintiff in following up on its suit with its advocates.

35. To my mind, the plaintiff has not sufficiently explained the inaction of over five (5) years in the suit and the failure to prosecute its applications previously filed. Notwithstanding the responsibility of its advocate to efficiently represent its interest in the suit, the ultimate burden fell upon the plaintiff to diligently follow up on the progress of its case but she did not. As such, I am not entirely convinced that the plaintiff has provided adequate reasons for the prolonged stagnation in the suit.

36. Suffice it to say that the essence of the court's discretion is to ensure justice to the parties. In the present instance, I have already established inadvertence on the part of both the applicant and its advocate.

37. Be that as it may, I must also consider the prejudice, if any, that will befall the 1st defendant in the event that the suit is reinstated for hearing.

38. The proviso of **Article 159** of **the Constitution** and the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** are in tandem on the subject of prejudice in this sense:

> ***"I admit that a party should always take steps to progress his case to logical conclusion…But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff..."***

39. Upon considering the explanation given by the 1st defendant on this issue, I find that while her sentiments are valid, I note that the subject property constitutes the subject of the instant suit and which property the plaintiff claims to have a stake in. I am also of the view that any prejudice visited upon the 1st defendant can be compensated by way of costs since there is nothing to indicate that she has been deprived of any enjoyment and use of the subject property as a result.

40. Upon also considering the arguments of the applicant, I am satisfied that unless the dismissal order is set aside, it stands to be prejudiced by virtue of the fact that it will lose its place on the seat of justice by being denied the right to have its suit heard on its merits. I say so without negating the fact that a party ought to take active steps to prosecute his or her case to the very end and in an expeditious manner. The rules of substantive justice enjoin me to grant the applicant an opportunity to be heard.

41. This brings me to the first application which was brought by the 1st defendant. From my study of the same, I note that the orders sought therein are of a permanent nature and yet the suit is yet to be heard on merit. Given the nature of the orders sought, I am hesitant to grant them at this stage as this is not a straightforward case since at the crux of the same lies the question of rights of the parties to the subject property, and which property the parties herein had entered into a consent regarding their rights to. There is nothing to indicate that the

consent has ever been set aside.

42. For the foregoing reasons, I find that it would be premature for me to grant a permanent injunction and eviction order against the plaintiff at this stage.

43. In the end therefore, the first application is hereby dismissed but with no order on costs.

44. Concerning the second application, I will allow order (ii) of the same and make the following orders:

> **a) The parties shall file their pre-trial documents within 14 days from today and take a date to confirm such compliance.**
>
> **b) The plaintiff shall from the lapse of the 14 days in a) above, prosecute its suit within 60 days from today, failing which the suit shall be dismissed. Costs of the Motion dated 15th July, 2019 shall abide the outcome of the suit.**

Dated, signed and delivered at NAIROBI this 29th day of October, 2020.

…….

L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiff

……. for the 1st Defendant

……. for the 2nd Defendant