



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

PETITION NO.1 OF 2021

MARY MUGA ONGOLO.....PETITIONER

VERSUS

LAND REGISTRAR BONDO SUB COUNTY.....1ST RESPONDENT

SIAYA COUNTY LAND SURVEYOR.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE BOARD OF MANAGEMENT

RABA SECONDARY SCHOOL.....INTERESTED PARTY

RULING

Petitioner's case

1. Within the provisions of **Sections 1A and 1B** of the **Civil Procedure Act** and **Order 12 Rule 7** of the **Civil Procedure Rules**, the petitioner filed a notice of motion dated 2/02/2021 in which she sought one relief;

a) That the honourable court be pleased to set aside the orders made on 1/12/2021 dismissing the case and the same be reinstated for purposes of taking further directions.

2. The motion is supported on the grounds set out on the face of the motion and on the supporting affidavit of the petitioner's advocate **SAMWEL NDUNG'U** dated 2/12/2021.

3. He contended that while he was filing an affidavit of service and submissions on 1/12/2021, he was informed that the suit had been dismissed earlier in the day. He stated he was of the mistaken belief that the suit was to come up for mention on 2/12/2021 and not 1/12/2021. He averred that the petitioner will be prejudiced if the suit is not reinstated and that the motion had been filed without undue delay.

Defendants case and submissions

4. The motion is unopposed. However, this court is called upon to determine the motion on its own merits.

Analysis and determination

5. I have carefully considered the petitioner's motion, grounds in support and supporting affidavit and the only issue falling for determination is whether the plaintiff has demonstrated sufficient grounds for reinstatement of the suit.

I will proceed to analyse the legal and jurisprudential framework.

6. **Article 50** of the **Constitution** recognises the right of a party to fair hearing while **Sections 1A and 3A** of the **Civil Procedure Act** provides that courts in seeking to give effect to the overriding objective should facilitate the just, expeditious, proportionate and affordable resolution of disputes. The case of **Ivita -vs- Kyumbu (1984) KLR 441** clearly sets out the principles that guide courts in exercising its

discretionary powers on whether or not to reinstate a suit as follows;

“the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time”

7. Prior to its dismissals this suit had been in court for over 4 years. It is of import to appreciate the chronology of proceedings in the court to appreciate the conduct of the petitioner.

8. The court issued orders on 16/2/2017 which were vacated on 8/6/2017. During this intervening period, the case was mentioned twice and on these two occasions, the petitioner for one reason or the other was not ready to prosecute her pending application and petition.

9. From 8/6/2017 to 13/07/2021, the suit was mentioned in Kisumu ELC for close to 20 times and in almost all these occasions, neither the petitioner nor his advocates were present in court. On the two occasions that the petitioner’s advocates attended court, he either informed the court that the court orders had been complied with by the Land Registrar or that the application has been overtaken by events.

10. The file was subsequently transferred to Siaya ELC and because Kisumu ELC had issued a Notice To Show Cause (**hereinafter “NTSC”**) why the suit should not be dismissed, Siaya ELC issued a fresh NTSC to issue to the petitioner. When the NTSC came up for hearing on 9/11/2021, the petitioner’s advocates informed the court that the outstanding issue for determination was prayer 4 of the petition and he urged the court not to dismiss the suit. Upon hearing the parties, the court did not dismiss the suit however, it directed the petitioner to; file written submissions on the singular issue within 14 days, issue and serve a mention notice upon all the parties and an affidavit of service to be filed. The mention date given by the court was 1/12/2021.

11. The submissions and affidavit of service were never filed as directed by the court. The petitioner has annexed to his motion a mention notice that was purportedly served on the respondents and interested party as directed by court but upon perusing this mention notice, this court is not satisfied that this notice was ever served on the parties.

12. The suit was dismissed on 1/12/2021 for non-appearance and non-compliance. The petitioner’s advocate contends that Mr. Owino, the advocate who held his brief on 9/11/2021, recorded the wrong mention date. However, the said Mr. Owino has not sworn an affidavit to prove so and the petitioner’s advocates assertion on this ground remains unsubstantiated.

11. Prior to its dismissal, the suit had on 3 previous occasions come close to being dismissed for want of prosecution. In the 1st instance, the suit was transferred from the High Court to ELC before it could be deemed as dismissed, in the 2nd instance, the petitioner informed the court that the application had been overtaken by events and the last instance is when the NTSC was before this court on 9/11/2021.

12. The general principles of law on applications of this nature are anchored in the realm of judicial discretion. Reinstatement of a suit is at the discretion of the court which power should be exercised judicially. The case of **John Waweru Njenga & 5 others v Motor Botique Limited [2020] eKLR** cited with approval the case of **Shah v Mbogo and Another [1967] EA 116** where the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

13. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants, however, it’s the considered view of this court that the conduct of the petitioner from the time this suit was filed has been somewhat wanting and it is quite obvious that the petitioner has never been keen to prosecute this suit.

14. In the premises, and for the foregoing reasons, the court is satisfied that the petitioner’s motion is not merited.

15. Ultimately, I make the following disposal orders;

a) The Notice of Motion dated 2/12/2021 is dismissed with no orders as to costs.

b) The file is marked as closed.

Ruling delivered virtually

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2022

In the Presence of:

N/A for both parties

Court assistant – Olivia Nyumba

HON. A. Y. KOROSS

JUDGE

27/1/2022