



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 120 OF 2019 (O.S)

AGNES NJOKI NGUGI PLAINTIFF

=VERSUS=

LAND REGISTRAR THIKA DEFENDANT

RULING

1. On 11/7/2019, the plaintiff took out an originating summons dated 9/4/2019, seeking the following orders:

(a) That the prohibitory order issued over Land Parcel Kakuzi Kirimiri/Block 9/249 in Civil Suit No. 124 of 1991 Muranga be lifted.

(b) That a declaration that judgement entered on 25th day of July 1991 is time-barred and cannot be enforced.

2. The suit came up for substantive hearing before Gacheru J on 13/10/2020, the hearing date having been fixed in the presence of counsel for the plaintiff. Both the plaintiff and her counsel were absent on the day set for hearing. Consequently, Gacheru J dismissed the suit for non-attendance. On or about 16/6/2021, the plaintiff brought a notice of motion dated 10/11/2020, seeking reinstatement of the suit. The said application dated 10/11/2020 is the subject of this ruling.

3. The application was supported by an affidavit sworn on 10/11/2020 by

John Kirori Ngaruiya, counsel for the plaintiff. Counsel deposed that he thought that the hearing slated for 13/10/2020 would proceed electronically on Microsoft Teams Video Conferencing Platform. Consequently, he was not physically in open court when the suit was called out for hearing on 13/10/2020. He added that this was an inadvertence on his part which should not cause the plaintiff to be completely shut out of the seat of justice. He pleaded with the court to reinstate the suit.

4. Canvassing the application orally in the virtual court on 6/12/2021, Mr. Ngaruiya, reiterated the above explanation and added that the dismissed originating summons was not an attempt to re-open an old suit. Counsel conceded that there was a delay in bringing the application for reinstatement but argued that the delay should not be visited on the plaintiff.

5. The defendant opposed the application through grounds of opposition dated 28/10/2021. First, he contended that the inordinate delay in bringing the application for reinstatement had not been explained. Secondly, no sufficient cause had been shown to warrant the grant of a reinstatement order. Thirdly, the defendant contended that the application was an abuse of the process of the court; and was unmerited, mischievous, misconceived and misplaced. Further, the defendant contended that the prayers sought in the originating summons ought to have been sought in the notice of motion dated 1/9/1991. Lastly, counsel contended that the prohibitory order was granted in **Murang'a SRM Civil Suit No 124 of 1991**, hence the plea for vacation of the order had been overtaken by events.

6. In his brief oral submissions before this court, Mr. Menge, Deputy Chief State Counsel, counsel for the defendant, reiterated that no proper explanation for the inordinate delay had been tendered and that the originating summons was spent. Counsel added that through the dismissed originating summons, the plaintiff sought to re-open a suit which had been determined and finalized 30 years ago. He urged the court to decline the application.

7. I have considered the application; the response to the application; and the parties' respective submissions. The single question to be answered in this ruling is whether the criteria for reinstatement of a dismissed suit has been met.

8. I have also considered the relevant legal framework and jurisprudential principles which govern our courts when exercising the discretionary jurisdiction to reinstate a dismissed suit. The approach to be applied in the exercise of this discretionary power was spelt out in the case of **Philip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103**, where Apaloo JA stated as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

9. Counsel for the pla suit property appears to be located in Muranga County, counsel for the parties will at the time of rendering this ruling be called upon to show cause why this suit should not be transferred to Murang’a Environment and Land Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Njoka for the Plaintiff

Mr Menge for the Defendant

Court Assistant: Phyllis Mwangi