



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 624 OF 2003.

SERAH NJERI MWAURA.....PLAINTIFF

VERSUS

HENRY MWANGI KIMANI.....DEFENDANT

RULING

1. On the 1st of February 2012 this suit was dismissed by Justice Mwilu after the plaintiff was served with a notice to show cause under order 17 rule 2(2) & (4) of the Civil Procedure Rules. On the 1st November 2013 the plaintiff filed a notice of motion under section 1A and 3 of the Civil Procedure Act, Order 40 rule (1) of the Civil Procedure Rule seeking orders that :
 - i. That the order of this court given on 1st February 2012 be set aside and the suit and orders given hereunder be reinstated.
 - ii. That pending the hearing of the application the defendant either by himself or by his servants or agents be restrained from evicting the plaintiff from all that parcel of land known as Kakuzi/Gituamba Block 11 (Ngatho) 241.

The application is based on the following grounds;

- i. That the plaintiff was not served with the notice to show cause before the court on its own motion dismissed the suit for want of prosecution on 1st February 2012.
 - ii. That the plaintiff only came to know about the dismissal of the suit when she was served with an order in that regard on 26th October 2013.
 - iii. That the plaintiff has been given seven (7) days notice which expires on 1st November 2013 to vacate the suit premises.
 - iv. That the plaintiff shall be put to great hardship if she is evicted from the suit premises as she has no other property to relocate to.
 - v. That the failure to set down the case for hearing was occasioned by termination of pro-bono services being offered by her previous advocates following an acceded to the proprietor of the firm which kept him from the office for a long time.
 - vi. That the plaintiff is willing to proceed with the case and the failure to fix the same for hearing was not deliberate.
2. The application is supported by the affidavit of Serah Nyeri Mwaura the plaintiff. She avers that prior to the notice to show cause she was not served with the notice to show cause and that she only became aware of the dismissed order when she was served on the 26th October 2013. That after the order was served she was given a verbal notice by one John Gitau on behalf of the

- defendant to vacate the suit premises within 7 days. The notice was to expire on the 1st November 2013.
3. She states that her failure to set down the suit for hearing was occasioned by withdrawal of pro-bono services being offered by her previous advocate following an accident to the proprietor of the firm and as a result he has been away from the office for a long time. That she was unable to get a replacement of a lawyer from Kituo Cha Sheria. That she has always been ready to proceed with the case as it involves the parcel of land on which the family resides.
 4. That her failure to fix the case for hearing was not deliberate. That had the notice to show cause been served on her she would have explained to the court the reasons for the failure to fix the case for hearing. That if the case is not reinstated and the restraining order granted she will suffer irreparable loss and damage and she will be evicted from the only property her family calls home.

The application is opposed. The respondent filed a replying affidavit sworn by Henry Mwangi Kimani dated the 19th January 2014.

5. He deposes that the applicant's application is unmerited for reasons that the application dated 19th February 2010 was served on the plaintiff. The said application came up for hearing on the 3rd May 2010. The plaintiff attended court and at her request she was given 21 days to look for an advocate. She did nothing for 3 years until the suit was dismissed by the court on its own motion. That the plaintiff has never been diligent in prosecuting the suit and the dismissal was proper. That the reasons given for not fixing the matter for hearing are inadequate in that there is no proof that Kituo Cha Sheria has been acting for her and that even if it did there is no way it would take 3 years to replace an advocate who was previously acting for her. He sought a dismissal of the plaintiff application.
6. Miss Nyaencha for the plaintiff reiterated what is deposed in the applicant's affidavit and in addition submitted that the plaintiff being a layman was not conversant with court procedure. Miss Ngugi for the respondent too reiterated what is deposed in the defendant's affidavit and in addition submitted that despite the matter being dismissed on the 1/2/12 the plaintiff has taken one year nine months to file the current application and that she does not deserve the orders sought.
7. I have gone through the court file. The plaintiff filed this suit in June 2003. The suit was instituted by way of an originating summons. Her claim is that she became entitled by adverse possession of the suit land and has sought to be registered as the proprietor of the said suit land **Kakuzi/Gituamba/Block 2(Ngatho) 241.**
8. The defendant has given a clear history of what has been happening in this case. The plaintiff/applicant claims that she was not served with the notice to show cause. It is the one dated 18th January 2012. From the court record parties appeared in court on the 3rd May 2010. On the said date the plaintiff was granted 21 days to look for a lawyer. The matter came up again on the 1st February 2012 after the notice to show cause was issued on the 18th January 2012.
9. I have looked at the said notice to show cause in the court file. The notices were issued to the firms of C. K Mwiha & Company for the plaintiff and Wambui Ngugi for the defendant. The applicant was not personally served. By then the court had given her a chance to get a lawyer. Had she been served she could have given the court an explanation. I therefore accept her explanation that she was not aware of the notice to show cause.
10. It is well over a year since the suit was dismissed. She avers she had no knowledge of the court order and that she only got to know of it when she got word she was to be evicted. 3 ½ years is a long time however I note that the subject matter in this case is land. Issues over land are emotive. I also note that she is a layman and might not know the seriousness of some court procedure. I will therefore exercise my discretion and give the plaintiff/applicant a chance to have her case heard.
11. I therefore set aside the order given on the 1/2/12 and reinstate the suit for hearing. Now that the plaintiff has an advocate she shall ensure that she complies with the provisions of order 11 of the Civil Procedure Rules within 30 days from date of ruling. I will give a mention date to confirm compliance. On the injunctive order sought the applicant has failed to show this court that the defendant has moved to evict her. In her affidavit she states that she was given a verbal notice by John Gitau who is not a party in this matter. I therefore decline to grant the injunction sought as

she has failed to show that the defendant has moved to evict her from the suit land. Costs shall be in the cause.

Orders accordingly.

Dated signed and delivered this *22nd* day of *January* 2014

R. E. OUGO

JUDGE

In the Presence of:-

.....Plaintiff/applicant

.....Defendant/ Respondent

.....Court clerk