



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC (OS) NO.31 OF 2019

IN THE MATTER OF LAND PARCEL NUMBER KISUMU/OJOLLA/545

BETWEEN

JACK OKUMU.....APPLICANT

-VERSUS-

JANE FRANCIS OKONG'O.....RESPONDENT

RULING

BRIEF FACTS

JACK OKUMU filed a Notice of Motion Application under section 1A,1B,3A,63 e of the Civil Procedure Act Cap 21 Laws of Kenya Order 12 Rule 7, Order 45 Rule 1, Order 51 Rule 1 &3 of the Civil Procedure Rules 2010 seeking for the following orders:

1. That this Honourable court be pleased to set aside and vary the dismissal order dated 19th January 2021 of the Applicant's originating summons dated 12th September 2019 and any subsequent order thereof.
2. That this Honourable Court do issue an order reinstating the instant suit which was dismissed on the 19th day of January 2021 for reason of want of prosecution.
3. That the costs of the Application be provided for.

The Application was based on grounds that the Applicant's suit was dismissed on 19th January 2021 for non-attendance and that Counsel for the Applicant inadvertently mis-diarized the hearing date of the matter hence absence from the court.

That the subject matter of the suit is a very substantial property of land and it would be in the interest of justice if the suit is determined on merits rather than technicalities. It was stated that at the time of dismissal of the suit, the parties had complied in terms of filing their respective documents and the mistake of the Advocate should not be visited upon an innocent litigant.

The Application was supported by the Affidavit of JACK OKUMU who deposed and stated that through his Advocates on record, he filed a suit by way of Originating Summons seeking declaration of adverse possession rights over land parcel number KISUMU/OJOLLA /545 where he has lived for more than 12 years. That sometime in 2020, his Advocate informed him that the matter was coming up for hearing on the last Monday of January and he was requested to attend court that day together with his witnesses.

He stated that he showed up at his Advocate's office on the day of hearing only to be told that the matter had not been indicated in the day's cause list for hearing. That his Advocate followed up and later found that he had mistakenly entered the hearing of the matter on the wrong date in his diary and the same had come up for hearing on 19th January 2021 on which day it was dismissed for non attendance.

That he has lived in land parcel number KISUMU/OJOLLA /545 for a long period of time and has established his home there. That this court should not visit mistake of his Advocate on him as he is interested in prosecuting the suit until the logical meritorious conclusion and it is in the interest of justice that the application be allowed, the order for dismissal be set aside and/or varied and the matter be reinstated, heard and determined on merit.

He further stated that he is an innocent litigant who ought not to be made to pay for mistake of counsel and that at the time of dismissal

parties had complied with filing of all documents. That the Respondent will not be prejudiced in the event the Application is allowed and there is no delay occasioned in bringing the Application. That unless the orders sought are granted, the Applicant stands to be condemned unheard and it is in the interest of justice that the orders sought are granted.

JANE FRANCES OKONG'O the Respondent herein filed a Replying Affidavit where he deposed and stated that the Application is made in bad faith, is misplaced, misconstrued, incompetent and lacking in bona fides and the same be dismissed with costs. That she was the registered owner of land parcel number KISUMU/OJOLA/ 545 for a period of over 30 years and in the year 2019, she elected to sell the said land as expressed in the demand letter dated 10th September 2019 addressed to the Applicant and immediately after receipt of the said demand letter, the Applicant filed this suit against her on 12th September 2019.

She stated that upon being served with the Application, she instructed her Advocates to enter appearance and defend the suit and the Applicant having not been kept on hearing of this suit, it was her Advocates who fixed this matter for mention for directions and served the said date upon the Applicant's Advocates. That on 22nd October 2020, directions were taken in this matter and the suit was fixed for hearing on 19th January 2021. That despite this date being taken in the presence of the Advocates for both parties, the Applicant or his Advocates failed to attend court leading to dismissal of the suit.

That from 19th January 2021 when the suit was dismissed, the Applicant waited a period of almost 1 year to file this Application to reinstate the suit and that the delay in filing this application is not explained. She further stated that the reason expressed by the Applicant for not attending court on 19th January 2021 is not plausible or believable and the Applicant does not state the erroneous date they recorded in their diaries or what they did when they attended court on this erroneous date and what action they took when they realized that they had an erroneous date.

That even after being served with the bill of costs on 26th March 2021 two months after the suit was dismissed, the Applicant failed to file an Application to reinstate the suit within reasonable time. That she was gravely prejudiced by this suit and the actions of the Applicant. She stated that she had travelled from Nairobi to Kisumu to attend court on 19th January 2021 when the suit was dismissed spending approximately Kshs. 20,000/= on air ticket, taxi services and accommodation.

She stated that reinstating this suit will further prejudice her as it is clear that the Applicant has never had interest in the hearing and determination of this suit. That since her interest was to dispose the suit parcel of land even before this suit was filed, she proceeded to sell the suit parcel after the suit was dismissed and the suit parcel is no longer registered in her names but in the names of MARY AYAKO ADHIAMBO who secured her title deed on 16th March 2021.

That the Applicant was given an opportunity to prosecute his suit but he remained indolent and the Applicant should not be allowed to seek the discretion of the court. That the Application lacks merit and the same ought to be dismissed with costs.

The matter came up for hearing on 21st February 2022 the Applicant was directed to file a Supplementary Affidavit together with submissions and the Respondent to file submissions.

The Applicant filed a Supplementary Affidavit on 1st March 2022 where he deposed and stated that this Application is neither made in bad faith, misconstrued, incompetent nor lacking in bona fides hence ought not to be dismissed with costs. That it is not in dispute that the Respondent was the registered owner of the suit parcel of land but the actual possession of the suit parcel is what is in dispute and that when he came into possession of the suit parcel of land the same was vacant and the Respondent was not in possession of it.

He stated that due to pressure of work experienced by his Advocate on record who is a sole proprietor with no assistant, this matter fell off the internal cause list hence delay in filing the instant application. That despite the Respondent selling the suit parcel, his respective rights over the suit parcel have not extinguished and as such he ought to be given a chance to prosecute his claim and have the issue determined on merit.

He further stated that the Respondent's actions and move to sell the suit parcel of land are not only suspect but also malicious and calculative with the intention to defeat justice. That the Respondent shall not be prejudiced if this application is allowed as any loss and or damage is compensable in damages. That the Application is brought in good faith and it is in the interest of justice that the orders sought be granted.

Applicant's Submissions

The Applicant filed his submission on 1st March 2022 where he raised one issue for determination. The issue raised was whether or not this Honourable Court should set aside/ vary the dismissal order and reinstate the suit for hearing.

The Applicant stated in his submissions that his Advocate on record mis-diarized the hearing date for a different date which is an accident and an excusable mistake which could happen to anyone and that the nonattendance was not deliberate at all on the part of the Applicant. That mistake of the Counsel should not be revisited upon the client.

He further stated that mistake of the Advocate is not negligent but excusable and having made an effort to correct the same, this court should accord the Applicant another chance to obtain justice. The Applicant submitted that the Respondent's disposal of the suit does not interrupt the Applicant's adverse possession and as such ought not be the ground upon which this honourable court disallows this Application.

The Applicant relied in the case of **Shah v Mbogo (1967) EA 166** and the case of **Githu vs Ndeete (1984) KLR 776**.

The Applicant therefore prayed that the suit be reinstated and determined on merits as opposed to technicalities.

Respondent's Submissions

The Respondent filed his submissions on 3rd March 2022 where he relied in his Replying Affidavit and the case of **Utalii Transport Company Limited & 3 Others s NIC Bank & Another (2014) eKLR** where the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court. I find that the delay was prolonged and inexcusable.

The Respondent also relied in the case of **Shah v Mbogo & another (1976) EA 1116 and t Bilha Ngunyo Isaac v Kembu Farm Ltd & Another (2018) eKLR**.

The Respondent submitted reinstatement of the suit will prejudice the Respondent yet the Applicant had his opportunity to prosecute the suit but failed and therefore prayed for the Application to be dismissed with costs to the Respondent.

Analysis and Determination

This suit was filed by the Applicant on 12th September 2019 seeking for orders that he be declared to have acquired prescriptive rights over land parcel number KISUMU/OJOLA/545 by way of adverse possession. The matter came up for hearing on 19th January 2021 and the same was dismissed for non attendance. The Applicant filed the instant Application seeking for orders of reinstatement of the suit.

The Respondent on the hand has opposed the said Application on grounds that the Application is made in bad faith, is malicious, misconstrued, incompetent and lacking in bona fides and the same should be dismissed with costs. The Respondent has alleged that he is the registered owner of the suit property for a period of over 30 years and she elected to sell the property to Mary Ayako Adhiambo.

The matter was fixed for hearing on 19th January 2021 however the Applicant failed to attend court and the suit was dismissed. It is the Applicant's case that the suit was dismissed because his Advocate inadvertently mis-diarized the hearing date of this matter.

In the case of **Phillip Chemwolo & Another V. Augustine Kubende (1982-88 1 KAR 1036**, Apaloo, J.A. enunciated the broad equitable approach in these sort of cases as follows:

“ I think a distinguished equity Judge has said: ‘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 the merits’.

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 for the purpose of imposing discipline”.

This court finds that the Applicant has not given enough evidence to indicate that his Advocate mis-diarized the matter. If it is true that his Advocates mis-diarized the matter, a copy of the page where the entry was made in the diary ought to adduced. Additionally, if the Advocate had mis-diarized the matter, he ought to have taken necessary steps to follow up with the registry and confirm the position of the matter.

However, the Applicant has stated in his Affidavit that when his Advocate informed him that the matter was coming up for hearing, he showed up in hos Advocates offices on the date of the hearing and was told that the matter had not been indicated in the day's cause list for hearing. I am of the view that the Applicant is keen on prosecuting his suit owing to the fact that he followed up his matter with his Advocate who had mis- informed him of the hearing date. This court has considered that should this Application be dismissed, the Applicant will be condemned unheard.

For these reasons I allow the application and set aside the orders of 19th January 2021 dismissing the suit and reinstate the same, but with costs to the Respondents. The Applicant is further directed to fix the case for hearing within 30 days.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE