



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 72 OF 2010

FRED BINAISA.....PLAINTIFF/APPLICANT

=VERSUS=

MARYAM SORBI LWANDE.....1ST DEFENDANT/RESPONDENT

DANIEL TERZI.....2ND DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. On 22nd August 2013, I dismissed the Plaintiff's/Applicant's suit for non-attendance pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules and allowed the 1st Defendant/Respondent to withdraw her Counter-claim with no order as to costs.
2. The Plaintiff has now filed an Application dated 20th August 2013 in which he is seeking for the following orders

(a) That the order made by this court on 22nd August 2013 dismissing the Plaintiff's suit number 72 of 2010 be vacated, varied and or set aside.

(b) That this court be pleased to reinstate the Plaintiff's case.

(c) That pending the hearing and determination of the said suit, the orders made preserving the suit property be revived and or reinstated.

The Plaintiff's/Applicant's case

3. According to the Plaintiff's Affidavit, he filed this suit and sought for his rightful share of the matrimonial property held in the name of the 1st Defendant who is her estranged wife and who had purportedly sold it to the 2nd Defendant.
4. It is the Plaintiff's deposition that on 22nd August 2013, Mr. Shujaa advocate, while in court, informed him that he heard that the suit had been dismissed for non-attendance whereupon he (the Plaintiff) contacted his advocates on record M/s Kamau Kuria & Kiraitu who appeared equally surprised with the dismissal order.
5. The Plaintiff/Applicant further deponed that upon inquiry, his then advocates acknowledged that they had been served with a hearing notice of 22nd August 2013 but were unable to locate him

- through the available contact; that his advocates then requested Ms Chepkwony advocate to hold their brief and have the matter adjourned and that M/s Chepkwony advocate found out that the matter was not listed because the High Court was hearing criminal matters on the day this matter was to come up for hearing.
6. All along, it was deponed, the members of staff of the court had informed the Plaintiff that the file could not be traced; that failure to attend court was not deliberate but was as a result of a breakdown in communication with his advocate and that the suit property forms a substantial portion of all that he has in material terms in this world.
 7. The Plaintiff/Applicant finally deponed that the Defendants will not suffer any loss or prejudice if the Application is allowed and the suit heard on merit.

The 1st Defendant's/Respondent's case

8. The 1st Respondent deponed that this matter was filed way back on 5th July 2010; that upon filing the suit and upon obtaining orders of status quo, the Plaintiff went to sleep; that the Plaintiff has been enjoying the orders of status quo and that she has been inviting the Plaintiff's advocate to fix the matter for hearing.
9. The 1st Respondent further deponed that upon selling the suit property, she left the country and the only business that kept her coming back to Kenya was this case which had orders of status quo and which prohibited the 2nd Defendant from taking possession and occupation of the suit property.
10. The 1st Respondent finally deponed that it is not true that this matter was not listed for hearing; that the court was not hearing criminal cases on 22nd August, 2013 and that the file has always been available.
11. It was the 1st Plaintiff's deposition that her travelling expenses to attend court on 22nd August, 2013 were more than Kshs.247,000 and reinstating this case will expose her to further expenses which the Plaintiff will be unable to meet and that if the suit is reinstated, then the Plaintiff should deposit in court Security for costs of Kshs.17,000,000.

2nd Defendant's/Respondent's Case

12. The 2nd Defendant deponed that he has never been served with the summons in this case although the summons were issued by the court on 5th July 2010; that the suit as it is cannot be reinstated and that the Application is devoid of merits.
13. It is the 2nd Defendant's case that in any event, he had obtained judgment in his favour in HCCC No. 108 of 2010 and that the said judgment was executed and the Plaintiff was evicted from the suit property.
14. The 2nd Defendant finally deponed that he shall suffer prejudice in the event the suit is reinstated because he was not served with summons and that the summons on record have already expired.

Submissions

15. The Plaintiff's counsel submitted that the matter was not listed on the day it was slated for hearing and that M/s Chepkwony Advocate ascertained that the matter was not listed because the high court was hearing only criminal matters on that day.
16. The Plaintiff's counsel further submitted that even if the matter was listed on that day, the mistake of counsel should not be visited on the Plaintiff and that the court's function is not to discipline or penalize parties but to decide the rights of the parties.
17. The Plaintiff's counsel submitted that the suit property is a matrimonial property and in it the Plaintiff runs his business enterprise and farming running into millions of shillings.
18. Counsel submitted that the 1st Defendant did not contribute any amount of money towards the purchase and improvements of the matrimonial properties and that a dismissal of the suit without considering the merit of the case is highly detrimental to, and a violation of the rights of the Plaintiff. Counsel relied on the cases of **Shah Vs Mbogo (1967) EA 116** and **Patel Vs EA cargo**

Handling Services Ltd (1974) EA 75 to buttress his arguments. Counsel also relied on the provisions of **section 93 (2) and (4) of the Land Registration Act** which I have considered.

19. The 1st Defendant's counsel submitted that there is a decree on record and that this matter is concluded. Counsel submitted that in the circumstances, Order 9 Rule 9 of the Civil Procedure Rules does not allow any notice of change of advocates to be filed in court without the leave of the court or the consent of the outgoing advocates with notice to all parties. Counsel submitted that the firm of Machuka & Co. Advocates is not properly on record and did not have the locus to file the current application.
20. The 1st Defendant's counsel submitted that the Plaintiff has never had an interest in prosecuting the matter and that he became in active the moment he obtained the status quo orders.
21. The 2nd Defendant's counsel submitted that although the summons as against the 2nd Defendant were issued on 5th July 2010, the Plaintiff failed to serve summons upon the 2nd Defendant and the same expired on 4th July 2011.
22. The 2nd Defendant's counsel further submitted that in litigation, the suit belongs to the client and the client has an obligation to make a follow up with his advocate. Counsel submitted that he Plaintiff was manifestly disinterested in the pursuit of his case.

Analysis and findings

23. The issues for determination in this matter as are as follows

- a. Whether the current application for reinstatement of the suit is properly before the court.
- b. Whether the court can reinstate this suit in the circumstances of this case.

24. The 1st Defendant's advocate submitted that the firm which filed the current application did not obtain the leave of the court before filing the Application contrary to the provisions of Order 9 of the Civil Procedure Rules.
25. Order 9 rule 9 of the Civil Procedure Rules provides that when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be affected without an order of the court upon an application or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
26. It is true that the firm of Machuka & Co. Advocates did not seek the leave of the court to come on record before filing the application to set aside the orders of the court dismissing the Plaintiff's case for non-attendance.
27. The question that arises is whether an order dismissing a suit pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules is a Judgment contemplated under Order 9 rule 9.
28. Section 2 of the Civil Procedure Act has defined "a decree" to include a judgment. A "decree" on the other hand has been defined to mean the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all matters in controversy in the suit.
29. A "decree," according to section 2 of the Act, does not however include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default.
30. The order dismissing the suit for non-attendance, in my view, is one of the exceptions of what a "decree" is. It is not a formal expression of an adjudication which conclusively determines the rights of the parties with regard to matters in controversy in the suit. It is an "order of dismissal for default" and not a "judgment" for the purpose of order 9 Rule 9 of the Civil Procedure Rules. The firm of Machuka & Co. Advocates did not therefore need leave to come on record for the Plaintiff.
31. The Plaintiff in this matter was filed on 5th July 2010. In the Plaintiff, the Plaintiff/Applicant sought for the following declaratory orders; a declaration that the Plaintiff has acquired beneficial ownership in L.R. Nos 2740 and 2742, Malindi upon trust for herself and the Plaintiff in equal shares; a declaration that the contract of sale of L.R. No.2470 and 2742 is null and void, an injunction restraining the 1st Defendant from transferring the suit property to the 2nd Defendant amongst others.
32. The Plaintiff has not denied that he did not serve the 2nd Defendant, who purchased the suit

- property from the 1st Defendant, with the Summons to Enter Appearance. The said Summons and the suit therefore lapsed sometimes on 6th July 2011 as against the 2nd Defendant.
33. The record shows that the Plaintiff's advocates, Kamau Kuria & Kiraitu, filed an Application for injunction on the same day the Plaintiff was filed. That Application was never heard inter partes because the Plaintiff was directed to serve the 2nd Defendant first. However, on 16th July 2010, the orders for the status quo to be maintained "awaiting the matter to be mentioned" were granted by the court.
34. The status quo order meant that the Plaintiff was to continue staying in the suit premises. He was required to serve the 2nd Defendant with the suit papers and prosecute his suit which never happened until 16th May 2013 when the matter was fixed by the 1st Defendant's advocate for mention before the Environment and Land Court for purposes of taking directions.
35. The record shows that the Plaintiff's then advocate, Kamau Kuria & Kiraitu advocate, were informed about the said mention date vide a letter dated 8th May, 2013 which they acknowledged by stamping.
36. However, neither the Plaintiff nor his advocate was in court on 16th May 2013 on which day the court directed that the parties do comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days. The court fixed the matter for mention on 25th June 2013.
37. The record shows that by way of a letter dated 11th June 2013, 1st Defendant's advocate informed the Plaintiff's advocate what had transpired in court on 16th May 2013. The said advocate also informed the Plaintiff's advocate that the matter had been slated for mention on 25th June, 2013. The 1st Defendant's advocate letter was received by the Plaintiff's advocate on 13th June 2013. The 1st Defendant's advocate filed an affidavit of service showing the service of the said mention notice.
38. Again, neither the Plaintiff nor his advocate was in court on 25th June, 2013. On that day, the court fixed the matter for hearing on 22nd August 2013.
39. On 22nd August 2013, I dismissed the Plaintiff's suit pursuant to the provisions of Order 12 Rule 3 after I was satisfied, on the basis of the affidavit of service, that indeed the Plaintiff's advocate had been served with a hearing notice.
40. I have confirmed that contrary to the deposition of the Applicant, this matter was listed for hearing before this court on 22nd August 2014 and not the High Court. This is the court that is mandated by the Constitution at Article 162(2) (b) to deal with disputes pertaining to the environment and the use and occupation of and title to land and not the High Court. That is a fact which the Plaintiff, the Plaintiff's then Advocate and M/s Chepkwony advocate are well aware of.
41. In any event, the Plaintiff's advocate's e-mail attached on the Plaintiff's Supporting Affidavit and addressed to M/s Chepkwony advocate in respect to this matter is clear that the Plaintiff had not been in touch with his advocate for over three (3) years.
42. The Plaintiff's advocate, after being served with the mention notice and a hearing notice had tried to get in touch with the Plaintiff without any success. The Plaintiff could not have been ready to proceed with his case on 22nd August 2014 even if M/S Chepkwony advocate was in court on that day because the whereabouts of the Plaintiff were unknown.
43. The e-mail by the Plaintiff's advocate shows that the Plaintiff lost any interest in the case immediately he obtained the orders of status quo on 16th July 2010. He never made any efforts to contact his advocates after the order of status quo was given with a view of prosecuting the suit. In the case of **BI Mach Engineers Ltd Vs James Kahoro Mwangi (2011) eKLR, Waki J A** stated as follows:

"The Applicant had a duty to pursue his advocate to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate of failure to inform as if there is no duty for the client to pursue his matter. If the client was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy....."

44. In **Kettman & Others Vs Hansel properties (1998) 1ALL 38 At 62**, Lords Griffins held as follows:

“We can no longer afford to show the same indulgence towards the negligent conduct of a litigant as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of negligence of the lawyer to fall on their own heads.....Another factor a judge must weigh in the balance is: the pressure on the courts caused by the great increase in litigation and the consequent necessity. That in the interest of the whole community, legal business should be conducted efficiently.”

45. In this matter, the Plaintiff never made any efforts to pursue his claim with his advocate or with the court. Instead, he stopped communicating with his advocates for over three (3) years.

46. The Plaintiff or his advocates also never made any complaint that the file was not accessible.

47. There is also no explanation why the Plaintiff never served the summons to the 2nd Defendant who is the registered owner of the suit property.

48. In the circumstances, I find that the Plaintiff has not offered any plausible explanation as to why this court should exercise its discretion in his favour to set aside the order dismissing the suit for non-attendance.

49. For those reasons, the Application dated 20th August 2013 is hereby dismissed with costs.

Dated and delivered in Malindi this 26th day of **September**, 2014.

O. A. Angote

Judge