



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 22 OF 2021

TABITHA NKATHA.....APPLICANT

VERSUS

SOLOMON K. MUTUNGI.....1ST RESPONDENT

JANET MBAYA.....2ND RESPONDENT

COUNTY GOVERNMENT OF MERU.....3RD RESPONDENT

RULING

A. The Application

1. By an application dated 30.7.2020 the court is asked to review, vary and or set aside the order made on 13.7.2015 dismissing the case under order 17 rule 2 Civil Procedure Rules. The application was supported by an affidavit sworn on 28.7.2020 by Tabitha Nkatha. The reasons given were that there was no notice served before the dismissal for non-prosecution since efforts had been made severally prior to the dismissal to seek for typed proceedings; the case was las in court on 19.1.2015 when it was directed to start denovo; parties were always desiring to have the matter heard; and the delay was because the file could not be traced.

2. The applicant was opposed by the 3rd respondents through a replying affidavit sworn on 30.10.2020 by Danson Kirua for being defunct following the Constitution of Kenya 2010.

3. On the part of the 1st respondent the applicant was opposed through a replying affidavit sworn by Solomon Kirera Mutungi on 21.10.2020 on the reason that notice to show cause had been served, there had been inordinate delay of five years; the applicant was enjoying property belonging to him; he thereafter filed CMM No. 46 of 2020 for eviction, where the applicant had filed a defence the suit had been pending for 22 years; the revival of the suit would not be in the interest of justice and the application lacked merits since he had been paying rates and rent.

4. Through an application dated 11.2.2021 the applicant sought for temporary orders of injunction restraining the respondents from demolishing, entering or trespassing or evicting or dealing with the suit property pending the hearing and disposal of the suit. The application was supported by an affidavit of Tabitha Nkatha sworn on 10.2.2021. The grounds upon which the application was made were that the property was worthy Kshs.10,000,000 containing a family house where she resides and there was an impending demolition or threatened eviction and there would be irreparable loss and damage if eviction were to occur.

B. Grounds of Opposition

5. The 1st respondent filed a relying affidavit sworn on 15.6.2021 on the basis that following dismissal of the suit there was no proper suit to base an application for injunction on; the letter of allotment had expired for lack of compliance; he held a certificate of lease which was superior to an allotment previous suits such as HCCC no. 61 of 1998 and no. 112 of 1998 were dealt with and dismissed. The application was opposed by the 2nd respondent through both a preliminary objection dated 1.3.2021 and a replying affidavit sworn on 16.9.2020 by Justus Mbaya Mugambi on the basis that the court lacked jurisdiction to entertain the suit; there was no pending suit to grant the orders upon. There was a pending suit in the lower court; there was proper service of notice before the suit was dismissed; there has been inordinate delay and that it was in the interest that the application be dismissed.

C. Written Submissions

6. Parties herein opted to dispose of the two applications and the preliminary objection through written submissions dated 20.12.2021, 19.1.2022 and 16.12.2021 for the applicant 1st respondent and 3rd respondent respectively.

7. The applicant has submitted she met the threshold of reinstating the suit. Reliance was placed on *Article 50 (1) Constitution, Pinnacle Projects Ltd vs PCEA Ngong Parish and Abor (2018)*, *Mina Achedid vs NBK (2020) eKLR*, *Nahashon Mwangi vs Kenya Finance Bank Ltd in liquidation (215) eKLR*, *Mwangi S. Kaimenyi vs AG and another (2014) eKLR*, *Loita vs Kyumbu (1984) KLR 441*, *CMC Holdings Ltd vs Nzioki (2004) IKLR 173*, *Mbogo & another vs Shah EALR 19*, *Fran Investments Ltd vs G4S Security Services Ltd (2015) eKLR*, *Philip Chemwolo and another vs Augustine Kubede (1982-1988) KAR 103*, *Belinda Murai and others vs Amoi Wainaina (1998) Joshua Kulei vs Republic and 9 others (2014) eKLR*, *NBK vs Nzunga Njau*, *Jim Rongers Gitonga Njeru vs AlHusnain motors ltd and 2 others (2018) eKLR*.

8. The 1st respondents submitted the court was right to dismiss the suit. Reliance was placed on *Nilesh Premchand Mulji Shah and another t/a Ketan emporium vs M.D Popot & others (2016) eKLR* *Lota vs Kyumbu (1984) KLR 441*, *Argan Wekesa Okumu vs Dima College Ltd and 2 others (2015) eKLR*. *George Gatire Kibota vs George Kuria Mwaura & another (2017) eKLR*, and *Mwangi S. Kaimenyi Supra, Nzoia Sugar co. Ltd vs West Kenya Sugar Ltd*.

9. The 3rd respondent submitted the court was right to exercise its powers. Reliance was placed on *Kestem Co. Ltd vs Ndala Shop Ltd and 2 others (2018) eKLR*, *Jacob Nyaga Njeru vs Njeru Kinanda (2017) eKLR*.

2ND APPLICATION

10. Regarding the application dated 11.2.2021 the 3rd respondents took the view it was an abuse of the court process given that the application was resjudicata since a similar application was compromised on 19.1.2015.

D. Issues for Determination

11. The issues for determination in my view are:

- (i) Whether the court should reinstate the suit
- (ii) If the applicant is entitled to orders of injunction and
- (iii) If the 3rd respondent is properly enjoined in this suit.

E. Findings

12. Starting with the first issue the suit came for mention on 19.1.2015 where parties agreed to have the case start denovo. By consent of parties status quo was agreed till the matter was heard and determined and a hearing date was to be fixed at the registry on priority basis.

13. Parties took no action until 13.7.2015 when the court dismissed the matter under order 17 rule 2 Civil Procedure Rules in the absence of the parties. Thereafter it appears there was no action until the application dated 30.7.2020 was filed. Prior to this the 2nd respondent had also filed an undated application on 8.7.2020 seeking for the formal vacation of injunction orders issued on 31.12.2014.

14. The basis of the applicant's application is that the notice to dismiss the suit was not served upon her and that she had always been keen to prosecute the suit.

15. Order 17 rule 2 Civil Procedure Rules grants the court the power to dismiss a suit where there has been non-prosecution for one year. The last time this case was before the court prior to the dismissal was 19.1.2015. So one year would have elapsed on 19.1.2016. On 13.7.2015 the one year had not lapsed from the last appearance in court.

16. Similarly I have not seen a duly extracted and served notice to show cause accompanied with a return of service by a court process server as evidence that there was properly service before the court exercised its discretion in dismissing the suit for non-prosecution.

17. In my view therefore the applicant was condemned unheard which was against the rules of natural justice. More importantly the one year had not lapsed for the court to reach a finding that there had been inaction as provided under the law.

18. The court in exercising the discretion as to reinstate the suit must establish;- if there was sufficient cause for the delay in seeking for the revival of the suit, the prejudice likely to be occasioned to opposite party, whether justice could still be met inspite of the inordinate delay and lastly whether the prejudice to the respondents could be met by way of costs as held in *John Nahashon Mwangi vs Kenya Finance Bank Ltd (in liquidation) (2015) eKLR*.

19. In this matter there is no indication why the applicant did not take remedial action on time or at all. There are no letters attached to show there was of diligence in seeking the setting for a hearing of the suit between 2015 – 2018 given the directives made to hear the matter on priority basis, aforementioned in this ruling.

20. The applicant is therefore guilty of laches and indolence otherwise she would have known the fate of the suit as soon as it was dismissed in 2015.

21. Similarly the respondents appear to have known the matter had been dismissed in 2020 where after they filed a suit for eviction in the lower court.

22. In my view and given there is pending new suit over the subject matter in which the applicant has filed a defence I see no prejudice to have this matter revived given the respondents can be compensated for the prejudice by way of costs.

23. Coming to the issue of the preliminary objection the suit was regularly transferred to the ELC by the High Court after the ELC Act 2011 came into operation.

24. Therefore the suit is properly before this court hence I find the preliminary objection lacking merits.

25. As to the 2nd issue of the preliminary objection raised that the 3rd defendant does not exist in law the court has not been moved appropriately for an amendment of the suit to bring on board the County Government of Meru.

26. As to whether the applicant deserves temporary orders of injunction a party seeking such orders must demonstrate a prima facie case with a probability of success, that there will be irreparable loss and damage which cannot be compensated by way of damages and that the balance of convenience tilts in favour of granting the injunction. *See Nguruma Ltd vs Bonde Nielsan & 2 others (2014) eKLR*. In this matter there is already a similar suit for eviction. There is no dispute a certificate of title is in existence while the applicant has a letter of allotment. Since the applicant is in occupation of the suit land and given the circumstances in this matter I shall grant orders of status quo subsisting for a period of 6 months only.

27. The applicant shall file an undertaking as to damages and provide security equivalent to Kshs. 1 million within 14 days from the date hereof otherwise the orders shall lapse. Costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF APRIL, 2022

IN PRESENCE OF:

MWIRIGI FOR 3RD DEFENDANT

ANAMPIU FOR 1ST DEFENDANT

KIOME FOR APPLICANT

NELIMA FOR 2ND DEFENDANT

HON. C.K. NZILI

ELC JUDGE