



REPUBLIC OF KENYA

High Court at Busia

Civil Case 14 of 2007

SALIMA UNDUSU SALIDU.....PLAINTIFF

**(Suing as the legal rep.of the estate of
SALIM HASSAN KABWERE - DECEASED
-VERSUS-**

JANE NANGUNDA KABWERE DEFENDANT.

R U L I N G.

By the Notice of Motion dated 30th May, 2012, the plaintiff through her advocates M/S. Wycliffe Obwoye Onsongo advocate prays for a review, setting aside or vacating the exparte orders dismissing the plaintiff's case for want of prosecution to enable the suit be determined on merit. She also prays for costs. The application is based on the following five grounds on the face of the application.

- “ 1. That the matter has not proceeded because there was stay of proceedings by consent pending the hearing and final determination of Busia CMCC. 227 of 2006.
2. That the said Busia CMCC.227 of 2006 has not been finalized.
3. That there was no laxity on the parties in prosecuting the matter.
4. That the orders of dismissal will cause irreparable loss to the plaintiff.
5. That there was an error apparent on the face of the record.”

The application is supported by the supporting affidavit of the plaintiff's counsel sworn on 30th May, 2012 in which he reiterates the grounds on the application and adds that the delay in this matter was to await the lower court's case to be finalized as some of the issues herein may be determined in that case.

M/S. Ashioya & company Advocates for the Defendant filed grounds of opposition dated 2nd July, 2012 setting out three grounds:

- “ 1 That the said application is frivolous, vexatious and an abuse of the courts process.
2. That the said application is inordinate – and has been made with unreasonable delay.
3. That the said application lacks in substance and merit and cannot attract the orders sought and as such should be dismissed with costs.”

On the day of the hearing of the application, Mr. Onsongo and Mr. Ashioya advocates appeared for

the plaintiff and Defendant respectively. Counsel for the plaintiff submitted along the lines of his supporting affidavit. The defendants' counsel submitted that the Applicants/Plaintiff has not availed any new and important matter that has been discovered to enable the court review its orders. He adds that the supporting affidavit sworn by the plaintiff counsel should be struck out as it contains contested matters and as plaintiff/Applicant has not sworn any supporting affidavit the application should be dismissed. Counsel further submitted that the application does not disclose the date of the alleged stay of proceedings and the proceedings of the lower court are not annexed to confirm there was a defence hearing on 1st August, 2012. He added that the plaintiff being served with notice to dismiss suit dated 26th March, 2012 did not take steps to show cause why the suit should not be dismissed. He ended his submissions by saying equity does not aid the indolent and the plaintiff/Applicant is an indolent litigant.

In reply, counsel for the plaintiff submitted that the supporting affidavit does not contain contested issues and as the consent order he alluded to was between him and the Defendant's counsel he was the right person to swear it. He concedes his affidavit failed to disclose the date of the stay orders but submitted that the court could peruse the record to confirm the date and its terms. He added that the notice of dismissal did not require the parties to attend court.

Lastly he submitted the plaintiff is not a party in the lower court case which nevertheless may settle some of the issues herein.

I have carefully considered the counsel submissions, the grounds on the application, contents of the supporting affidavit and the grounds of opposition and also the notice to show cause why suit should not be dismissed dated 26th March, 2012 and herebelow are the issues for determination:

1. Is the application properly before the court in view of the fact that the supporting affidavit was sworn by the plaintiff's counsel?
2. Had the suit remained for more than one year without any steps being taken to prosecute it as at the date of the notice to show cause?
3. Was there an error on the face of the record when the order of dismissal was issued?
4. Is the Plaintiff/Applicant entitled to the orders sought?

In his submissions, Mr. Onsongo explained why it was necessary for him to swear the supporting affidavit. That the issues in the affidavit were only known to him as they relate to consent between him and Mr. Ashioya Advocate for the Defendant. I have taken judicial notice that other than submission by Defendant's counsel from the bar there was no affidavit filed to dispute the factual contents in the supporting affidavit. It could have been better had the counsel annexed a copy of the consent order referred to in his affidavit but did not do so. It is important to restate that it is the party's responsibility to place before the court all materials they wish the court to know about in respect of their case. The practice of asking the court to peruse the record to get the facts, position or material should be discouraged as the court is never a party to the proceedings before it. I have however perused the record and the following is the consent that was entered to on 6th December, 2007:.

“ By consent of both parties, It is agreed that the status quo as pertaining today on all the parcels of land be maintained until the application is heard and determined Interpartes. District Land Registrar to therefore ensure that no transactions are registered against those parcels until further orders from the court.”

The interpartes hearing was to proceed on 4th February, 2008 then moved to 18th February, 2008 and then moved to 2nd June, 2008. It was then fixed for hearing on 1st December, 2008 when counsel for the plaintiff indicated their satisfaction with the orders of 6th December, 2007. The Defendants counsel then indicated the lower court case number 227 of 2006 on the same subject matter was coming up for hearing on 9th January, 2009. The court then fixed this matter for a mention on 4th May, 2009

when the following order was entered.

“ Case be mentioned on 30th June, 2009 pending determination of lower court case 227 of 2006.”

This was followed by a mention on 6th October, 2009 when the following order was made:

“The lower court file has not been finalized. Next mention on 1st February, 2010.”

Then come 12th May, 2010 the following order was made:-

“ 1. Mention on 26th July, 2010.

2. Status quo be maintained as before.”

This was followed with a mention on 26th July, 2010 when a further mention of 4th October, 2010 was fixed. This was followed with mention on 2nd December, 2010 when another mention of 7th March, 2011 was fixed with a further order to maintain status quo.

On the 7th March, 2011, the matter was not mentioned in court but the entry by the registry shows one Juliet from M/S. Ashioya & company Advocates fixed the matter for further mention on 30th May, 2011. No other step was taken until the court issued the notice dated 26th March, 2012 followed by the eventual dismissal for want of prosecution order of 19th April, 2012. This was after more than one year from 7th March, 2011 when Juliet from Defendants counsel took the mention date of 30th May, 2011 when no orders or entry was made on the file.

While it is obvious the plaintiff had taken more than one year by 26th March, 2012 without taking any steps to prosecute the case the contents of the supporting affidavits cannot be said to be contentious contrary to the submissions by Defendant's counsel.

As shown above, the record has two consents. The first consent was of 6th December, 2007 and relates to status quo being maintained and was extended twice as shown in the order of 12th May, 2010 and 2nd December, 2010. The second consent was that of 4th May, 2009 that the case be placed for mention on 30th June, 2009 pending the determination of the lower court case 227 of 2006 and was extended by the order of 6th October, 2009 to 1st February, 2010.

There was no further mention about staying the prosecution of the suit awaiting the finalization of the lower court case at the time the notice to show cause why the suit should not be dismissed for want of prosecution was issued on 26th March, 2012. The notice stated as follows:

“ TAKE NOTICE that you are REQUIRED to show cause, within 14 days from the date hereof, why this suit should not be dismissed for want of prosecution since no steps have been taken by either party for one year.”

The fourteen days given were ending at the end of the month of March, 2012 and the dismissal order was entered on 19th April, 2012 and by then no party had addressed the court on why the suit should both be dismissed. Contrary to the plaintiff's counsel submission that the notice did not require party to attend court, it required any party interested with the survival of their suit to show cause by giving reasons within 14 days. A party could show cause by writing to the court giving the reasons or by filing the affidavits or by moving the court for a mention during which the party gets the opportunity to give their reasons why the suit should not be dismissed . the parties herein received the notice and no steps were taken by either party to show cause and the suit was dismissed on 19th April, 2012 and after

about six weeks this application dated 30th May, 2012 was filed. Even though none of the parties disclosed when they got to know of the dismissal order of 19th April, 2012 the period of six weeks taken by the plaintiff before filing the application cannot be said to be inordinate. Whereas the court is of the view a party who shows interest in being heard should be given the opportunity to do so, all parties are obliged to ensure their cases are prosecuted without undue delay as justice delayed is justice denied.

For this reasons, I find the plaintiff should be accorded the opportunity to prosecute her case to enable the court decide on the issues on merit. She has however taken too long to prosecute the case leading to the dismissal order now being applied to be set aside. The Defendant cannot be penalized by being required to pay costs of this application while they were not to blame for the plaintiff's failure to show cause why the suit should not be dismissed for want of prosecution.

As such, I allow the application dated 30th May, 2012 in terms of prayer 1 with an order that each party bears their costs of the application in any event. The plaintiff is further directed to ensure steps are taken in the next 30 days fix the case for hearing.

S. KIBUNJA,

JUDGE.

21ST MAY, 2013.