



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

H C.C. NO. 26 OF 2010.(O.S)

(ORIGINALLY BUNGOMA HCC. NO. 117 OF 2004)

JOSEPH AFWANDE MUSIMBIAPLAINTFF

VERSUS

BONFACE OMOLO AJUOGI]

For; OCHIENG ODALANGA &]..... DEFENDANTS.

KHALABA OCHIENO]

R U L I N G.

The Defendants/Applicants filed the Notice of Motion dated 2nd November, 2012 against the Plaintiff/Respondent for orders;-

1. That this suit be dismissed for failure to comply with the order of 28th May, 2012 and for want of prosecution.
2. That the caution/inhibitions or restrictions registered on 27th January, 2005 or any other on Samia/Luchululo-Bukhulungu/346 be lifted/removed forthwith.
3. That Plaintiff/Respondent meet the costs of the suit and application.

The application is supported by the undated affidavit of 1st Defendant/Applicant filed with the application on 16th November, 2012.

The application is opposed by the Plaintiff/Respondent through his replying affidavit sworn on 21st January, 2013 and another affidavit by Emmanuel Mukhebi Situma also sworn on 21st January, 2013.

The application was on 7th August, 2013 fixed for hearing on 1st January, 2013, by the Defendant/Applicants' counsel. On 16th August, 2013 a hearing notice was served on the Plaintiff's/Respondent's counsel and affidavit of service by Joseph Orata Kweyu dated 19th August, 2013 filed. On the hearing date the Plaintiff's/Applicant's counsel did not attend court and the court allowed counsel for the Defendants/Applicants to prosecute the application.

The court has carefully considered the supporting and replying affidavits and the annexures thereto. The court has also considered the submissions by Defendants/Applicants counsel and come to the following findings;-

1. That in its order of 28th May, 2012, the court inter alia directed the Plaintiff to take appropriate action to fix the case for hearing within ninety (90) days of that date. The court further directed that;

‘ If the plaintiff does not do so, the Defendants shall be at liberty to invoke this court’s jurisdiction on dismissal for want of prosecution.’

By the time the application dated 2nd November, 2012 was filed on 16th November, 2012 a period of about five and a half months had lapsed since the court order of 25th May, 2012. Had the plaintiff complied with the court order to fix the case for hearing in 90 days.? The Defendants/applicants submits they had not and hence this application. The Plaintiff/Respondent have in the replying affidavit annexed claimed they had taken steps to visit the court registry to fix the case for hearing but were told no dates were being given in such cases as instructions were that they await the appointment of Environment and Land judges. They have annexed copies of the Chief Justice’s practice directions of 9th February, 2012 and 20th September, 2012 and a letter dated 13th August, 2012 to the Deputy Registrar asking for case to be mentioned on 12th November, 2012 for purposes of fixing a hearing date. They have also annexed a mention notice dated 17th September, 2012 addressed to Defendants/Applicants counsel indicating that the matter had been fixed for mention on 12th November, 2012.

2. That after perusing the court record there is no copy of the letter dated 13th August, 2012 that had been received by the court. There is also no entry in the court record of the action taken on 12th November, 2012 which is the date the letter of 13th August, 2012 had indicated a hearing date was to be taken. More surprising is the fact that the letter of 13th August, 2013 had not been copied to the Defendants/Applicants counsel, yet a hearing date was to be fixed on 12th November, 2012. It is doubtful as to whether the letter dated 13.8.2012, if written at all, was brought to the attention of the court registry.
3. That on 13th September, 2012 the Plaintiffs/Respondent’s advocates had the court file produced and fixed a mention notice on 12th November, 2012. On 17th October, 2012, the mention notice was issued addressed to the Defendants’/Applicants counsel. The copy of the notice annexed to Mr. Situma’s affidavit and marked EMS has a date stamp of Defendant’s/Applicant’s counsel indicating they received it on 16th October, 2012. The affidavit by Mr. Situma sworn on 21st January, 2013 at paragraph 9 indicates service of mention notice was effected on 16th October, 2013. This fact has not been disputed by the Defendants/Applicants.
4. That having found as in 2 and 3 above, it follows that the evidence available shows that the Plaintiff/Respondent took his first step towards fixing the case for hearing on 13th September, 2012 when he took the mention dated of 12.9.2013 and consequently served the mention notice dated 17th September, 2012 on Defendants’/Applicants’ counsel on 16th October, 2012. The claim that a letter dated 13th August, 2012 had been written and sent to the Deputy Registrar is not supported by the record of the court.
5. That there is no material presented before this court to show that the registry was not fixing hearing dates of matters relating to environment and land during the period following the court order of 28th May, 2013. This court is aware the Honourable Judge who issued the orders of 28th May, 2012 was in the station up to the end of the year, 2012, and had continued to deal with environment and land matters until he left the station for his next assignment in accordance with the Chief Justices directions.
6. That the Chief Justice directions of 9th February, 2012 and 20th September, 2012 had not stopped the hearing of the environment and land matters before the existing courts. The practice direction of 9th February, 2012 especially practice direction No. 1 provided:

‘ All proceedings relating to the environment and the use and occupation

of, and title to land pending before the Court of Appeal, High court, Subordinate courts or Local Tribunal of competent jurisdiction – other than Land Disputes Tribunalshall continue to be heard and determined by the same courts or Tribunal. Any proceedings which shall not have been concluded by the time the Environment and Land Court is established shall be moved to the court upon its establishment.”

This direction does not state that no action would be taken on environment and land cases until Environment and Land Court is established. It allowed the hearing to proceed before the courts the matters were pending, and it was in pursuant of this position the High Court heard the Defendants’ earlier application dated 24th November, 2011 and issued the orders of 28th May, 2012.

7. That the Chief Justices practice direction of 20th September, 2012 which revoked those of 9th February, 2012 came into force after the period of 90 days from the court orders of 28th May, 2012. Practice direction number 4 provided as follows;-

“ All cases relating to the environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto has yet to commence; shall be transferred to the Environment and Land court as directed by the Chief Registrar.”

There is nothing in the Chief Justice’s practice directions of 20th September, 2012 to suggest that hearing dates would not be fixed until the establishment of the Environment and Land Court. It talked about the transfer of fresh matters from the High Court to this court. This matter was referred to this court on 31st July, 2013.

8. That the Plaintiff/Respondent has not availed a copy of the instructions to the effect that dates would not be fixed in environment and land cases or an affidavit from the Deputy Registrar or any other such registry staff who may have communicated such information. In any case, had there been such instructions, then one wonders when they were withdrawn for the Plaintiff/Respondent to be attended on 13th September, 2012 when the mention date of 12th November, 2012 was fixed.
9. That the above findings confirms that the Plaintiff’s/Respondent’s first step to fix this matter for hearing from the date of the Court Order of 25.5.2012 was on 13.9.2012 when they fixed this matter for mention on 12.11.2012. This step was been taken too late in the day as the 90 days period from 28.5.2012 had lapsed on or about 28.8.2012. The Plaintiff/Respondent had not taken steps to have the period of 90 days fixed by the court on 28.5.2012 extended before they fixed the matter for mention. No such request has been made before this court to date and their explanations are not convincing.
10. That the Defendants/Applicants were acting in pursuant to the court order of 28.5.2012 when they filed the application dated 2.11.2012. The provisions of Order 17 Rule 2 (4) of Civil Procedure Rules allows the filing of applications seeking to dismiss a suit for failure to comply with the Court Order. The court had on 28.5.2012 ordered Plaintiff/Respondent to.

“ take appropriate action to fix the case for hearing within ninety (90) days of today’s date.”

11. That the pleadings filed herein in reply to the originating summons dated 25.10.2004 by the Defendants/Applicants, being the replying affidavit by Khabala Ochieno sworn on 3.8.2005 do not contain a counterclaim. The replying affidavit only asks that the originating summons be dismissed. As such the Defendants/Applicants attempt to introduce their own claim through prayer (b) of their application dated 2.11.2012 is irregular and in contravention of the courts process.

In the upshot of the forgoing findings, the Plaintiff/Respondent has failed to comply with the courts

order of 28.5.2012, that he takes steps to fix the case for hearing in 90 days. The Defendants'/Applicants' application of 2.11.2012 has merit and is allowed in terms of prayer (a) and (c). The Plaintiff/Respondent suit is dismissed with costs.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED..ON 27TH ..DAY OF NOVEMBER, 2013.

IN THE PRESENCE OF;

JUDGE.