



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 553 of 2012

MAUREEN CHEROTICH BETTPLAINTIFF

- VERSUS -

STEPHEN KAMITI WANGANGA DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 4th October 2012. The plaintiff prays that the order of court of 11th September 2012 be set aside and that the application dated 28th August 2012 be reinstated for hearing. That order dismissed the latter application. The motion is brought under order 12 of the Civil Procedure Rules 2010 and sections 1A, 1B, 3 and 3A of the Civil Procedure Act.
2. The plaintiff's earlier application dated 28th August 2012 was fixed for hearing by the plaintiff for the 11th September 2012. The plaintiff or her counsel did not appear in court. The defendant's counsel applied for dismissal. The application was dismissed. The plaintiff avers that after the *ex parte* hearing on 29th August 2012, she served the defendant for hearing *inter-partes* on 11th September 2012. Some negotiations ensued resulting in settlement proposals that were to be recorded in court on the hearing date. She avers that her advocate was bereaved and could not attend court. She stated that her car developed mechanical problems and she arrived in court late. She has registered a caution on the property. She is thus at the peril of having the property sold by the defendant.
3. The defendant contests those assertions. He depones in a replying affidavit that the plaintiff transferred the property known as Juja/Kalimoni Block 3/118 to him with authority to sell it to third parties. He has sold and deposited a sum of Kshs 484,500 into the plaintiff's bank account. The application is also attacked on its merits and for laches. In the end, the defendant's case is that the application has been overtaken by events.
4. The plaintiff has now brought this motion under order 12 rule 7. Order 12 rule 3 allows a court to dismiss a suit for non-attendance. Rule 7 then permits the aggrieved party to set aside that order and reinstate the suit. The decision of *Maina Vs Mugiria* [1983]KLR 78 reaffirms this court's wide and unfettered discretion to set aside an *ex parte* order or judgment and to do substantial justice to the parties. The case cited with approval the decision in *Shah Vs Mbogo* [1967] E A 116. The latter decision holds that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice.
5. When I juxtapose the law against the facts, I find further as follows. The plaintiff's original lawyer who was said to be bereaved has not sworn any affidavit deposing to that fact. The plaintiff herself has put forward a lame excuse that her car broke down. Although the plaintiff claims to have appeared

later before the Hon. Justice Havelock on 11th September 2011 and mentioned her matter, there is no such record. She concedes freely that she was late to court. Her lawyer could have instructed other counsel to hold his brief despite the circumstances. He did not do so. I thus find that the court was entitled under order 12 rule 3 to dismiss the application dated 28th August 2012. For the same reasons and the evidence before me, I am disinclined to exercise my discretion in favour of the plaintiff.

6. The application to set aside the judgment has been presented with unexplained delay. The plaintiff knew her application was dismissed on the same day of the impugned court order. The motion for review or setting aside was not made to court until 24th days later on 5th October 2012.

7. But there is more than meets the eye here. The defendant does not controvert the plaintiff's claim that they had reached a settlement that was to be recorded in court on 11th September 2012. The circumstances under which the plaintiff, as proprietor, transferred the suit land to his agent for sale are opaque. Both parties have deliberately kept the court in a blind spot.

8. The defendant depones that he has sold the land and deposited Kshs 484,500 into the plaintiff's account. The plaintiff's case is that upon the defendant's failure to sell the land within the prescribed time in the agreement for sale, the plaintiff would refund Kshs 533,000 and recover her title. That is strange because the plaintiff concedes she had only received Kshs 250,000 from the defendant but which was entered in the agreement for sale as Kshs 533,000 including interest. I have reached the inescapable conclusion that both parties are less than candid about the true nature of the conveyance. When parties hide behind material non-disclosure, it amounts to obstructing the course of justice that can only delay expeditious disposal of the suit. I thus find that the applicant has failed to rise to the threshold for setting aside an *ex parte* order set in Shah Vs Mbogo (Supra).

9. I also note that the dismissed application sought an injunction to restrain the defendant from selling the suit land. The plaintiff depones that she has registered a caution against the title. The title itself, from the annexure marked "SK1", is registered in the name of the defendant. Despite the predicament the plaintiff finds herself in, the registered caution gives her some reprieve. The defendant depones the property has been sold. The plaintiff did not file a supplementary affidavit to controvert that allegation. In all this, I am left in serious doubt that any purpose would be met in reinstating the application. It is also not lost on me that if the plaintiff prevails at the trial, the court has inherent power to grant other suitable remedies.

10. In the result, the plaintiff's notice of motion dated 4th October 2012 is without merit. I order that it be and is hereby dismissed. As the main suit is still alive, costs shall abide with the final judgment.

It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of November 2012.

**G.K. KIMONDO
JUDGE**

Ruling read in open court in the presence of

Mr. G.W. Mahugu for Mr. Matwele for the Plaintiff.

No appearance for the Defendant.