



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 79 OF 2007

CHARITY WAMBOGO BENSON.....PLAINTIFF

VERSUS

LOIS GICUKU KIBARU.....DEFENDANT

R U L I N G

The defendant herein applied to this court for dismissal of the plaintiff's suit for want of prosecution. When the application came up for hearing on 15.07.09 both counsel recorded a consent to the effect that the application be withdrawn but the plaintiff pays thrown away costs of 5,000 Sh. The matter was marked SOG but the court urged counsel for the plaintiff to move the court with dispatch. A hearing date was taken by consent of both counsel on 13.11.09. The suit was fixed for hearing on 12.5.2010. When the matter came up on that date, counsel for the plaintiff was absent. Mr. Kathungu for defendant informed the court that the thrown away costs of 5,000 Sh. had not yet been paid. The court therefore dismissed the suit.

The plaintiff through Utuku Advocate then filed the present application under Section 3A of the Civil Procedure Act urging the court to set aside the "dismal order" dated 12.05.2010 and reinstate the suit. As rightly submitted by counsel for the defendant/respondent the "dismal" order is not attached and I have no idea why counsel would refer to a valid court order as a "dismal" order. I don't think my orders of 12.05.2010 were "dismal".

Be that as it may, I have considered the application along with the rival Affidavits. Counsel for the Applicant maintains that the suit should be reinstated so that the same can be heard and decided on merit. Counsel for the defendant on the other hand maintains that there is nothing to be heard. The suit is for eviction of the defendant from the suit premises yet she does not even live on the plot. The defendant herself deposed that it is the plaintiff who is in possession of the said property. That fact has not been denied by the plaintiff so how can be court asked to evict a person who is not even on the plot in question. I have perused the plaint. I note that there is another prayer for a permanent injunction against the defendant restraining her from trespassing on the said plot. I have seen a Ruling by Judge Khaminwa dated 14.02.08 in which she says that the defendant does have proprietary rights on the said plot – so the issue of trespass does not arise either. I agree with counsel for the defendant therefore that reinstating the suit for trial will be an exercise in futility as there is nothing to try. There is in my view no triable issue in

this matter. I also find that the failure to comply with the court order on payment of the money was not sufficiently explained. I have no reason to reinstate this suit. The application dated 20.5.2010 lacks merit. The same is hereby dismissed with costs to the Defendant/Respondent.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 6th day of December 2010

In presence of:-Mr. Utuku for Applicant & Applicant

N/A for Respondent.