REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1099 of 2002

MARY GAME …….....…….PLAINTIFF

VERSUS

MARSABIT COUNTY COUNCIL …….……...……....1ST DEFENDANT

COMMISSIONER OF LANDS……...…….….2ND DEFENDANT

GALFALO BARILE…….…….…….…….……....3RD DEFENDANT

BOKU GUFU……..…..……...4TH DEFENDANT

THE ATORNEY GENERAL…….……..…….…..... 5TH DEFENDANT

RULING

The application subject to this ruling was filed in this Court on 22nd November 2006. It sought setting aside of an order of this Court made on 22nd February 2006, which had dismissed the suit filed herein on 28th June 2002.

There was also an order for costs thereof. The application was based on the affidavit of an advocate called ***Kamaiyo Kiptanui*** sworn to on the same day as the application.

The affidavit deponed that the deponent is an advocate of the High court who is in conduct of the case subject to the application.

That the suit herein was set down for hearing on 22nd February 2006 but that it was not confirmed at the call over and that on the hearing date there was no appearance for any of the parties and the case was dismissed for non-attendance; hence the application for setting aside the dismissal order and that the case be heard on its merit.

The suit above-referred to was over ***Plot Number 828*** in ***Marsabit Township*** which was allocated to the applicant in 1984 by Marsabit County Council.

That though the applicant had paid registration fees and other rental charges, the Council wrote to the applicant on 18th November 1997 advising her that Plot No. 828 had been earmarked for a public library and that the applicant would be allocated an alternative plot.

But the applicant rejected this offer because she disputed the motive of the Clerk to Council.

That the development plan map of 24th July 2000 by the Ministry of Lands and Settlement indicated that the plot had been subdivided and exists as a residential plot and had by the time of the suit been allocated to the third and fourth defendants, hence the necessity of the suit and present application.

A replying affidavit deponed to by counsel for the 1st, 3rd and 4th Defendant/Respondents, one ***Kiogora Mutai*** avers, amongst others, that the principal sole prayer in the application herein is incapable of being granted by this honourable Court as granting the same shall be in direct conflict with ***order 1X B rule 7(1)*** of the Civil Procedure Rules; that equity aids the vigilant and not the indolent; hence the application should be dismissed;

That the Respondent's counsel has written various reminders to counsel for the applicant to set the case down for hearing but to no avail; and that because of this laxity this counsel had intimated his intention to apply for dismissal of the suit to counsel for the applicant.

According to the averments in the replying affidavit even the application subject to this ruling is inordinately late given that the suit was dismissed in February 2006 and this application filed herein on 22nd November 2006.

That the applicant does not give any good reason for the failure by the applicant's counsel to appear in Court on the hearing date.

That the applicant has not demonstrated the merits of this suit and that no material particulars have been advanced on the basis of which the Court should exercise its discretion to grant this application.

That since at one time or other a litigation must come to an end, this application should be dismissed with costs.

The matter was placed before court on 20th March 2007 when counsel for both parties appeared to submit on it.

Counsel for the applicant referred the Court to the application and the supporting affidavit and repeated that the hearing of the case on 22nd February 2006 was not confirmed at the call over.

Counsel urged that the dismissal order should be set aside to allow the case to be heard on its merits.

He submitted that no party attended Court and that this was good cause shown why the dismissal order should be set aside.

That no party would suffer prejudice if the dismissal order made on 22nd February 2006 was set aside and that there was no inconvenience and that thrown away costs were adequate compensation.

For the Respondent, one ***Kuchio*** who appeared for him submitted that the applicant was guilty of indolence because the applicant took almost a year to apply for setting aside an application made on 22nd February 2006.

According to counsel, no good cause had been shown why the dismissal order should be set aside. That no details of the call over were given nor was the merit of the case demonstrated hence this application had no merit and should be dismissed with costs.

These are the submissions made before me for consideration and decision.

In the first place, this application is fatally defective as it does not comply with the rules of Civil Procedure which require that grounds on which an application is based be stated on the face thereof.

Secondly the sole ground for the application for setting the dismissal aside was that the hearing of the

case was not confirmed at the call over.

But if the applicant's counsel cared to peruse the Cause List for 22nd February 2006 he would have discovered this case had been fixed for hearing for that day and gone to Court to alert the Presiding Judge that the case had not been confirmed at the call over, if at all, thus averting the situation he finds himself in today.

But that he was not so alert and then swears an affidavit in this application and says the case had not been confirmed at the call over, this Court would expect a serious advocate to give it details of the call over, when it was, which Court, what time and if possible exhibiting his diary or copy thereof, on the supporting affidavit to give these details.

It is true, in matters of this nature, the court has power to exercise its discretion and grant such an application but before doing so it must have basis for doing so.

It is also true to say in matters requiring the exercise of Court's discretion time is of great essence.

This suit was dismissed on 22nd February 2006 and this application was filed herein on 22nd November 2006, a period of nine months since.

For a party who is serious about his case this is surely an inordinate delay and the Court is not obliged to exercise its discretion in favour of such party.

Dismissal of a case is a very serious matter and a party interested in reviving it cannot take even one month to make the necessary application because the matter should be treated urgently. Hence he took nine (9) months to do so.

I have considered the submissions and perused the record of proceedings. I am aware the dispute relates to a plot of land but this alone is not good reason for setting aside the dismissal order.

I dismiss this application with an order that each party bears his/her own costs thereof.

Delivered at Nairobi this 19th day of April 2007.

D. K. S. AGANYANYA

JUDGE