

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 45 OF 2019

FRANCIS KIPKOECH KIGEN.....APPLICANT

VERSUS

MWANAHAMISI IDDI MWACHANYUMA.....RESPONDENT

RULING

(Application for reinstatement of an application dismissed for failure to prosecute and for non-attendance; counsel stating that he had technical hitches in joining the virtual court; applicant having been ordered to file his submissions which he failed to do in time and application was to be dismissed for failure to do so; no previous court fees paid; court not persuaded that in those circumstances it ought to exercise its discretion in favour of the applicant; application dismissed)

1. The application before me is that dated 2 December 2020 filed by the applicant in this miscellaneous cause. The application seeks the reinstatement of the main motion which was dismissed on 13 October 2020. The application is opposed.

2. By way of background, the applicant filed a Miscellaneous Application dated 7 November 2019 seeking orders that the OCS Diani Police Station do accompany the applicant and provide him with security so as to enable him fence his land parcel Kwale/Diani Beach Block/642. The grounds upon which the application was made was that the respondent had no colour of right on the said land as their dispute was decided on 19 March 2012 and 26 January 2007. The applicant averred that the respondent has continuously been blocking his attempts to fence the suit land. He annexed an order issued in Mombasa HCCC No. 479 of 2009, where the respondent's suit against him was dismissed. The respondent filed a replying affidavit to oppose the motion. She averred that she is beneficial owner of the suit land as she was born and brought up in it. She stated that the applicant ought to have filed his application in the previous suit.

3. The application came for inter partes hearing on 3 February 2020. On that day, Mr. Birir, learned counsel for the applicant sought leave to file a supplementary affidavit and requested to file written submissions to dispose of the application. I directed that a supplementary affidavit be filed in 7 days and thereafter the respondent could file a further replying affidavit 7 days thereafter. I directed that after this period, Mr. Birir to file his written submissions in 7 days and Mr. Atancha, learned counsel for the respondent, could file his written submissions 7 days upon service. I gave 10 March 2020 for the formal hearing of the application. On 10 March 2020, Mr. Birir mentioned that he had filed his supplementary affidavit and stated that the application may be disposed of by way of written submissions. I pointed out to him that he was to file his submissions before the date. I nevertheless gave him 7 days from the date to do so and subjected his client to a fine of KShs. 1,500/= for failure to abide by the earlier orders and Court Adjournment fees of KShs. 1,000/= . I gave 23 April 2020 for hearing. The matter did not proceed on 23 April 2020 owing to Covid-19 restrictions and parties were advised that the application would be canvassed virtually on 13 July 2020 by way of Microsoft Teams. On that day, despite links to attend being sent, neither Mr. Birir nor Mr. Atancha attended the virtual court. On that day, an email to counsel was sent informing them that directions have been issued that the application be strictly canvassed by way of written submissions and if the applicant failed to file his submissions within 14 days, then his application will stand dismissed. The date of 13 October 2020 was given for the application. By that date, no submissions had been filed. Again despite links for virtual court being sent to counsel, neither Mr. Birir nor Mr. Atancha attended the virtual court session. I had no option but to order the dismissal of the application with costs to the respondent. Subsequently, the applicant filed this application to reinstate the dismissed motion.

4. The supporting affidavit is sworn by Kipkirui Ng'eno Birir, who is counsel for the applicant. He has deposed inter alia that on 13 October 2020, he logged into the court session but he could not be heard. He attributes this to inadvertent technical issues. He deposed that he filed his submissions on 7 August 2020 while the respondent filed hers on 7 October 2020. The application is opposed by the respondent who filed Grounds of Opposition. It is averred inter alia that there are no good grounds to support the application as there is no allegation that the court link had a problem. It is stated that it was the duty of counsel to join the online session in time.

5. I have considered the application. I would ordinarily allow a party the leeway to present their case where it is clear that there is a mistake of counsel, or that the party was prevented in one way or another, out of matters beyond his control, to attend court. But what I have here is the epitome of a party who has filed a suit but does not appear keen to prosecute it. When the matter came up on 10 March 2020, it emerged that the supplementary affidavit had been filed very late, in fact on the eve of the mention day, despite 7 days being given from 3 February 2020. It will be recalled that I fined the applicant for the tardiness and also ordered payment of court adjournment fees. I have no record of these having been paid. I do not see how a party can seek the sympathy of the court while at the same time not complying with orders on payment of court fees. It will again be noted that Mr. Birir never attended virtual court on 13 July 2020 despite the link being sent to him. No explanation has been given for Mr. Birir's non-attendance on 13 July 2020. It will further be observed that on that day, I directed filing of submissions within 14 days or else the motion will stand dismissed. These directions were sent to Mr. Birir on the same day meaning that he had up to 27 July 2020 to file his submissions. In his affidavit in support of this motion, Mr. Birir deposes that he filed his submissions on 7 August 2020. For the record, I have not seen these submissions, but if such were filed, then they were filed after the application had been automatically dismissed. Mr. Birir claims that he had technical hitches. This is something that can neither be proved nor disproved, for all we have is Mr. Birir's word. If at all Mr. Birir had technical hitches on 13 October 2020, all he needed to do was to contact the Court Assistant, or ask someone to hold his brief. He could also have written a message on the chat of the Microsoft Teams App. He does not say that he did either of the above. I note that this application was filed close to two months after the dismissal. Again, no explanation has been given why it

needed close to two months to file this application.

6. It is for the above reasons that I am not persuaded to allow this application. It is hereby dismissed with costs.

7. The result is that the main motion remains dismissed with costs.

8. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA