



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 259 OF 2017

STEPHEN NGUGI NDEGWA.....1ST PLAINTIFF/APPLICANT

EDWARD GITAU.....2ND PLAINTIFF/APPLICANT

RUTH MACHARIA KIMANI.....3RD PLAINTIFF/APPLICANT

GRACE WANJIRU KIMANI.....4TH PLAINTIFF/APPLICANT

VERSUS

NJOGU MANG'ETHI.....1ST DEFENDANT/RESPONDENT

GEORGE KARENJE KIMANI.....2ND DEFENDANT/RESPONDENT

MBITHA NJERI NDEGWA.....3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR, KIAMBU.....4TH DEFENDANT/RESPONDENT

RULING

1. It is the Applicants application dated the 16/11/2020 seeking the following orders:

a. That the orders made on the 21/4/2017 dismissing the suit for want of prosecution be set aside and the suit be reinstated and heard on merit.

b. That costs be in the cause.

2. The application is supported by the grounds annexed thereto that; the Applicants Advocate was not notified of the transfer of the suit from Nairobi ELC Court to Thika and neither were they notified of the hearing of the Notice to show cause on the 21/4/17.

3. In his supporting affidavit dated the 16/11/2020 the 1st Applicant reiterated the grounds set out in para 2 above. That in July 2020 he made inquiries in the ELC Registry Nairobi about his case and was informed that the file was transferred to Thika ELC Court and given a new number ELC 259 OF 2017. That he visited the ELC Thika Registry and a perusal of the file revealed that the suit was dismissed on the 21/4/2017 for want of prosecution. That even his Advocate was not notified of the transfer of the suit file to the ELC Court at Thika. That the delay in prosecuting the matter was caused by the two ELC registries which failed to notify his Advocate of the changes.

4. Further that the suit land was purchased by the members of the Cornerstone Pentecostal Church of Africa and urged the Court to grant them another chance to prosecute the matter.

5. Vide the replying affidavit sworn by Mwaniki Gachomo, Advocate for the 1st Defendant. He agreed with the Applicants that the suit was filed in Nairobi and later transferred to Thika. That a Notice to show cause was sent to the parties on the 2/10/2017 and when the Plaintiffs did not attend Court the suit was dismissed. The deponent contended that the delay in filing this application 5 years after the dismissal of the suit disentitles the Applicant of the remedy sought. That the 1st Defendant stands to be prejudiced because he is no longer in possession and control, of the subject suit property.

6. The application was argued orally on the 6/10/2021 where the parties reiterated the contents of their pleadings in Court.
7. I have also read and considered the written submissions of the Plaintiffs filed on the 17/5/2021.
8. The key issue is whether the Applicant is deserving of the orders sought.
9. The guiding provision of the law in setting aside Ex parte Judgment is to be found under Order 12 Rule 7 of the Civil Procedure Rules which provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides:-

"The Court may set aside an order made ex parte"

10. The power of the Court to set aside judgement is a discretionary one. In the case of **Esther Wamaita Njihia & two others vs. Safaricom Ltd** the Court citing relevant cases on the issue held inter alia:-

"the discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel vs. E.A. Cargo Handling Services Ltd.); the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See Sebei District Administration vs. Gasyali). It also goes without saying that the reason for failure to attend should be considered."

11. The above reasons are meant to curtail or check any whimsical or capricious exercise of discretion.
12. This case was filed on the 13/7/2010. Judgement in default was entered on the 22/3/2011 against the 1st - 4th Defendants. On the 13/10/2014 the 1st Defendant filed an application seeking the setting aside of the default judgement entered on the 23/3/2011 to allow the 1st Defendant to defend the suit unconditionally.
13. On the 23/3/2015 the Court directed the 1st Defendant to serve the Plaintiffs with the application. The record shows that todate this application has not been prosecuted.
14. It is borne of the record that this file was transferred to this Court vide the orders made on the 9/2/17. The matter was to be mentioned on the 20/4/2017 before the Judge for directions. The record does not show that the matter was mentioned on the 20/4/17 as directed.
15. However, the Court on the 5/7/2017 issued a notice under Order 17 rule 2(1) and 4 of the CPR. These sections provide as follows;

"(2) (1) in any suit which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss it.

(4) the Court may dismiss the suit for non-compliance with any direction given under this order."

16. According to the record there is no notice served upon the parties or their Advocates with respect to the transfer of the file to Thika ELC. I have perused the notice to show cause issued by the Court on the 5/7/2017. It is addressed to the counsel representing the Plaintiffs and the 1st Defendant as well as the 2nd, 3rd and 4th Defendants. It shows the same was received by 1st Defendants Advocates on the 21/8/17 at 12.53 pm as shown on the stamped copy of the said notice on record.
17. Default judgement having entered against the Defendants in 2011 and the same having not been set aside there was no need to serve these parties.
18. That said there is no evidence that the Plaintiffs' Counsel was served. There is no return of serve on record to evidence service. The affidavit of service dated the 14/9/2017 shows that it is only the Advocate of the 1st Defendant that was served. The Process server states as follows;

"That on the 21/8/17 I received a copy of the dismissal notice dated the 5/7/2017 to serve upon Ms Ngugi Mwaniki & Co Advocates. That on the same day at 12.53 pm I proceeded to Post Bank House 5th Floor within Nairobi Town where I served the dismissal notice upon Ngugi Mwaniki & Co Advocates who accepted the service stamped and signed it."

19. Having established that the Applicants were not served, the dictates of natural justice demands that the Applicants be given the opportunity to be heard.

20. I allow the application and set aside the notice of dismissal made on the 2/10/2017 on condition that the Applicants prosecute their suit within a period of 60 days in default the suit stands dismissed without any further orders from this Court.

21. I make no orders as to costs.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 4TH DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

M/s Mwaura for 1st, 2nd, 3rd and Plaintiffs

No appearance for the Defendants

Ms. Phyllis Mwangi – Court Assistant