



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 303 of 2017

SAMMY NDEGWA MURIITHIPLAINTIFF

VERSUS

RICHARD GACHAGWA THAIRU.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI..... 2NDDEFENDANT

RULING

1. Coming up for ruling is a Notice of Motion application dated 29th January 2019 filed by the Plaintiff seeking the following orders;

i. Spent.

ii. That a temporary injunction do issue restraining the 2nd defendant/applicant vide itself, servants, agents and/or employees from proceeding with a further construction, transferring, leasing and/or charging the suit property herein, namely Title Number NRB/BLOCK/83/616 and/or status quo be maintained as initially directed by the Honourable Court vide the Notice of Motion dated 4/5/2017 pending the hearing and determination of the Application inter-parties.

iii. That the Honourable Court be pleased to vary, set aside and/or vacate the orders issued on the 28th of January, 2019 dismissing the suit for non-attendance.

iv. That the suit dismissed for non-attendance be hereby reinstated and that the suit be hereby laid down for hearing on a priority basis.

v. That the costs of this Application be in the course.

2. The application is based on the grounds on its face and on the supporting affidavit of Eric T. Kokul, the advocate for the Applicant. He has deponed that in the month of September 2018, they came on record for the Plaintiff replacing the firm of Ntarangwi advocates. The new advocates inadvertently failed to attend court on the date due to mis-diarized dates leading to the dismissal of the suit.

3. The 1st Defendant opposed the application vide their replying affidavit dated 6th February 2019 indicating that the Plaintiff occupied land Nairobi/ Block 83/616 and 1st Defendant occupied Nairobi/ Block 83/1751 which are two distinct and different parcels of land and as such, the Plaintiff had no case against the 1st Defendant. He also added that they sought the suit to be dismissed since both the Plaintiff and his advocate were absent from court on the scheduled date.

4. The 2nd Defendant filed grounds of opposition dated 3rd October 2021 stating that the application lacked merit, that there had been inordinate delay in prosecuting the application and that the application was in bad faith with the intention of denying the 2nd Defendant an opportunity to enjoy their hard earned income.

5. This application was canvassed by way of written submissions.

Submissions

6. It was submitted for the Plaintiff that the suit was meritorious and ought to be reinstated as the same was dismissed on 28th January 2019 based on false claims by the 1st Defendant that the parties had consented to dismissal of the suit.

7. The Plaintiff contends that the Defendant had acquired the title in respect to Nairobi/Block/1751 fraudulently and the same was under investigations following the County Secretary & Head of County Public Service S.G Mwangi disownment of the signature commending prosecution of the culprits. It was further stated that the claim by the 1st defendant that the Plaintiff's title Nairobi/ Block 83/616 and the Defendant's Nairobi/Block/1751 were situated in different premises is false since they emanate from the same allotment number.

8. On the issue of the inordinate delay in prosecuting the application, it was submitted that the application was never certified urgent and the court kept issuing far dates adding that this was also occasioned by the fact that the 2nd Defendant was on many occasions not present in court. It was submitted that he who comes to equity should come with clean hands citing that the delay to prosecute the application was also caused by confusion in dates issued at the registry which led them to file yet another application under certificate of urgency.

9. On injunction, it was submitted that the prayer had been overtaken by events since the 1st Defendant had erected rental premises on the suit property and their recourse was to amend the pleadings should the suit be reinstated. As such, they were seeking the 3rd, 4th and 5th prayers of the application.

10. In support of his case, the Applicant relied on the following authorities; **Board of Trustees National Social Security vs Micheal Mwalo [2015] eKLR**, **John Waruinge Kamau versus Phoenix Aviation Limited (2015) eKLR** where it was held that “....the grounds for setting aside contracts or consents are fraud, coercion, mistake or misrepresentation....” and **Monicah Gathoni Githae & another v Independent Electoral and Boundaries Commission & 5 others [2018] eKLR**.

11. For the 1st Defendant, it was submitted that the Plaintiff's prayer for injunction had been canvassed on 4th May 2019 and orders issued and thus could not make such a prayer in a non-existent suit which was yet to be reinstated. The court was urged to strike out the further supporting affidavit (if any) that might have been filed by the Plaintiff since they had not served the 1st Defendant as ordered by court on 28th September 2021.

12. It was submitted that the parcels of the two litigants are different as evidenced by land search, surveyor's report and index maps and as such, there is no case. It was further submitted that an application for setting aside ought to be filed immediately but it has been 3 years since it was filed and was also prosecuted after court's intervention. As such the application should be dismissed with costs to the 1st Respondent.

Analysis and determination

13. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the single issue for determination is: ***whether the suit which was dismissed on 28.1.2019 should be reinstated.***

14. **Order 12 Rule 6 of the Civil Procedure (amendment) Rules 2020** provides that:

“(1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.”

15. In considering whether a suit should be reinstated or not, it has been stated time and again that courts ought to look at the merits of a case for the purposes of deciding whether a procedural lapse should be condoned or not. The idea is to uphold the fundamental principles of justice as enshrined in the constitution, See- **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR**.

16. I have keenly perused the proceedings of 28.1.2019, and I note that the advocate for the 1st Defendant was not candid, since in the absence of the Plaintiff, he had informed the court that the dispute had been resolved and the suit should be dismissed with no orders as to cost. The suit was indeed dismissed on that day. The Plaintiff has averred that he never consented to have the suit dismissed and that his advocate had inadvertently wrongly diarized the court date. It appears that indeed the advocate for the 1st Defendant had given false information to the court regarding a none existent consent. I am also inclined to find that the issue of mis-diarizing of the date is an excusable mistake considering that the advocates for the Applicant were new in the matter.

17. This court also notes that there is a contentious issue of ownership with the 1st Defendant indicating that there are two different parcels of land for the two litigants. I find that these are weighty issues where parties deserve an opportunity to be heard and as such the Plaintiff should not be driven out of the sit of justice for failure to attend court on what the court finds as an excusable error.

18. However, this court should not be used as a vehicle to abuse the judicial process. Courts have a duty to intervene to put a stop to misuse of legal and judicial process noting that litigation must come to an end. I say so because I have discerned that the two litigants (Plaintiff and 1st Defendant), and particularly the plaintiff appear to be in competition in the filing of various applications which currently are 7 in number as follows;

1. The application dated 4.5.2017 filed by the plaintiff seeking injunctive orders against the defendants

2. Application dated 24.5.2017 filed by the plaintiff seeking orders to cite the 1st defendant for contempt of court.

3. Application filed on 4.7.2017 by the 1st defendant seeking discharge of the orders issued on 4.5.2017.

4. Application dated 27.10.2017 filed by the plaintiff seeking orders to cite 1st defendant for contempt of court orders.

5. Application dated 17.10.2018 filed by the 1st Defendant to strike out the suit.

6. Application dated 29.1.2019 (Current application), to reinstate the suit.

7. Application dated 1.9.2021 filed by the plaintiff.

19. None of the aforementioned applications appear to have been prosecuted to their logical conclusion. It is clear that the litigants have fallen short of their duty to embrace the overriding objective set out under the **Civil Procedure Act**. In that regard, this court will give directions geared towards application of Active Case Management principles so as to halt the birth of a Gordian knot in this matter, see my decision in **Lawrence Kinyua Mwai vs. Nyariginu Farmers Co. Ltd. & Another (2019) eKLR** where I dismissed about 17 un-prosecuted applications at one go.

20. Against this analysis, I proceed to give the following orders;

i. This suit is hereby reinstated for hearing and determination on condition that the same is set down for hearing within the next 6 months.

ii. The Applicant is condemned to pay costs of the current application.

iii. All the first 5 applications are hereby dismissed with no orders as to costs.

iv. Directions are to be taken forth with with regard to the prosecution of the 7th application, the one dated 1.9.2021.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Munguti h/b for Kokul for the Plaintiff/Applicant

Wambua h/b for Mr. Kimathi for the Defendant

Court Assistant: Eddel