



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 780 OF 2015

ROSELINE AKINYI ONYUKA.....PLAINTIFF

VERSUS

JUSHUA KIMETICH.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

1. The Plaintiff seeks vide motion dated 12th May 2017 for review and or to set aside the court Judgment dated 23rd November 2016 and all consequential orders; and the suit instituted through the plaint dated 16th April 2009 be reinstated and heard on merit. The Plaintiff relies on the fourteen (14) grounds on the face of the application that is also supported by the affidavit sworn by Roseline Akinyi Onyuka on the 12th May 2017. That it is the Plaintiff's position that contrary to the court's finding in its ruling, the Plaintiff's claim against the 1st Defendant was capable of being prosecuted even in the absence of the 2nd Defendant, as a party, as the application for amendment to enjoin the Lands Registrar could have cured that. That the court erroneously expunged the documents filed by Counsel for the Plaintiff in response to the Defendants' application on the grounds that Counsel had not filed a notice of change of advocate, which they had. That ruling has an error apparent on the face at paragraph 2 (e) at page 3, and paragraph 6 (d) at page 9 as the 1st Defendant never raised delay in prosecuting the suit as a reason for striking out the suit. That there is a further error on the face of the record at paragraph 6 (e) of page 10 as the Counsel for the Plaintiff had filed the notice of change of advocate. That the foregoing errors warrant the review and setting aside the ruling of the court as prayed.

2. The application is opposed by the 1st Defendant through the undated replying affidavit sworn by Joshua Kimetich Chepchieng. That it is the Defendant's response that application is misconceived, unsustainable in law, devoid of merit and incurably defective for the Plaintiff has already filed the notice of appeal dated 28th November 2016, and lodged with the registry on the 30th November 2016 and prayed for the application to be struck out for contravening **Order 45 Rule 1 (1) (a) of Civil Procedure Rules**. That the court did not dismiss but struck out the Plaintiff's suit. That the 1st Defendant pointed out they had raised the ground of delay in prosecuting the case at paragraph 4 of the supporting affidavit of 29th May 2015, by stating that the suit had not been heard since 13th July 2012. That there were no errors apparent on the face of the ruling of 23rd November 2016 to warrant it being reviewed and or set aside. That the suit was struck out for inter alia, lack of reasonable cause of action against the 1st Defendant and cannot therefore be reinstated. That the Counsel for the Plaintiff had not filed and or served a notice of

change of advocate.

3. The application came up for hearing on the 30th April 2018 when Counsel agreed to file and exchange written submissions. The learned Counsel for the Plaintiff and 1st Defendant subsequently filed the written submissions dated the 2nd October 2018 and 11th March 2019 respectively.

4. The following are the issues for the court's determinations;

a) Whether the Plaintiff has established the existence of errors on the ruling upon which the relief of review and or setting aside may be considered.

b) Whether the Plaintiff has made a case for reinstating of her suit.

c) Who pays the costs.

5. The Court has carefully considered the grounds on the motion, the affidavit evidence by both parties, the written submissions by Counsel, the record and come to the following findings;

a) That as correctly pointed out by the 1st Defendant at paragraph 4 and 5 of the replying affidavit, and his counsel's submissions, the Plaintiff indeed filed the Notice of Appeal dated the 28th November 2016 on the 30th November 2016, signaling her intention to prefer or file an appeal. That though the 1st Defendant position through his deposition and submission is that the Plaintiff, having filed the said Notice of Appeal, is precluded from moving the trial court for review and or setting aside of the same order or Judgment subject matter of the notice of appeal, the superior court's decisions in the following cases shows otherwise.

· **Kwanza Estate vs Dubai Bank Ltd [2014] eKLR where Kasango J. cited with approval Odunga J in Leonard Gikaru Wachira vs Southern Travel Services Ltd & Another [2012] eKLR.**

· **Phineas Isaiah Nyaga vs Charles Njagi Ireri [2018] eKLR.**

· **Court of Appeal case in Narodhco Kenya Ltd vs Loria Michele [1998] eKLR in which the Court of Appeal decision in Haryanto vs ED & F. Mau(sugar) Ltd Civil Appeal No. 122 of 1992 and Motel Schweitzer vs Thomas Edward Cunningham & Another (1955) 22 EACA 252 were cited and all confirm that provisions of Order 45 Rule 1 of Civil Procedure Rules does not preclude an aggrieved party who has filed a notice of appeal, from seeking for review and or setting aside of the same order or Judgment, so long as no record of appeal has been filed.**

That as there is no evidence tendered that the Plaintiff has filed a record of appeal, subsequent to the filing of the notice of appeal, then the court finds and holds that the Plaintiff's motion is properly before the court.

b) That the court understand the Plaintiff's motion and evidence in support to be based on the ground that first paragraph 6 (e) at page 10 of the ruling on the expunging of the replying affidavit sworn by the Plaintiff on 31st March 2016 and filed through M/s Rachier & Amollo Advocates for reason of Counsel not having filed a notice of change of advocate, was an error on the face of the ruling as they had filed the notice. That secondly, the finding in paragraphs 2 (e) and 6 (d) at pages 3 and 9 of the ruling respectively that there was delay in prosecuting the case was also an error as it had not been raised by the 1st Defendant in their application. That as clearly shown in the ruling, specifically paragraph 6 (e) at page 10, the court stated that the status of Counsel for the Plaintiff had not been raised by the 1st Defendant. The court nevertheless went ahead to express itself that having noted M/s Rachier & Amollo Advocates had not filed the notice of change of advocate, the documents filed by the said counsel were expunged, thereby leaving the 1st Defendant's motion

unopposed. The Plaintiff has annexed at paragraph 20 of the supporting affidavit “**RAO -2**” which is headed “**Notice of Change of Advocate**” dated the 24th June 2015. The copy bears the court’s stamp dated 24th June 2015 and that of M/s Waruhiu Kowade & Nganga Advocates dated 25th June 2015. The 1st Defendant has at paragraph 16 of the Replying affidavit deponed that the “**court was right in striking out this suit as there is no notice of change of advocate in the court file nor has my advocate been served with a copy of the same.**” That deposition by the 1st Defendant has not been challenged or rebutted through a further affidavit, and no copy received by the Counsel on record for the 1st Defendant has been exhibited. That by the time the court delivered the ruling of 23rd November 2016, there was no copy of the Notice of Change of Advocate filed by M/s Rachier & Amollo Advocates, and todate there is none except the one attached to paragraph 20 of the Plaintiff’s supporting affidavit, which on its own is not sufficient to prove that it has ever been filed, in the absence of the filing receipt. That finding of the court does not amount to an error in any way and cannot therefore be the basis of reviewing and or setting aside the ruling of 23rd November 2016.

c) That further to (b) above, the 1st Defendant responded to the Plaintiff’s claim that the issue of delay in prosecuting the case had not been raised in his application. That at paragraph 11 of the Replying affidavit, the 1st Defendant deponed that he had raised the issue of delay at paragraph 4 of the supporting affidavit dated 29th May 2015 where he stated that since 13th July 2012, the matter had not been heard, clearly depicting delay in prosecuting the suit. The court at paragraph 2 of the ruling of 23rd November 2016 had set out a summary of the 1st Defendant’s deposition and paragraph 2 (e) is merely the court’s paraphrasing what it understood the 1st Defendant to have deponed at paragraph 4 of his supporting affidavit. That there is no error in paragraph 2 (e) of the ruling that can be the basis of reviewing and or setting aside the ruling. That as for paragraph 6 of the ruling, the court set out its conclusions and subparagraph (d) on there having been inordinate delay is the court’s finding based on the law and facts as it understood it. That is also not an error that can be the basis of reviewing and or setting aside the court’s ruling but preferably an issue to be pursued on appeal.

d) That as clearly shown at paragraph 7 of the ruling of 23rd November 2016, the court “struck out with costs to the 1st defendant” the Plaintiff’s suit upon finding merit in the 1st Defendant motion dated 29th Ma 2015. That for avoidance of doubt, the court did not dismiss the Plaintiff’s suit, contrary to the Plaintiff’s deposition at paragraph 8, 13, 14, 18 and 19 of the supporting affidavit.

e) That while the court is aware and alive to the Plaintiff’s Constitutional right to fair administrative action, and fair hearing as enshrined under **Article 47 and 50 of the Constitution 2010**, the court is equally required by **Article 159 (2) (b) of the Constitution**, and **Section 1B of the Procedure Act Chapter 21 of Laws of Kenya** to ensure justice is not delayed and to further the overriding objective of the Act so as to attain the aims set out in **Section 1B of the Act** as follows;

(a) “**the just determinations of the proceedings;**

(b) **the efficient disposal of the business of the court;**

(c) **the efficient use of the available Judicial and administrative resources.**

(d) **the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and**

(e) **the use of suitable technology.”**

The overriding objective of the Act is set out under **Section 1A of the Act** as “**facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act**”, and this suit is one of such disputes. That overriding objective cannot be attained when parties file

suits in court, and then fail, neglect or delay in taking appropriate processes and steps aimed at having the suit heard expeditiously. That taking steps to prosecute the suits without delay is the only way the costs of litigation will remain affordable to the parties and the courts, which is forced to use tax payers resources in managing the dormant files in the registries. That it is only where parties and their advocates do as required of them by **Section 1A (3) of the Act** “*to assist the court to further the overriding objective of the act and to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court*”, that the court would comply effectively with the principle set out in **Article 159 (2) (b)** that “*Justice shall not be delayed.*”

f) That while the court has unfettered Jurisdiction in reviewing and or setting aside its orders and ruling upon the requirements of **Order 45 Rule 1 of Civil Procedure Rules** being satisfied, the court finds the Plaintiff’s application dated the 12th May 2017 to be without merit. That accordingly, and in terms of **Section 27 of Civil Procedure Act**, the 1st Defendant is entitled to costs.

6. That flowing from the findings above, the Plaintiff’s motion dated the 12th May 2017 and filed on the 23rd May 2017, having been found unmeritorious, is hereby dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS **10TH** DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel

M/s Jemtai for Olel for 1st Defendant

M/s Aliongo for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE