



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 180 OF 2015

JOSEPH KINYUA WAHOME.....PLAINTIFF

-VERSUS-

JOEL NJOROGE MICHUKI.....1ST DEFENDANT

ISAAC WAHIU WAHOME.....2ND DEFENDANT

JOHN NDIRANGU KINYUA.....3RD DEFENDANT

JAMES WAMBUGU WANJOHL.....4TH DEFENDANT

RULING

A. INTRODUCTION

1. By a plaint dated 12th June, 2015 the Plaintiff sued the Defendants seeking cancellation of the 1st and 2nd Defendants' registration as proprietor of Title No. Laikipia/Kinamba Mwenje Block 1/910 and cancellation of the subsequent subdivisions being Title Nos. Laikipia/Kinamba Mwenje Block 1/3250, 3251 and 3252. The basis of the Plaintiff's claim was that the 1st Defendant had fraudulently acquired the suit property from the Plaintiff's late father after which he caused the same to be registered jointly in his name and that of the 2nd Defendant.

2. It was further pleaded that the suit property was later on subdivided into several parcels some of which were transferred to the 3rd and 4th Defendants. Curiously though, the Plaintiff did not seek cancellation of the titles in the names of the 3rd and 4th Defendants in his prayers.

3. The record shows that the suit remained dormant for several years without being prosecuted. No steps were ever taken to prosecute the suit between 2015 and 2018 in consequence whereof the court dismissed the suit for want of prosecution under **Order 17 rule 2 of the Civil Procedure Rules** on 13th February, 2018.

4. The material on record further shows that no action was taken in the matter for a further 3 years until 22nd February, 2021 when the Plaintiff filed the instant application for review or setting aside of the dismissal order.

B. THE PLAINTIFF'S APPLICATION

5. The Plaintiff's notice of motion dated 12th January, 2021 but filed on 22nd February, 2021 was based upon **Sections 3A and 80 of the Civil Procedure Act (Cap 21), Order 45 rules 1, 2 and 3 of the Civil Procedure Rules, 2010 (the Rules) and all enabling provisions of the law**. The Plaintiff sought a review and setting aside of the dismissal order as well as transfer of the suit to the Environment and Land Court at Nyahururu for trial and disposal.

6. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 12th January, 2021. The Plaintiff contended that the suit was dismissed for no fault of his own but due to the mistake of his former advocates; that there was no inordinate delay in filing the instant application; and that it was in the interest of justice for the application to be allowed.

7. It was the Plaintiff's contention that although he had instructed the firm of C. M. King'ori and Company Advocates to act for him, the advocate had filed the suit as though he was acting in person. It was further contended that it was the said law firm which had failed to

prosecute the suit on his behalf hence the dismissal which he came to learn of in 2021. The Plaintiff conceded that by the time of dismissal of the suit summons to enter appearance had not been served.

C. THE DEFENDANTS' RESPONSE

8. There is no indication on record of the Defendants having participated in the application. Indeed, they could not have participated since they were never served with summons to enter appearance and accorded an opportunity of being heard. Consequently, the application was canvassed *ex parte*.

D. THE PLAINTIFF'S SUBMISSIONS

9. When the application was listed for hearing on 21st April, 2021 the Plaintiff's advocate orally prosecuted the application on the basis of the grounds set out in the application and the contents of the supporting affidavit and prayed that the same be allowed. It was submitted that the Defendants shall not suffer any prejudice since they had not even been served with summons to enter appearance.

E. THE ISSUES FOR DETERMINATION

10. The court has considered the Plaintiff's said application together with the supporting affidavit. The court is of the opinion that the following two issues arise for determination herein:

- (a) Whether the Plaintiff has made out a case for review and setting aside of the dismissal order.
- (b) Whether the Plaintiff has made out a case for transfer of the suit to the Environment and Land Court at Nyahururu.

F. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has made out a case for review and setting aside of the dismissal order.

11. The court has considered the Plaintiff's application, his submissions as well as the material on record. The material on record indicates that the Plaintiff's suit was dismissed on 13th February 2018 for want of prosecution under **Order 17 rule 2 of the Rules**. The principles which are considered on dismissal of a suit for want of prosecution were enunciated in the case of **Ivita v Kyumbi [1984] KLR 441**. It was held that where there has been prolonged delay in the prosecution of a suit and there is no satisfactory explanation for the delay the court may dismiss the suit for want of prosecution.

12. In the case of **Savings and Loan Limited v Susan Wanjiru Muritu Milimani HCCC No. 397 of 2002 Kimaru J** also made the following relevant pronouncement on an application for setting aside an order dismissing the Defendant's application for want of prosecution:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate on the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

13. There is no doubt from the material on record that the Plaintiff's suit was dismissed for want of prosecution after being dormant for about 3 years. The Plaintiff's explanation for the delay in failure to prosecute the suit was that he was relying upon his former advocates to prosecute the suit on his behalf. The court is of the opinion that even where a party has instructed an advocate he still has a legal obligation to facilitate the prosecution of his suit. He would have an obligation to pay professional fees and follow up with this advocate on the progress of the suit. He would have an obligation to facilitate service of summons to enter appearance by directing the advocate or process server to the Defendant for service.

14. A party cannot simply instruct an advocate and sit back for 3 years without following up with his advocate on the progress of the suit. In fact, the material on record further indicates that Plaintiff only discovered about the dismissal of his suit in 2021 meaning that he had neglected to follow-up on his case with his advocate for 6 years! The court is of the opinion that that is a clear demonstration that the Plaintiff was not a diligent litigant and that he had lost interest in prosecuting the suit.

15. The court is thus not satisfied that there was a good explanation for the delay of 3 years in prosecuting the suit between 2015 and 2018. The court is further not satisfied that there is a good explanation for the delay of 3 years in seeking the reinstatement of the suit. If the Plaintiff had been diligent in following up on the progress of his suit, it would not have taken him 3 years to discover the dismissal. Accordingly, the court finds and holds that the Plaintiff has failed to make out a case for review or setting aside of the dismissal order made on 13th February, 2018.

(b) Whether the Plaintiff has made out a case for transfer of the suit to the Environment and Land Court at Nyahururu

16. The court is of the opinion that this issue has become moot by reason of the court's holding on the first issue. Since the court has declined to set aside the dismissal order, there is really no basis for granting a transfer order. A dismissed suit is practically a non-existent suit hence it cannot be transferred from one station to another.

G. CONCLUSION AND DISPOSAL ORDER

17. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for reinstatement and transfer of suit. Accordingly, the Plaintiff's notice of motion dated 12th January, 2021 is hereby dismissed with no order as to costs.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF JUNE 2021.

In the presence of:

Ms Wangechi for the Plaintiff

No appearance for the Defendants

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE