



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 250 OF 2018

MARY MUTHONI MUTHAKA.....PLAINTIFF/APPLICANT

VERSUS

MUTHAKA MBUGUA JOEL.....1ST DEFENDANT/APPLICANT

LAND REGISTRAR, THIKA 2ND DEFENDANT/APPLICANT

RULING

Before this Court is an application dated **5th November 2020**, brought under Sections **1, 1A, 3A** and **63 E** of the **Civil Procedure Rules Order 17 Rule 2** of the **Civil Procedure Rules, Article 159(2) (d)** of the **Constitution** and all enabling provisions of the law.

The prayers sought are for reinstatement of the suit herein and all interlocutory orders and costs of the application be provided for.

The grounds upon which the application is based are:- that on the last hearing on **30th March 2020**, the court was not sitting due to **Covid 2019 pandemic**; the Applicant lives in the USA taking care of a son who is sickly and hence cannot attend Court due Covid 19 restrictions; the file could not be found or traced by the advocate on record so as to fix a hearing date; the Court acted *suo moto* in fixing the Notice to Show Cause and did dismiss the matter unilaterally; there were unavoidable circumstances and lastly the matter is matrimonial in nature, and raises serious issues; the Court has discretion to reinstate and hear the matter on merit instead of dismissing it on a technicality.

The application is supported by the affidavit of **Maingi Kamau**, sworn on **5th November 2020**, which largely reiterates the grounds on the face of the application. In particular, the deponent denies ever receiving the **Notice to Show Cause** and has attached MMM "1" a medical report in support of the assertion that the Plaintiff/Applicant is based in the USA, with a sick son and hence the reason she could not prosecute her case on time or at all.

The application is opposed through grounds of opposition dated **22nd March 2021**, and a Replying Affidavit sworn on the same date. According to the **1st Respondent** the Court was justified in dismissing the suit for non-prosecution, the application to reinstate the suit was brought too late in the day and that the matter even if reinstated is a matrimonial cause which this Court lacks jurisdiction to entertain. Further, the **1st Respondent** depones that the Applicant has not sworn any affidavit in support of her application so as to demonstrate the difficulties she has encountered and leading to delay in prosecuting the suit.

BACKGROUND OF THE CASE

In order to contextualize this application, it is important to set down the history of this matter. The Plaintiff/Applicant came to Court on **15th October 2018**, under a certificate of urgency. The Plaintiff was also under fast track. Three witnesses were listed including the Plaintiff. The Court gave interim Orders on **30th October 2018**, and listed the matter for interpartes on **26th November 2018**. The **1st Respondent** entered appearance on **25th October 2018**, filed a defence on **13th November, 2018**, and a Replying Affidavit sworn on **13th November 2018**. The Plaintiff/Applicant did not reply to the defence though the same raised a Preliminary Point of law on jurisdiction.

On **20th November 2018**, a consent was recorded and directions given for compliance with **Order 11** and a date for pre-trial directions given for **5th February 2019**. The Plaintiff/Applicant did not comply with those directions within **30 days** as ordered on **5th February 2019**. She sought for an **extra 45 days** to comply and a date was given for **2nd April 2019**, for pretrial. The Plaintiff did not move the Court nor comply with those directives until **30th February 2020**, when the Deputy Registrar gave directions for a Notice to Show Cause for **30th March 2020**. Due to Covid 19 pandemic, the Court directed in line with the Hon. Chief Justice directives for an electronic service of the Notice to Show Cause and a date given for **22nd June 2020**. Again the parties did not appear and the Court extended the Notice to show cause for **21st September, 2020**. Service was to be done electronically and the same appears to have been done through email; Consortiumkentconsortium@gmail.com; mainaklaw1@gmail.com; Nganga Ngigi ngangaadvocates@yahoo.com, on **29th June 2020** at

10.53 a.m.

This is the status of the file as at the time the matter was dismissed for non-prosecution.

The legal framework for dismissal of a suit for want of prosecution is found on **Order 17 Rule 2** of the Civil Procedure Rules which states:-

“2(1) In any suit in which no application has been made and no step taken by either party for on year the Court may give notice in writing for the parties to Show Cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit;

(a) The Court may dismiss the suit for non-compliance with any direction given under this order.”

The Principles to be considered in a case of this nature were set out in the case of *Loita vs Kyumbu 1984 KLR 441*.

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice to both the Plaintiff and the Defendant. So both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendants must however satisfy the Court that it will be prejudiced by the delay or even though the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. This even if delay is prolonged if the Court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed, but if will be set down for hearing at the earliest available time.”

The Applicant has urged the Court to be guided also by **Article 159** of the **Constitution**.

While exercising the discretion, the applicant has to satisfy the Court that it exercised all diligence, and took all the necessary measures to have the suit set down for hearing.

It is instructive to note that the Notice was not only served, but was also displayed through the causelist in the **Judiciary website** and through the **Kenya Law Report** that publishes the Cause list. Given this, can it be said that the applicant has given a reasonable explanation for the delay? Can it be said that the Applicant has even tried to come within the overriding objective of the Civil Procedure Act as outlined under **sections 1A and 1B** of the **Civil Procedure Act**, which includes the use of appropriate technology?

In *Fran Investments Ltd vs G4S Security Services Ltd (2015)eKLR* the Court held:-

“Order 17 Rule 2(1) of the Civil Procedure rules does not require service of the Notice. It uses the word “give notice”. The Court may give Notice of the dismissal through its official website or through the causelist. And those mediums will constitute sufficient Notice for the purposes of Orders 17 Rule 2(1) of the Civil Procedure Rules.”

There is a proper notice of the Notice to Show Cause duly served upon parties. The applicant has not disputed that the suit was not in the cause list for the day as well as the Judiciary website. He who alleges must prove and so the applicant had a duty to submit otherwise other than merely blaming the Court for non-service.

The reason for non-prosecution given is that the applicant has been held up in the USA on account of her son’s sickness. It has not been stated when the applicant travelled to USA and when she is likely to be back. The medical Report attached is for **2017**, long before the suit was filed. The current status of the son has not been indicated nor has the Plaintiff sworn the affidavit in support by herself. No explanation has been given why she has not sworn the affidavit herself and said when she is likely to come back and prosecute her case, if the Court were to reinstate the suit. Further, her advocate has not also stated why he did not seek the intervention of the Court for alternative ways of proceeding given the recent practice directives on virtual hearing of matters.

Again the Plaintiff has listed other witnesses in her pleadings though none signed any witness statements. The said witnesses available in the county and the Plaintiff could as well grant them a power of attorney to prosecute the case on her behalf if at all, she has constrains in attending the hearing in person.

Similarly, and more importantly, the Plaintiff has not given any explanation why the Court directives on **Orders II** have todate not been complied with.

From the records, it is apparent the applicant was in hurry to approach the Court and once interim orders were issued in her favour, the urgency was no more. One would have expected the same vigour in having the suit heard and determined in an expeditious manner.

This Court has given the Plaintiff enough opportunity and time to prosecute the matter. Unfortunately, when the Court gave directives and issued **Notice to Show Cause**, the Plaintiff/Applicant did not act accordingly leaving the Court with no option but to dismiss the suit for want of prosecution.

Given the foregoing, the Plaintiff/Applicant should be the last person to blame the Court for the dismissal, but offer a reasonable explanation as to why since **March 2020**, and with the resumption of open Court sessions in **July 2020**, she took no action in expediting trial of her suit until **21st September 2020**. Again the Plaintiff/Applicant alleges the file was missing from the Court registry, yet no single letter has been

attached to show that indeed there was any follow up or report made to the registry to that effect. This Court Registry has no history of missing files.

On the issue of prejudice for the delay and in the event the suit is reinstated, the 1st Respondent has filed grounds of opposition and a Replying Affidavit explaining how he would be prejudiced and secondly raising a preliminary objection in his defence that the suit is matrimonial in nature which are beyond the jurisdiction of this Court. That affidavit has not been challenged by way of a Supplementary Affidavit. Needless to say, it is the duty of this Court to interrogate the issue and make a finding. The Applicant's own witness statement filed on **15th October, 2018**, admits that fact that parcel **No. Juja/Juja East Block 1/417**, forms part of their matrimonial property, which were jointly acquired during their marriage with the 1st Respondent. Paragraphs 7, 8 and 9 of the Plaintiff refers to the property as such. The Applicant has not sought for any substantive prayers for co-ownership.

Again as deponed in paragraph 6 of the Supporting Affidavit, it is clear the Plaintiff/Applicant is living in the United States of America and not visiting there. So even if the matter is reinstated, there is no guarantee and / or indication how soon she can have the matter disposed off one way or the other, without inconveniencing both the Court and the Respondents.

The upshot of the foregoing is that this Court finds no merit in the Notice of Motion dated **5th November 2020**. Consequently, the same is dismissed entirely with costs to the 1st Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of July 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the

Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Applicant

M/s Kinyua holding brief for Mr. Nganga Ngigi for the 1st Defendant / Respondent

No appearance for the 2nd Defendant / Respondent

L. GACHERU

JUDGE

15/7/2021