



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 37 OF 2020 (OS)

MARY KITHINU INOTI.....PLAINTIFF/APPLICANT

VERSUS

SALOME KARUGA M'MUTUNGI

(Also as Legal representatives of DAVID M'MARETE (Deceased).....DEFENDANT

RULING

1. The application before the court dated **9th March 2021** is brought under **Sections 1A, 1B & 3A of the Civil Procedure Act Order 12 Rule 7 and Order 51 of the Civil Procedure Rules**. It seeks review, setting aside and or variation of the orders made on **3rd March 2021** dismissing the suit for want of prosecution.
2. The applicant also prays for reinstatement of the suit for hearing. He relies on an affidavit sworn on **9th March 2021** and a supplementary affidavit sworn on **21.3.2021**.
3. The grounds upon which the application is based are: the applicant is keen in prosecuting the suit; on **February 10th 2021** pre-trial conference happened and compliance was confirmed and a hearing date set for **May 18th 2021**; parties were to file paginate bundles before the hearing date; it is only while filing the bundle the applicant was notified of dismissal; there was error on the face of the records as the matter had two varying hearing dates namely **3.3.2021** and **18.5.2021** and lastly in the interest of justice the order ought to be varied, reviewed or set aside and the matter reinstated for hearing.
4. The application is opposed through a replying affidavit sworn by **Salome Karuga M'Mutungi on 13th April 2021**. She avers that the date for hearing was taken by consent on 10.2.2021; there was no error at all as alleged on the face of the record; the applicant and his lawyers simply refused to attend court for no good reason; there will be prejudice if reinstatement occurs for she will incur endless expenses and time to attend court and lastly in the unlikely event it is allowed throw away costs should be assessed at Kshs.50,000/= as the applicant is enjoying use of the suit property.
5. Further the applicant relies on written submissions dated 20th May 2021 and on the case law of *Nahashon Mwangi vs Kenya Finance Bank Ltd (2015) eKLR, Ivita vs Kyumbu (1984) KLR 441 CMC holdings Ltd vs Nzioki 2004 1KLR 173, Philip Chemololo & another vs Augustine Kubende 1982 – 88 1KAR 103, Shayona Timber ltd vs Kenya National Highway Authority (2018) eKLR and lastly Jim Rodgers Gitonga Njeru vs Al-Husnain Motors Ltd & 2 others (2018) eKLR*.

Background

6. On **9th September 2020** the applicant filed an originating summons under **Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and Order 37 of the Civil Procedure Rules** seeking for orders by adverse possession against **Parcel No. Nyaki/Mulathankari/4201**. Simultaneously the applicant brought a motion under certificate of urgency seeking for temporary injunction against the respondent to which interim orders were granted on **15th October 2020**. Parties were also directed to file and serve replies and bundle of documents within 30 days and pre-trial directions was scheduled for **20th January 2021**. The applicant filed witness statements on **19th January 2021**. The respondent filed a replying affidavit to the originating summons on **20th January 2021**. Likewise the applicant filed a list of documents on **26th January 2021** while the respondent also filed witness statements on **9th February 2021**.

7. When parties appeared for pre-trial directions on **20th January 2021** another date for directions was given for **10.2.2021** and were directed to comply before a hearing date taken by consent for **3rd March 2021**.

8. The record shows a further order was made for pre-trial directions for **10th February 2021**. Parties appeared virtually before the court on **10th February 2021** and a hearing date was fixed for **15.5.2021**.

9. The matter came for hearing on **3.3.2021**, there was no appearance for the applicant and hence the suit was dismissed for non-attendance. The applicant upon learning the outcome now filed the current motion claiming there was an error on the face of the record which is two rival hearing dates, were given for 3.3.2021 and 15.5.2021.

10. Indeed the court record shows there were two hearing dates given on two different occasions. Whereas that may be true and if indeed the applicant was aware two hearing dates were given it required of her to clarify with the court. More so as a vigilant applicant one would have expected the applicant and his lawyers to attend court on the first date set for hearing or at the very least as soon as they realized two different dates had been given.

11. Be that as it may and given that parties had substantially complied with court directives as at the time the matter was coming for hearing, this court is inclined to give the applicant a benefit of doubt and allow the application with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

ODHIAMBO FOR PLAINTIFF/APPLICANT

MRS. OTIENO FOR RESPONDENT

COURT ASSISTANT: KANANU

HON. C.K. NZILI

ELC JUDGE