



REPUBLIC OF KENYA



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Muturi v Jeza Zhomu Umoja Private Company Ltd & 2 others (Civil Case 620 of 2001) [2023] KEHC 17517 (KLR) (Civ) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 620 OF 2001

JN MULWA, J

MAY 11, 2023

BETWEEN

LUCY WAMBUI MUTURI PLAINTIFF

AND

JEZA ZHOMU UMOJA PRIVATE COMPANY LTD 1ST DEFENDANT

MASTERWAYS PROPERTIES LTD 2ND DEFENDANT

KINDEST AUCTIONEERS 3RD DEFENDANT

RULING

1. Before the court is an application dated 21/06/2022 by the 1st defendant Jeza Zhomu Umoja Private Company Limited under provisions of section 1A, 1B & 3A of the *Civil Procedure Act*, and Order 22 Rule 25, Order 12 Rule (7) & (13) of the *Civil Procedure Rules*.
2. The applicant seeks two orders that the court do issue an order to set aside, vary, vacate and/or review the exparte orders of dismissal of the suit issued on the 25/02/2015 for none attendance by the parties, and do reinstate the suit for hearing on merit;
And that the applicant be given unconditional leave to defend the suit as per the defence and counter claim on record.
3. The grounds stated for the application are that the plaintiff and the 1st defendant hold title documents to the suit property LR No. 209/2788/16; that by a Notice to show cause issued by the court under order 17 Rule 2 (1) of the civil procedure Rules was never served upon the 1st defendant, leading to the suit being dismissed for want of prosecution on the 23/02/2015, and the fact of dismissal come to the applicant's notice on the 12/05/2021, as the plaintiffs advocates Muturi Kamande & Co. Advocates stopped communicating with the defendants in 2011, and further that the court file went missing from



- the court registry only to be traced at the supreme court archive after extensive search by the applicant, on the 12/05/2021.
4. The above facts are replicated in the supporting affidavit and further affidavit sworn by the applicant's director Harrison Ngugi Njenga on the 21/06/2021 and 20/12/2021 respectively. The deponent has annexed a bundle of 13 notices as exhibits for hearings and letters calling for the other parties to attend to fix hearing dates for the period October, 2006 upto February, 2011.
 5. The deponent further avers that during the period its advocates never communicated with them despite the correspondent upon which they engaged the advocate on record; and that grant of the orders sought will not prejudice the plaintiff as she still collects rental income from the suit property.
 6. The plaintiff by her replying affidavit opposes the application stating that status quo should be to be maintained; that upon expiry of the lease she singly applied for, and obtained a renewed lease to herself alone on the 10/03/2008; that upon issue of the new lease to herself, she sold the property to a third named party as shown by a certificate of search date 8/04/2009, showing the new owner as Apple Farm Company Ltd. – "LWM3"
 7. It is therefore urged that setting aside the dismissal orders and reinstatement of the suit will be of no use as prayers sought in the counterclaim are incapable of being enforced, and that any judgment that may result from a hearing will be unenforceable and of no use to the applicant.
 8. The court has considered the plaintiff's/respondent's submissions dated 17/10/2022 and the bundle of authorities as well as the applicants dated 30/09/2022.
 9. Two issues arise for determinations in the court's opinion:
 - a. Whether the dismissal orders of the suit dated 23/02/2015 should be set aside, and the suit be reinstated for hearing on merits.
 - b. Whether the applicant/1st defendant is guilty of laches.
 10. It is common ground and trite in law that under Order 17 Rule 1 and 2 of the Civil Procedure Rules, the notice (NTSC) must be served upon the plaintiffs and the Defendants, to enable them to respond, showing cause by giving reasons why a case should not be dismissed for want of prosecution, if any, and there being no cause shown, the court may dismiss the suit.
 11. In this case, none of the parties or their advocates attended court for hearing of the notice to NTSC, nor was any affidavit filed giving reasons by any of the parties to the suit. The applicant depones that the notice to show cause was never served upon itself hence the failure to attend court to show cause. The plaintiff in her affidavits did not aver as to whether she was served with the notice to show cause or not. The case was therefore dismissed.
 12. I have taken the liberty to peruse the court record to satisfy myself whether or not the notice to show cause was served upon the applicant or the Plaintiff/Respondent, or any other party in the case.

I have not found an affidavit of service filed by the Deputy Registrar stating that the court process by notice to show cause was served upon any of the parties, and particularly the 1st Defendant/Applicant. I have not found an affidavit of service on record by a court process server or any other process server.
 13. It is also trite that the power of a court to dismiss a case for want of prosecution is discretionary - *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v – M.D Popat & Others* (2016) eKLR.



It cannot be said that none attendance by the applicant to show cause was therefore deliberate, or a mistake, it was neither. It was by the courts discretion upon none response to the NTSC by any of the parties to the suit.

A judge's discretion is neither restricted or limited except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties; and is intended to avoid injustice of hardship from excusable mistake of error or accident, and not designed to assist an of the parties – *John Kabiara Kioni v. George Namasaka Sichangi t/a Sichanji & Co. Advocates* (2019) eKLR; and *Franklin J. B. Chaban Vs. Tharaka Nithi County Government & Another* (2019) eKLR.

14. Service of court process of any nature to parties to a suit is paramount and is duly governed by Order 5 of the Civil Procedure Rules 2010, and amended in 2020 to widen the methods of service to parties.

The purpose for service of court process to a party is to accord the party an opportunity to present itself to court and be heard, whether the response would be frivolous or not.

15. It is a cardinal rule of law and affair hearing that every litigant must be afforded a right to be heard as a principle of natural justice Article 25 and Article 51 of the *Constitution*.

Having made it clear that the applicant was not served with the notice to show cause what follows then is whether the Orders of dismissal of the suit on 23/02/2015 ought to be set aside, and the suit be reinstated for hearing on merit.

16. In the case cited above, Nilesh Premchand (Supra) the court pronounced itself that

“.... That the court's discretion to dismiss or not must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.....”

See *Ivita v. Kyumbu* (1984) KLR 441.

17. In the instant application, the application is not by the plaintiff, but by the 1st defendant, who had an alleged equal right to the suit property with the 1st defendant /applicant. As rendered in *nother (201Utalii Transport Co. Ltd & 3 others vs. NIC Bank & others)* eKLR a case ordinary belongs to the plaintiff, and it is upon the plaintiff to prosecute the case with speed. However, what is obtaining hereto is that the plaintiff had other plans, and never took any steps to move the case to hearing and waited for it to be dismissed as may be deduced from the flow of actions the plaintiff she took soon after the dismissal of the suit; obtaining a renewed lease in her names, to the exclusion of the applicant; and quickly thereafter transferring the same to a third party.

18. This is by no way absorbing the applicant from blame. It ought to have taken positive steps to get the suit fixed for hearing; and indeed, this was done.

The 13 letters, notices and invitations to fix a hearing date taken out by the applicant speak to that. Obviously, that goes to the plaintiff's failure to acknowledge or respond to any of the letters because she knew what she had done, without informing the applicant; noting that at all material times, all parties were represented by counsel.

19. I have perused the ruling dated 15/07/2005 by Justice J. B. Ojwang; (as he then was). An order of preservation of the status quo was issued until the case was heard and determined. To bring this to perspective, this order was issued on the 15/07/2005. By records attached as exhibits to the plaintiff's affidavits in opposition to the application, the property changed joint ownership to the plaintiff solely



on the 10/03/2009 and sold to a third party on the 8/04/2009, long before the dismissal order was issued on the 23/02/2015.

20. What does the plaintiff's action show? Total disregard to the court's orders of status quo; and by extension contempt of lawful court orders, which orders by Ojwang Judge, were neither set aside or varied.

To that end, the plaintiff should not be allowed to benefit, at least in the interim, from impunity and contempt of court orders.

21. In the circumstances of this case, and being guided by the old age decision in *Ivita vs. Kyumbu* (supra) and others following thereafter, I am persuaded that the applicant has put forth very spirited and plausible reasons for the court to be called upon to exercise its discretion in its favour, to avoid very obvious injustices and hardship, not resulting in its inadvertence, mistake or error – *Bilha Nyonyo Isaac v. Kembu Farm Ltd & another* (2018) eKLR which echoed the decision of *Shah V. Mbogo & Another* (1967)EA.

22. Consequently, the court finds that the applicant's /1st defendant's application dated 2/06/2021 has merit, and is allowed in terms of prayers 2 and 3.

Each party shall bear own costs on this application.

23. In view of the obvious cause of action as exhibited in the pleadings, and the suit having been filed long before *the constitution* of Kenya 2010, and the establishment of the Environment and Land Court, this court directs that the said suit be and is hereby transferred to the court with the requisite jurisdiction; the Environment and Land court for hearing and determination. The Deputy Registrar of the court is directed to take swift action to actualize the order above.

- 24 Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MAY, 2023

JANET MULWA

JUDGE

