



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 729 OF 2011

MIRIAM JUMA.....1ST PLAINTIFF

PARK HEALTH CENTRE LIMITED.....2ND PLAINTIFF

NECTEK (K) LIMITED.....3RD PLAINTIFF

VERSUS

JANE WANJA NJIRU.....1ST DEFENDANT

WANJIKU ITHONDEKA.....2ND DEFENDANT

RULING

This suit was fixed for hearing on 17th February, 2020. When the same was called out in the morning, Mr. Rene held brief for Mr. Havi for the plaintiff, Mr. Mwinzi appeared for the 1st defendant while Mr. Omondi held brief for Mr. Gachie for the 2nd defendant. From the court record, the matter was allocated a hearing time of 12:30p.m. At 12:30 p.m, the court was still in the middle of a hearing of another matter that was ahead of this matter. From my recollection, all the advocates who appeared before court in the morning appeared again at 12:30p.m. and were informed that the court was still in the middle of another hearing and that they should wait.

When the matter was ultimately reached and called out for hearing again at 2:30p.m, only the advocates for the defendants were present. Mr. Rene advocate who was holding brief for Mr. Havi was absent. On application by the defendants' advocates, the plaintiffs' suit was dismissed for non-attendance. After the dismissal of the suit, the 1st defendant applied to withdraw her counter-claim against the plaintiffs with no order as to costs which application was allowed.

What is now before me is the plaintiffs' application brought by way of Notice of Motion dated 20th February, 2020 seeking; an injunction to restrain the 1st defendant from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with all that property known as L.R No. 209/7842, Nairobi ("suit property"), the setting aside of the order made on 17th February, 2020 dismissing the suit for non-attendance, reinstatement of the suit for hearing and the costs of the application. The application that was supported by the affidavit of Isaac Rene advocate was brought on the grounds that the suit was dismissed on 17th February, 2020 for non-attendance while the plaintiffs' advocate had stepped out of court to contact the 1st plaintiff who was to testify in the suit. The plaintiffs averred that the defendants' advocates were well aware that the plaintiffs' advocate was in the court premises and that they took advantage of his absence in court to apply for the dismissal of the suit. The plaintiffs averred that they were always ready and willing to prosecute the suit and that they stood to suffer substantial loss if the orders sought were not granted.

The plaintiffs averred that the 1st plaintiff's husband, the late Jacob Juma was until 27th June, 2011 the registered owner of the suit property. The plaintiffs averred that the 1st defendant caused the suit property to be fraudulently transferred to her name after which she unlawfully evicted the deceased from the suit property. The plaintiffs averred that by an order made by this court on 20th April, 2012, the court ordered that the status quo be maintained pending the hearing and determination of the suit. The plaintiffs averred that the said order stood discharged when the suit was dismissed. The plaintiffs averred that they were apprehensive that the 1st defendant could proceed to alienate and/or dispose of the suit property or encumber the same thereby defeating the plaintiffs' title to the property unless the order of dismissal was set aside and the suit reinstated.

The application was opposed by the defendants. The 2nd defendant swore a replying affidavit on 12th March, 2020 in opposition to the application. The defendants termed the plaintiffs' application an abuse of the process of the court. The defendants averred that no valid grounds had been put forward to warrant the granting of the orders sought. The defendants averred that the plaintiffs were not ready to proceed with the hearing of the suit and that after their application for adjournment was disallowed and the matter allocated a time for hearing, the plaintiffs' advocate failed to turn up when the matter was called out for hearing and attempts to look for him in the court corridors did not bear fruit. The defendants averred that the plaintiffs were not in court and that the plaintiffs' advocate was determined to

delay the hearing of the suit by deliberately walking out of the court room. The defendants averred that the court acted within the law in dismissing the suit for non-attendance considering the age of the matter and the conduct of the plaintiffs.

The application was heard orally on 26th April, 2021 when Mr. Havi appeared for the plaintiffs/applicants, Mr. Mwinzi for the 1st defendant and Mr. Gachie for the 2nd defendant. I have considered the plaintiffs' application together with the supporting affidavit. I have also considered the replying affidavit sworn by the 2nd defendant in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the parties. This suit was dismissed on 17th February, 2020. The present application was brought on 21st February, 2020 when what transpired in court on 17th February, 2020 was still fresh in my mind. It is not true as claimed by the plaintiffs that the defendants' advocates took advantage of the absence of the plaintiffs' advocate in court to seek the dismissal of the suit.

The true account of what transpired in court is set out in the replying affidavit of the 2nd defendant. The matter was called out in the morning and the court indicated to the advocates that the matter having been adjourned twice previously, the court would not entertain another application for adjournment. It is dishonest in my view for Mr. Rene to claim that he had just stepped out of court to talk to the 1st plaintiff when the matter was called out again at 2:30 p.m. and dismissed for non-attendance. The duty to be candid and honest to the court required Mr. Rene to admit that he did not have a witness on 17th February, 2020 and that he was not ready to proceed when he walked out of court never to return rather than putting blame unfairly on the defendants' advocates for the dismissal of the suit.

I am in agreement with the defendants that the plaintiffs and their advocates have not given reasonable explanation for their absence in court when the suit was dismissed for non-attendance. However, that alone cannot fetter the court's discretion in an application of this nature. I am inclined to exercise my discretion in favour of allowing the application. In Nchapi Leiyagu v I.E.B.C & 2 others, Civil Appeal No. 18 of 2013,[2013] eKLR, the court stated that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

In Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 1033 at 1040, Apaloo J.A. stated as follows:

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

I have noted from the record that although the suit is old, the plaintiffs are not entirely to blame for the delay in the prosecution of the same. I have noted that the hearing of the suit had commenced on 2nd February, 2018 and that the plaintiffs' first witness who had testified in part died before he was re-examined. This made it necessary for the hearing of the suit to start a fresh. I have also noted that all the applications for adjournment made in the matter by the plaintiffs were considered by the court and allowed on merit. I have noted further that the present application was brought 4 days of the dismissal of the suit which is an indication that the plaintiffs were still interested in prosecuting the suit. I am also not convinced that the defendants would suffer prejudice that cannot be compensated by an award of costs if the application is allowed.

Due to the foregoing, I hereby allow the application dated 20th February, 2020 on the following terms.

1. The order made on 17th February, 2020 dismissing this suit for non-attendance is set aside and the suit reinstated for hearing on merit.
2. The 1st defendant's counterclaim against the plaintiffs is similarly reinstated for hearing.
3. The status quo prevailing as of the date hereof relating to title, possession and use of L.R No. 209/7842, Nairobi shall be maintained pending the hearing and determination of the suit or further orders by the court.
4. The plaintiffs jointly and severally shall pay to each of the defendants forthwith Kshs. 30,000/= as throw away costs within thirty (30) days from the date hereof in default of which the defendants shall be at liberty to take out warrants of attachment for the recovery thereof.
5. The defendants shall have the costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF JULY 2021.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Angawa h/b for Mr. Havi for the Plaintiffs

Mr. Mwinzi for the 1st Defendant

Mr. Omondi h/b for Mr. Gachie for the 2nd Defendant.

Ms. C. Nyokabi-Court Assistant