



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC 461 OF 2017

RACHEAL NJERI NGIGI.....PLAINTIFF /APPLICANT

VERSUS

LUCY NYAMBURA MBURU.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed instant Application dated 16/9/2021 under Order 12 Rule 7, and Section 3A of the Civil Procedure Rules (CPR) for Orders THAT;

a. This Honorable Court be pleased to set aside, vary or dispense with its orders dated and delivered on 23rd October 2019 dismissing the Plaintiff's suit for want of prosecution and that the same be reinstated and heard on its own merit.

b. The cost of this application be provided for in any event.

2. The Application is based on the grounds thereto and Supporting Affidavit of the Applicant's Advocate, **Richard Kimani Charagu** sworn on even date. He averred that without his knowledge and notice, the matter came up for notice to show cause on 23/10/2019. That due to the Covid 19 pandemic that affected Court proceedings, he just learnt of the dismissal of the suit and filed the instant application. That it is in the interest of justice that the suit be reinstated and the Plaintiff allowed to prosecute lest she loses her land.

3. The application was served upon the Respondent vide a Return of Service dated 27/9/2021 and filed on 4/10/2021. The Respondent did not file any objection.

4. Be that as it may the Court will proceed to determine whether the application is merited. The application is expressed under Order 12 rule 7 Civil Procedure Rules which states;

"7. Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

5. Further the Applicant relies on **Section 3A** of the Civil Procedure Act which provides that nothing in the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This Section is preceded by Sections 1A and 1B that are popularly known as the oxygen principles. They state;

"1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subSection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

6. The provisions for Notice to Show Cause is found in Order 17 Rule 2 Civil Procedure Rules;

“2. Notice to Show Cause why suit should not be dismissed [Order 17, rule 2.]

(1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to 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.

(2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

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

7. Reinstatement of a suit is a discretionary remedy of the Court. It can only be granted to a deserving case who lays a sufficient basis for it. In the case **Shah -vs- Mbogo & Another (1967) EA 116**, the Court stated that such discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

8. A perusal of the Court record shows the Applicant’s last action was filing of the Originating Summons dated 13/4/2017. The handwritten proceedings begin from 24/6/2019 without the Applicant’s appearance.

9. This application has been filed almost two years after the impugned dismissal. The Applicant avers that he has been following up the matter but to no avail due to the Covid Pandemic. No iota of evidence has been adduced to demonstrate the alleged follow ups. The Applicant has not offered plausible reasons for the Court’s indulgence. Further, the Applicant did not explain how he came to learn of the dismissal and when if at all.

10. In giving effect to Section 3A of Civil Procedure Act above, the Court is minded to safeguard against any abuse of the Court process. It is also this Court’s duty to ensure efficient and timely disposal of cases.

11. The Applicant has contended that he was never served with the notice to show cause. I have perused the file and note that it is true that the notice to show cause was not served upon the Applicant. That said the duty to prosecute her case rests on her shoulders and the burden cannot shift. For this reason, the application is granted on terms;

a. The orders dismissing the suit made on the 23/10/2019 be and are hereby set aside.

b. The suit to be fixed for hearing within a period of 60 days (pretrial included) from the date of this Ruling in default the suit shall stand dismissed with no further orders from this Court.

c. I make no orders as to costs.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

CHARAGU FOR PLAINTIFF/APPLICANT

DEFENDANT/RESPONDENT - ABSENT

MS. PHYLLIS – COURT ASSISTANT