



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 108 OF 2015

ZUBEDA SALIM IDDI (Suing as Personal Representative of the Estate of

Khadija Salim Iddi alias Khadija Khalfan -deceased).....PLAINITFF

VERSUS

MUSTAPHA YUSUF ALI JIWANJI.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

(Application seeking orders to set aside an order dismissing the suit for want of prosecution; the plaintiff asserting that the notice to show cause why the suit should not be dismissed was not served; no proof of service of the notice; application allowed as plaintiff not given an opportunity to show cause why the suit should not be dismissed)

1. The application before me is that dated 25 August 2019 filed by the plaintiff. The application seeks orders to set aside the order of 1 November 2018 which dismissed this suit for want of prosecution. The main ground is that the suit was dismissed for want of prosecution based on a Notice to Show Cause (NTSC) issued by the court but which it is alleged was never served upon the applicant.
2. To put matters into context, this suit was commenced through a plaint which was filed on 21 May 2015. The plaintiff has brought this suit on behalf of the estate of Khadija Salim Iddi (deceased) over the land parcel Mombasa Block XXVIII/37 (the suit land). It is the contention of the plaintiff that the suit land belonged to the deceased and that the 1st defendant fraudulently caused one half share of it to be transferred to himself and took possession. In the suit, the plaintiff inter alia seeks a cancellation of the transfer of the said one half share of the suit land to the 1st defendant and a permanent injunction to restrain the 1st defendant from the suit land. Together with the suit, the plaintiff filed an application for injunction. The 1st defendant filed defence and opposed the application for injunction. A ruling on the injunction application was delivered on 15 September 2015 through which the application was allowed.
3. Not much appears to have happened in the matter thereafter and on 17 September 2018, the court issued a notice for the plaintiff to show cause why the suit should not be dismissed for want of prosecution. On 1 November 2018 when the notice came up for hearing, only Ms. Nabwana, learned counsel holding brief for Mr. Kaburu for the 1st defendant was present and the suit was dismissed. It is following that dismissal that this application was filed.
4. The supporting affidavit is sworn by Clarise Osore, an advocate practising in the law firm of M/s Wandabwa & Company Advocates, which is the firm on record for the plaintiff. She has deposed that she took over the matter within the firm from a Ms. Maina who was previously handling the suit. She prepared an application for filing but when the filing clerk went to file the same, he was informed that the suit was already dismissed for want of prosecution. It is upon a perusal of the file that it dawned upon her that the suit had actually been dismissed. She has deposed that the NTSC was never served upon her law firm thus the need to set aside the order of dismissal.
5. At the hearing of the application, Ms. Nabwana, learned counsel for the 1st defendant inter alia submitted that the plaintiff took no steps to have the suit heard and was absent when the NTSC was to be heard. She further pointed out that the application has been filed 11 months after the dismissal of the suit.
6. Mr. Ngonze, learned counsel for the 2nd defendant also made submissions opposing the application. He similarly pointed out that the plaintiff and his counsel never appeared at the hearing of the NTSC; that the affidavit does not disclose when it was discovered that the matter had been dismissed; that the affidavit has not been sworn by the plaintiff; and that a setting aside order can only be made where it is shown that there was a mistake, error or inadvertence and that the application has been made without unreasonable delay.

7. I have considered the rival submissions. The key reason given is that the NTSC was not served upon counsel for the plaintiff. I have gone through the file and I have not seen any proof of service of the NTSC upon the plaintiff's counsel. It is therefore apparent to me that the NTSC was heard without giving the plaintiff an opportunity to show cause why the suit ought not to be dismissed. To me that alone is enough to set aside the order of dismissal of the suit. I have considered the submissions raised by counsel for the defendants, but whichever way one looks at it, so long as the plaintiff was never informed of the NTSC and was never given a chance to show cause, then it would be unfair to have the order of dismissal remain in place.

8. It is for the above reasons that I allow this application, set aside the order dismissing the suit for want of prosecution and reinstate the suit.

9. I make no orders as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of January 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Ojwang' holding brief for Mr. Wandabwa for the applicant.

Ms Arika holding brief for Mr Kaburu for 1st defendant.

No appearance on the part of Mr Ngonze for the 2nd defendant.

Court Assistant; David Koitamet.