REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 129 OF 2012

SIMON NGUGI NJENGA.....PLAINTIFF

=VERSUS=

TABITHA WANJIKU MUNYUA.....1ST DEFENDANT

CAROLINE NJANGO MUNYUA.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 15th March, 2012 seeking an order compelling the 1st defendant to execute an instrument of transfer in his favour in respect of all that parcel of land known as L.R No. Kabete/L.Kabete/2492 (hereinafter referred to as **"**the suit property") and an order compelling the 2nd defendant to remove a caution lodged by her on the title of the suit property to facilitate the registration of the said transfer. In his plaint, the plaintiff averred that the defendant sold to him the suit property which was a portion of L.R No. Kabete/L.Kabete/957 (hereinafter referred to as **"**the original title") at a consideration of Kshs. 300,000/-. The plaintiff averred that he took possession of the suit property after purchasing the same and started developing the same pending the transfer of the same to his name. The plaintiff averred that he had constructed on the suit property a permanent residential house which he was occupying with his family.

The plaintiff averred that he carried out a search on the title of the suit property on 24th February, 2012 which revealed that the 2nd defendant had registered a caution against the same to stop the transfer of the property to the plaintiff. The plaintiff averred that he obtained consent of the Land Control Board for the transfer of the suit property to his name and when he presented the instrument of transfer to the 1st defendant for execution, the 1st defendant declined to sign the same despite the fact that he had paid the purchase price in full.

The defendants filed a joint statement of defence on 27th April, 2012. The defendants admitted that the 1st defendant entered into an agreement for sale to sell the suit property to the plaintiff at a consideration of Kshs. 300,000/- and that the 2nd defendant who was a daughter of the 1st defendant had registered a caution against the title of the suit property to restrain any dealings in respect thereof. The defendants averred that the plaintiff paid a deposit of Kshs. 182,000/- but failed to pay the balance of the purchase price in the sum of Kshs. 118,000/-. The defendants averred that the agreement for sale between the plaintiff and the 1st defendant was void on account of the plaintiff's failure to complete the same by making payment of the balance of the purchase price.

On 21st May, 2013, the plaintiff filed an application for a temporary injunction restraining the defendants from trespassing on, selling, mortgaging or interfering with the suit property in any manner whatsoever pending the hearing and determination of this suit. The plaintiff's application was not opposed and the same was allowed as prayed on 16th September, 2013.

On 1st October, 2014, the plaintiff brought an application of the same date seeking an order that the defendants be summoned to appear in court and show cause why they should not be punished for disobeying the orders issued by the court on 16th September, 2013. On 19th November, 2014, the court directed that the plaintiff's application be argued by way of written submissions and set timelines within which the parties were to file submissions. The matter was fixed for mention on 4th February, 2015 for fixing a ruling date. For reasons which are not clear from the record, the matter was not mentioned on 4th February, 2015.

From 19th November, 2014 when the court gave directions on the plaintiff's application dated 1st October, 2014, no further action was taken in the matter for a period of about 3 years. On 11th September, 2017, the court ordered that the parties be served with a notice to appear in court on 24th January, 2018 to show cause why the suit should not be dismissed for want of prosecution. The parties were served with a Notice to Show Cause by post. The plaintiff who acts in person was served at his Postal Address P.O. Box 355-00900 Kikuyu. None of the parties appeared in court on 24th January, 2018 and the court having noted that no action had been taken in the matter for a period of over 3 years dismissed the suit for want of prosecution.

On 31st January, 2018, the plaintiff brought an application by way of Notice of Motion of the same date seeking the setting aside of the order made on 24th January, 2018 dismissing the suit for want of prosecution and the transfer of the suit to the ELC Thika for hearing and final determination. The said application which is the subject of this ruling was brought on the grounds set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 31st January, 2018. The plaintiff averred that he was not served with a Notice to Show cause and that what was served upon him was a hearing notice. The plaintiff averred that when he was served with a hearing notice, he thought that what was coming up for hearing was his application dated 1st October, 2014 which was pending determination. The plaintiff averred that the dismissal of the suit was prejudicial to him and that unless the order was set aside and the suit reinstated, he risked incurring great loss.

The application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 9th November, 2018. The defendants averred that the application was defective, bad in law and an abuse of the court process. The defendants averred that the plaintiff was duly served with a Notice to Show Cause and opted not to exercise his right to appear and show cause why the suit should not be dismissed. The defendants contended that the court ought to examine the conduct of the plaintiff in the prosecution of the suit. The defendants averred that the plaintiff's allegation that he was not served was unfounded. The defendants averred that the plaintiff had admitted knowledge of the date when the suit came up for Notice to Show Cause but had not given reason for his failure to attend court even if it was to prosecute his alleged application dated 1st October, 2014.

The defendants averred further that the plaintiff's failure to attend court showed contempt of court and cavalier approach to the suit. The defendants averred that the plaintiff was not keen in prosecuting the suit because the status quo favoured him and that the plaintiff wanted the court to rectify his own mistakes at the expense of defendants' rights. The defendants averred that the plaintiff was hell bent on delaying this matter to the extreme prejudice to the defendants. The defendants contended that application was brought in breach of the mandatory provisions of Order 51 Rule 13(2) of the Civil Procedure Rules. The defendants urged the court to dismiss the application with cost.

The application was argued orally on 18th September, 2019. The plaintiff who appears in person submitted that he came to court late when the matter came up for Notice to Show Cause and found that the case had already been dismissed. The plaintiff submitted that he had attended all the previous court sessions and urged court to allow the application.

In his submission in response, Mr Gacheru who appeared for the defendants argued that the reason for the plaintiff's failure to attend court when the suit was dismissed was unknown. He submitted that in his affidavit in support of the application, the plaintiff claimed that he was not served while in his submission, the plaintiff contended that he came to court but arrived late after the court had dismissed the suit. The defendants' advocate submitted that prior to the dismissal of the suit, there had been no action in the matter since 2014. The defendants' advocate submitted that the delay in the prosecution of the suit was in the plaintiff's favour as he had the title of the suit property and possession. The defendants' advocate submitted that in the event that the court was inclined reinstate the suit, the court should order the plaintiff to surrender the title of the suit property to the court's custody. The defendants' advocate submitted that the suit was rightly dismissed since the plaintiff was duly served.

Determination:

I have considered the plaintiff's application and the affidavit filed by the defendants in opposition thereto. I have also considered the submissions by the parties. What I need to determine is whether valid grounds have been put forward to warrant the setting aside of the order made herein on 24th January, 2018 dismissing this suit for want of prosecution and if the suit is reinstated, whether it should be transferred to the Environment and Land Court at Thika for hearing and final determination.

There is no dispute that the court has power to reinstate a suit that has been dismissed for want of prosecution. The power is however discretionary. An applicant for reinstatement of a suit has to satisfy the court that he deserves the exercise of the court's discretion. I have at the beginning of this ruling given the history of the dispute between the parties and the progress of the suit. From the evidence on record, I am satisfied that the plaintiff was served with a Notice to Show Cause and as such the suit was regularly dismissed. It was also not disputed that as at the time the suit was dismissed, it had remained dormant for over 3 years. The plaintiff did not give a convincing explanation for his failure to take action in the matter for that long. The fact that the plaintiff had a pending application to punish the defendants for disobedience of the orders of injunction that were issued by this court was not a reasonable excuse for not prosecuting the suit.

That said, I have noted that the plaintiff filed this application for reinstatement of the suit within one week of the dismissal of the suit. This is a demonstration that the plaintiff is still interested in prosecuting the suit. There is no evidence on record that the plaintiff had attempted at any time in the course of the proceedings in this suit to delay or to frustrate the prosecution of the suit. As I have stated earlier, there is no reasonable explanation given by the plaintiff as to why he did not attend court to show course why the suit should not be dismissed or why he had taken over 3 years without taking steps to prosecute the suit. This alone in my view cannot fetter the court's discretion in an application of this nature. 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."**

Due to the nature of the dispute between the parties, I am inclined to give the plaintiff a chance to prosecute his suit. I am not persuaded that the defendants would suffer such prejudice that cannot be put right by payment of costs.

In conclusion, I find merit in the Notice of Motion application dated 31st January, 2018 limited to the prayer seeking the reinstatement of the suit. As concerns the prayer seeking the transfer of the suit to the Environment and Land Court at Thika, I am not satisfied that good grounds have been put forward to justify the transfer of this old case to Thika where it will be treated as a new suit. The plaintiff's application is allowed in terms of prayers 2 and 3 thereof. The defendants shall have the costs of the application assessed at Kshs. 15,000/= payable forthwith.

Delivered and Dated at Nairobi this 27th Day of February 2020

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

The Plaintiff present in person

Mr. Odawa h/b for Mr. Gacheru for the Defendants

Ms. C. Nyokabi-Court Assistant