



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 225 OF 2012

MILLICENT ODERO OWINO.....PLAINTIFF

VERSUS

1. STANELY THINE BIRITHIA

2. JUMA OMAR MUSA alias MUJUMA.....DEFENDANTS

RULING

1. The application for determination is the Notice of Motion dated 1st March 2019 in which the Plaintiff/Applicant is seeking to reinstate the suit which was dismissed on 8th November 2018 for want of prosecution. The Application is brought under Article 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules. The Application is based on the grounds on the face of the motion and supported by the affidavit of the applicant sworn on 1st March 2019, and another sworn by Maureen Were filed on 8/7/19. The applicant states that the reason they failed to attend court was because she had no money for fare nor to hire an advocate to represent her. That her previous advocate, Mr. Oguk died and through the assistance of a good Samaritan, Patrick Were, her matter was taken over by another advocate, Mr. Kariuki. The Applicant states that unfortunately, her financier also passed on on 1st January 2017 and she was unable to travel to Mombasa from upcountry where she has relocated to and also could not afford to hire an advocate. That she was forced to seek pro bono services from Kituo cha Sheria to represent her in the matter.

2. The application is opposed by the 1st Respondent through a replying affidavit sworn on 3rd July, 2019. The 1st Respondent avers inter alia that he is the registered owner of PLOT NO.1665/VI/MN having purchased it way back in the year 2010. That upon purchasing he sought for vacant possession vide CMCC No.2250 of 2010 which was concluded in his favour. He states that the applicant never applied to be enjoined in CMCC NO.2250 of 2010. That the applicant with one Sheikh Ali Abdalla Jahadam filed CMCC NO 2534 of 2010 but never prosecuted the same upon being served with defence. That the applicant filed the present suit on 16th October 2012 through M/s Obura J and Company Advocates. The 1st respondent avers that the applicant had already relocated to her rural home even before purchasing the suit plot. That there is no evidence to show that the applicant received financial support from the late Patrick Were. That the Applicant has not explained what steps she took to prosecute the case after learning of the death of her advocate, the late Justice (Retired) Oguk. The 1st Respondent states that the suit plot and the developments thereon have been compulsorily acquired by the National Land Commission. That he took over possession of the suit plot on 12th April 2012 and has made immense investments thereon. The 1st Respondent has attached pleadings in CMCC N.2250 of 2010 and 2534 of 2010 and other documents.

3. The application was canvassed by way of written submissions. The Applicant filed her submissions on 12th September 2019 in which she reiterated the facts in the affidavits in support of the application and urged the court to allow the application.

4. The 1st Respondent filed his submissions on 2nd October 2019 in which he urged the court to dismiss the application. The 2nd Respondent filed submissions on 9th October 2019 in support of the application.

5. I have considered the application. The suit was filed on 16th October, 2012. There is an amended defence and counter-claim filed on 21st July, 2014. The case was stood over generally on 26/7/2016. The record shows that the matter was listed for notice to show cause why the case should not be dismissed for want of prosecution on 16th May, 2017. The court, however, did not dismiss the suit because the notice was premature as one year had not lapsed from 26/7/2016. The matter was fixed for mention on 4/10/17 when none of the parties attended and the matter was again stood over generally. The record further shows that from 4th October 2017 to 8th November 2018 no action was taken in the matter. Pursuant to a notice to show cause under Order 17 rule 2, the suit was dismissed by the court on 8th November, 2018. The applicant has now applied for the suit to be reinstated.

6. The appropriate test in the exercise of discretion to reinstate a suit is the same as the one applicable in deciding whether to dismiss or spare

a suit. The court has the discretion to excuse any delay which is not contumelious and inexcusable; one which has been explained to the satisfaction of the court and it causes no substantial prejudice to fair trial of the case or to one party or other or both.

7. I have perused the record. The notice to show cause dated 12th October 2018 was to be served on J. S. Kaburu & Co. Advocates, S. O. Oguk & Co. Advocates and Joel Obura & Co. Advocates. The notice was only received by M/s J. S. Kaburu & Co. Advocates on 17th October 2018. There is no evidence to show that the firm of S. O. Oguk & Co. Advocates and the firm of Joel Obura & Co. Advocates were served with notice to show cause. It is not in dispute that the late Justice (retired) Oguk died in April 2016 and so service could not have been effected on him in October 2018. I also note that in the earlier notice to show cause dated 3rd May 2017, Ms. Obura & Co. Advocates received the notice with remarks that he is no longer acting for the plaintiff. I further note that the notice to show cause that was served was to be heard on 5th November, 2018. It is not clear from the record what transpired on 5th November, 2018. It is also not clear how the matter came up on 8th November 2018 when it was dismissed.

8. The applicant has given an explanation as to why she did not take action in the matter before it was dismissed. It is also apparent that the Applicant's counsel may not have been served with the notice to show cause. For the foregoing reasons, I am satisfied that the plaintiff's application dated 1st March 2019 has merit. The overriding objectives of the court would come to the aid of the applicant.

9. The upshot is that the Notice of Motion dated 1st March 2019 is allowed to the extent that the order made herein on 8th November 2018 dismissing the plaintiff's suit is set aside and the case is reinstated. Costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of February 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Musamia holding brief for plaintiff

No appearance for defendant

Yumna Court Assistant

C.K. YANO

JUDGE