



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 407 OF 2017

CAROLINE AKUMU NYANDIERO.....PLAINTIFF

VERSUS

BETTY AKINYI OCHIENG.....1ST DEFENDANT

JOSEPHINE MALATYA.....2ND DEFENDANT

LAND REGISTRAR, MOMBASA.....3RD DEFENDANT

RULING

March 2019. On that date, only Mr. Apollo Muinde, learned counsel for the 2nd defendant was present. Counsel for the plaintiff did not appear to argue the preliminary objection despite being served. The preliminary objection was heard and allowed on the same day. The learned Judge wondered why no step had been taken to rectify the anomaly in the plaint despite the Notice of Preliminary Objection and also wondered why the plaintiff's counsel did not appear. The court concluded that this was a demonstration of indolence or lack of interest by the plaintiff in the matter. The result was that the entire suit was struck out.

5. It is upon that dismissal that this application was filed and as I had earlier set out among the orders sought is the reinstatement of the suit. The application is founded upon the grounds that the application dated 24 February 2019 was never served upon her previous advocates; that the respondent knows the applicant very well but she never disclosed this to the court; that the 2nd defendant has filed no defence in the matter; that the 2nd defendant has illegally transferred the suit land to her name despite there being a court order; and that the applicant stands to suffer great loss if the application is not allowed.

6. The application is opposed by the 2nd defendant who has filed a Replying Affidavit. She has deposed inter alia that firstly the application is defective for the supporting affidavit is sworn before a person who purports to be an Advocate and Commissioner for Oaths yet his status in the Law Society of Kenya's website is shown to be inactive. She has also deposed that counsel previously on record for the plaintiff was well aware of the date for the hearing of the preliminary objection and has referred to the affidavit of service filed.

7. I have considered the application. First on the coming on record of the law firm of M/s Mwaniki Gitahi & Company, that is allowed. The other prayer seeks the reinstatement of this dismissed suit. It is partly alleged that the preliminary objection was heard without there being service on the part of counsel then on record for the plaintiff. That cannot be true. I have seen the affidavit of service filed before the preliminary objection was heard. It provides that M/s Odindiko & Company Advocates were served with the hearing notice and the hearing notice is attached. That hearing notice shows that the law firm of M/s Odindiko & Company Advocates, did receive the hearing notice and appended their stamp and signature on it. I do not see how it can be argued that the said law firm was never served despite such clear evidence. Of course, when counsel for the plaintiff failed to appear to defend the preliminary objection, and there was no overture to remedy the defect in the plaint, the court had little option but to dismiss the suit for being defective. Even within this application there is no concession by the plaintiff that her plaint is defective and no offer to rectify the anomaly. Given that position, I do not see how I can reverse the orders of 4 March 2019. It is thus not necessary for me to go into the other grounds raised by the 2nd defendant in her reply in opposing this application. I proceed to dismiss this application with costs to the 2nd defendant.

8. Not having been persuaded to reverse the order of 4 March 2019 which dismissed this suit, this suit remains so dismissed and any interim orders made are vacated.

9. If the plaintiff is so minded, she is at liberty to file a fresh suit.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF: