REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 140 OF 2017

FAITH WANGU MAINA.....PLAINTIFF

VERSUS

DORIS NJOKI NJIRU T/A GIANT AUCTIONEERS.....1ST DEFENDANT

PETERSON KINYUA KIAMA T/A KINYUA KIAMA & CO. ADVOCATES....2ND DEFENDANT

LAND REGISTRAR, KIRINYAGA COUNTY.....3RD DEFENDANT

RULING

The application before me is the Notice of Motion dated 10th May 2019 brought under ***Article 50, 159 (2) (a, d & e) of the Constitution, Section 1A, 1B, 3A CPA and Order 51 Rule 1 CPR***. The applicant seeks the following orders:

1. Spent.

2. That this Honourable Court be pleased to set aside the Court's order dated 30th July 2018 together with all consequential orders and reinstate the suit.

3. That this Honourable Court be pleased to extend the time of service of summons and pleadings on the defendants and thereafter to set the matter down for interparties hearing at the earliest opportunity time.

4. That pending the hearing and determination of this application, the defendants/respondents either by themselves, their servants, agents or otherwise be restrained from disposing off or transferring or in any other manner dealing whatsoever with Title Number MWEA/NGUCWI/326.

5. That there be no order as to costs.

The applicant filed eight grounds and a supporting affidavit sworn the same date in which she stated that sometime in the year 2006, she instructed the 2nd defendant/respondent to act for her in a matter at Wanguru Senior Resident Magistrate's Court being Case No. 58 of 2006 in which she had sued one Martin Munene Mwai over a parcel of land he had placed a caution. She had entered into an oral agreement with the 2nd defendant/respondent that he would advance her a sum of Ksh. 30,000/= and represent her in the said case and thereafter recover the legal fees together with the advanced sum of Ksh. 30,000/= once the case was concluded. The applicant further stated that it was further agreed between her and the 2nd respondent that once she recovered the land, she would sell it in order to repay the advocate. Based on their understanding, she gave the 2nd defendant the original title No. MWEA/NGUCWI/326 to hold as security until the case was concluded and thereafter sell the same. The 2nd defendant represented her in the said case and the caution placed on title No. MWEA/NGUCWI/326 was removed and she was able to get her property back. The applicant further deponed that despite their agreement to sell the land and pay the 2nd defendant as agreed, she was unable to find a buyer quickly. She then approached a friend who advanced her Ksh. 30,000/= to pay the 2nd defendant as she looked for money to settle his legal fees. She took the money to the 2nd defendant but the 2nd defendant declined to accept insisting that he wanted his fees in full.

The 2nd defendant then filed a Bill of costs at Wanguru Law Courts which was taxed at Ksh. 251,379. The 2nd defendant thereafter commenced execution to recover the taxed costs which included evicting her from the suit property which he transferred to his wife. The applicant explained how he went to numerous organizations including Kituo Cha Sheria and FIDA in search of legal assistance since she was not able to engage a private lawyer due to her financial position.She stated that she is now distressed and troubled as the 2nd

defendant/respondent sold her land at a low value compared to the market value of the land and thereafter proceeded to transfer the same to his wife leaving her and her children to suffer. The application is opposed by the 1st and 2nd defendants who filed grounds of opposition dated 24th June 2019.

THE APPLICANT'S SUBMISSIONS

The applicant through the firm of Brenda, Yambo Advocate submitted that the applicant has substantively explained that her non-attendance in Court when this suit was dismissed was occasioned by her former advocates' mistake which was beyond her control. She stated that the mistake by her hitherto advocates denied her an opportunity to be present. She cited the following cases:

1. Sebei District Administration Vs Gaysali (1968) E.A 300.
2. Pan African Paper Mills Limited Vs Silvester Nyarango Obwocha (2018) e K.L.R.
3. Philiph Chemwolo & Another Vs Augustine Kubede (1982 – 88) K.A.R 103.
4. Belunda Murai and others Vs Amoi Wainaina (1978) e K.L.R.
5. Wachira Karani Vs Bildad Wachira (2016) e K.L.R.

1ST AND 2ND RESPONDENTS SUBMISSIONS

The 1st and 2nd respondents submitted that this suit abated upon expiry of the summons to Enter Appearance after the plaintiff/applicant did not serve summons within the stipulated period of 12 months. The 1st and 2nd respondents also submitted that the suit automatically abated since no application was lodged for extension of the validity of the summons. The respondents also submitted that the suit was dismissed for want of prosecution on the Court's own motion after the plaintiff was issued with Notice to show cause and failed to show cause. They stated that the 1st defendant has enjoyed exclusive possession and cultivation of L.R MWEA/NGUCWI/326 for the last six (6) years after she bought it from Court bailiffs who were executing a valid decree of the Court which has not been set aside, reviewed and/or appealed against.

ANALYSIS AND DECISION

I have considered with anxious care the affidavit evidence and the submissions by the parties. I have also considered the applicable law. From the Notice of Motion dated 10th May 2019, the applicant is seeking an order of substantive nature to set aside the orders of this Court issued on 30th July 2018 together with all subsequent orders and to reinstate the suit. Upon perusal of the Court record, it is apparent that this suit was filed on 2nd October 2017 and Court summons were issued on 11th October the same year, 2011. No action took place until the Court on its own motion fixed the matter for Notice to show cause on 30th July 2018. When the case came up for mention on the said 30th July 2018, the same was called out but the parties were absent. The Court was satisfied that the parties were indeed served.

Order 5 CPR regulates the issuance of summons. Under ***Order 5 Rule 2 &7 CPR***, the law provides as follows:

> **"(2) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons".**
>
> **(7) Where no application has been made under Sub- rule (2), the Court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons".**

As I have noted that the Court summons was issued on 11th October 2017, the lifespan of the summons was to expire on 10th October 2018. This suit was dismissed by this Court for want of prosecution on 30th July 2018 on its own motion after it was satisfied that the parties were duly served. My simple arithmetic indicates that the dismissal of this suit for want of prosecution was pre-mature as the life of the original summons of twelve (12) months had not crystallized. I find that this is a case where this Honourable Court is called upon, in the interest of justice, to exercise its inherent powers to correct an error apparent on the face of record under ***Section 1A, B and 3A CPA and Article 159 of the Constitution of Kenya 2010***. An error or mistake apparent on the face of record was defined in the case of ***Nyamogo & Nyamogo Vs Kogo (2001) E.A. 174 as follows:***

> **"……. An error apparent on the face of the record, cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantive point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal".**

The order dismissing this suit on 30th July 2018 is liable, in my view to be reviewed on grounds of an error apparent on the face of the

record. As such, I find the application dated 10th May 2019 merited and the same is allowed in the following terms:

1. The order of this Honourable Court issued on 30th July 2018 dismissing this suit and all consequential orders are hereby set aside and the suit reinstated.

2. The summons to enter appearance issued on 11th October 2017 are hereby re-issued and extended for a period of six (6) months from the date hereof.

3. Pending the hearing and determination of this suit, the defendants/ respondents either by themselves or their servants, agents and/or employees are hereby restrained by way of an injunction from disposing off, transferring or in any other manner dealing whatsoever with title No. MWEA/NGUCWI/326.

4. The costs of this application to be costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of March, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Asiimwe holding brief for Kinyua Kiama

2. Mbogo, Court clerk – present

3. Plaintiff/Advocate – absent

4. 3rd Defendant - absent