



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 18 OF 2019

LUCIE NDUKO MWANGANGI.....PLAINTIFF

VERSUS

KAHAWA SUKARI LIMITED.....DEFENDANT

JOSEPHINE AWOUR.....INTERESTED PARTY

RULING

Through the application dated 1/12/2015, the Plaintiff sought stay of execution of the decree and the setting aside of the *ex parte* judgment on the ground that the Plaintiff was not aware of the hearing date of the case and that her advocates were not served with the hearing notice nor were they invited to fix the hearing date.

The application was supported by the Plaintiff's affidavit in which she deponed that her advocates informed her that the last time the case was fixed for hearing was on 15/3/2011. She averred that the Defendant's advocates dropped a letter dated 26/7/2012 in her advocate's office on 7/7/2015 informing the 1st Defendant that the suit had been finalised and a decree issued. She produced a copy of the letter dated 19/8/2015 written by Alphonse Mutinda & Co. Advocates to Amuga & Co. Advocates making reference to the letter dropped at their offices on 7/7/2015. She also annexed a copy of the letter dated 26/7/2012 together with letters from Mutinda & Co. Advocates dated 21/2/2013 and 30/1/2013 inviting the Defendant's advocates to fix a hearing date.

Paul Amuga Advocate swore the replying affidavit in opposition to the Plaintiff's application which he termed as incompetent and an abuse of the court process. He averred that no *ex parte* judgement exists in this case. He deponed that the Interested Party's application dated 16/1/2012 seeking dismissal of the suit for want of prosecution was served on the Plaintiff's advocates on 20/6/2012. He urged that the Plaintiff had failed to explain her failure to attend court on 4/7/2012 when the Interested Party's application to dismiss her suit came up for hearing. Further, that no explanation had been given by the Plaintiff as to why she took three years and half to file the application after the suit was dismissed on 4/7/2012. The Interested Party claimed that she purchased the Suit Property from the Defendant and took possession of the land and fenced it.

The Plaintiff deponed in her further affidavit filed on 10/5/2018 that her advocates were seeking a hearing date from the registry and were not aware that proceedings had been taken in their absence. She conceded that the application to dismiss the suit was served on her advocate who informed her that they failed to attend court on 4/7/2012 because they did not diarize the matter for that day. She added that her advocates were in Machakos attending to the hearing of other matters on the day the application to dismiss her suit came up for hearing. She added that the fact that the suit had proceeded in their absence became known to them on 7/7/2015 when her advocate was served with the letter dated 26/6/2012 informing them that the suit had been dismissed for want of prosecution.

Alice Wacheke Muiruri swore the replying affidavit which was filed by the Defendant in court on 20/2/2020 in which she averred that the Plaintiff had not established the legal or factual basis for the grant of the orders she seeks. She added that the Plaintiff had not explained where she was for the last five years when she failed to prosecute her claim. She stated that the Plaintiff seeks an equitable remedy that is only available to a deserving party at the court's discretion and the applicant must satisfy the court by laying a basis for the exercise of the discretion in their favour. She urged that the Plaintiff had failed to satisfy the court to exercise its discretion in her favour. She stated that the Defendant will suffer loss if the application is allowed.

The Plaintiff's advocate relied on Article 159 of the Constitution and the case of **Giro Commercial Bank Limited v Jasvinder Singh Dhadialla [2005] eKLR** in support of the argument that the mistake of counsel should not be visited on a client. The Defendant submitted that the Plaintiff had not been keen on prosecuting this suit which she filed in 1996. It pointed out that this suit was dismissed in 2012 and the application to reinstate it was filed in 2015 and prosecuted in 2020. The Interested party submitted that there was no *ex parte* judgement entered in this suit and clarified that the suit was dismissed following an application for its dismissal for want of prosecution.

The issue for determination is whether the court should grant the orders sought by the Plaintiff. This suit was filed in 1996. The Plaintiff has not explained the inordinate delay in prosecuting this matter. The order dismissing her suit was made on 4/7/2012. It took her three and a half years to file the application which was argued almost five years later. The Plaintiff has been indolent.

The court declines to grant the orders sought in the Plaintiff's application dated 1/12/2015 and awards the Defendant and the Interested Party the costs of the application.

Dated and delivered at Nairobi this 5th day of March 2020.

K.BOR

JUDGE

In the presence of:-

Mr. J. Gichigo for the Plaintiff

Ms. A. Kayoi holding brief for Mr. P. Amuga for the Interested Party

Mr. V. Owuor- Court Assistant

No appearance for the Defendant