



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.407 OF 2012

JULIUS KIPKENY KOLIL.....1ST PLAINTIFF

RUTH JEMUTAI KAMAR.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

NANCY WAITHIRA KIRURI.....2ND DEFENDANT

MUGANDA WAKULWA T/A KEYSIAN AUCTIONEERS.....3RD DEFENDANT

RULING

Before this Court is the Notice of Motion dated **12th November 2018** by which the Plaintiff/Applicants seek the following Orders:-

“1. SPENT

2. SPENT

3. THAT this Honourable Court be pleased to vary Review and/or set aside its orders issued on 26th September 2018.

4. THAT the Honourable Court be pleased to reinstate the Plaintiff/Applicants suit dated 25th June 2012 and the orders issued by Justice J.B. Havelock on the 28th Day of March 2013 barring any interference or eviction of the Plaintiff/Applicants from the suit property herein being LR NO.9042/685 pending the hearing and determination of the reinstated suit.

5. The costs of this Application be provided for.”

The Application which was premised upon **Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010** and all enabling provisions of the law was supported by the Affidavit sworn on **12th November 2018** by **JOEL KIMUTAI BOSEK**, an Advocate of the High Court of Kenya.

The **1st** Defendant being **“KENYA COMMERCIAL BANK”** filed the Replying Affidavit sworn on **3rd December 2018** by **NELLYNE AKINYI OGONJO** an Advocate of the High Court of Kenya in which they opposed the application to reinstate the suit.

The Application was disposed of by way of written submissions. The Applicants filed their written submissions on **28th February 2019**.

The background of this matter is as follows. On **26th September 2018** this court dismissed the present suit for want of prosecution under **Order 17 Rule 2** of the Civil Procedure Rules 2010. This followed service of a Notice to Show Cause upon the parties. On the date for hearing of the said Notice only the Defendant was in court.

In their submissions the Applicants submit that their failure to attend court on **27th September 2018** was not intentional but arose due to confusion regarding the parties listed in the Notice to Show Cause. The Applicant further submits that there has not been inordinate delay in

prosecuting this matter. They contend that the Plaintiff will be greatly prejudiced if the present application is not allowed and that the mistake of counsel ought not to be visited upon the client. The Plaintiffs maintain that they have all along remained engaged in the matter through seeking an out of court settlement and by trying to have the suit set down for hearing to no avail. They pray that the present application be granted.

On their part the Respondents submit that the Plaintiffs have been deliberately sluggish in prosecuting their suit. That said delay has been inordinate and is inexcusable. That there was no excuse for the failure by counsel for the Plaintiff to attend court on **27th September 2012** for hearing of the Notice to Show Cause. Finally the Respondents urge this court to dismiss the present application which they insist lacks merit.

I have carefully considered the submissions filed by the parties in this matter, the relevant statute and case law. This is a suit which was filed way back in the year 2012. However it is clear that the Plaintiffs did not having filed the suit, merely sit back and do nothing. Attempts were made to set down the matter for hearing but due to various challenges which included the unavailability of the file in the Court Registry the matter was never listed. The fact that the file was missing in the court Registry is a matter over which the Plaintiff could have had no control at all.

I also note the fact that two Notices to Show Cause were issued in this case indicating different dates for hearing. One Notice dated **6th September 2018** indicated that the matter would be heard in Court No.32 on **27th September 2019**. A second notice dated **7th September 2019** indicated that the matter would proceed in court No.36 on **26th September 2019**. The issuance of two divergent notices indicating different courts and different hearing dates would undoubtedly lead to confusion. The Plaintiff has indicated its desire and commitment to prosecute its suit. To deny them that chance would cause prejudice as they stand to lose a valuable property.

Accordingly I do allow this present application and direct that the suit be set down for hearing within sixty (60) days of the date of this Ruling failing which it will stand dismissed. In order to expedite the matter, parties will appear before the Hon. Deputy Registrar for Case Management within 30 days of this ruling. It is so ordered. Costs to the 1st Defendant.

Dated in Nairobi this 4th day of July 2019.

.....

Justice Maureen A. Odero