



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMIANI COMMERCIAL & TAX DIVISION

HCCC NO. 612 OF 2014

TERESIA MURUGI MURAYA.....APPLICANT

-VERSUS-

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION LIMITED (ICDC)....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

RULING

By a Notice of Motion Application dated 31st January 2019, the applicant sought for the following orders;

- a) That pending the hearing and determination of this Application interpartes, the Court be pleased to issue a conservatory order restraining the Defendants/Respondents either by themselves, servants, employees and/or agents from advertising for sale, selling, auctioning, alienating and/or in any way interfering with the suit property known as L.R. No. 12149/9 I.R NO. 86474;*
- b) That pending the hearing and determination of this Application interpartes, the court be pleased to vary, set aside or stay the proceedings of 9th October 2018 in its entirety and/or any other consequential orders entered thereon;*
- c) That this honourable court be pleased to reinstate the Plaintiffs suit and any other consequential orders issued and flowing thereon;*
- d) That the costs of this application be provided for.*

On 16th May 2019 both Counsel for the Applicant and Respondent confirmed exchange and filing of each party's written submissions.

PLAINTIFF'S SUBMISSIONS

It was the Plaintiff's submission is that on 9th October 2018, this matter came for Notice to show cause before Honourable Lady Justice Rachel Ngetich, and the matter proceeded in their absence and was dismissed for want of prosecution.

That on 20th September 2018 when the said Notice to Show Cause was served upon the Applicant's firm, the date of 9th October 2018 was improperly scheduled as 19th November 2018 by the firm's secretary which was a grave omission.

That on 9th October 2018, when the Notice to show cause was scheduled to be heard, Counsel on record had travelled to Nyeri High Court to attend to a matter being **Employment and Labour Court Case No. 86/2017 (John Waititu Mharia –vs- The Board of Trustees Archdiocese of Nyeri)**.

The Applicant further submitted that on 19th November 2018, when the matter was presumed to be in court, Counsel on record checked the online Cause List and found out that no such matter had been listed, and consequently instructed the firm's legal clerk to confirm the status of the instant Court file.

That from 19th November 2018 up to 30th November 2018, they made efforts to enquire the whereabouts of the Court File from the Registry personnel who confirmed to them that the file was not in the shelves. The personnel in charge at the registry told their clerk to keep on checking on the Court file as they try to locate it.

That the file was finally found on 10th December 2018, and they perused the same on 11th December 2018, when it became evident that the Honourable Judge had dismissed the suit pursuant to the Notice to show cause dated 20th September 2018.

The plaintiff/Applicant relied on the case of Mutau Mwangangi & another –vs- James Mutua Mutio [2016]eKLR, where Edward M. Muriithi J stated;

“Order 12 Rules 1 and 7 of the Civil Procedure Rules empower the court to dismiss a suit for want of attendance by the parties and for reinstatement thereof upon application upon terms as may be just, as follows;

Order 12 Rule 1 of Procedure the Civil Rules 2010 provides:

“if on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”

Order 12 Rule 7 of the Civil Procedure Rules 2010 provides:

“where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order such terms as may be just. I consider that a fortiori, an application being a minor procedure within a suit, the court would have similar powers to dismiss and reinstate an application as in this case.”

The Applicant also referred to the following landmark cases on exercise of judicial discretion;

Pithon Waweru Maina vs Thuka Mugiria .C.A.27 of 1982;

Patel vs Cargo Handling Servces Ltd [1974] E.A 75 AT 76;

Shah vs Mbogo [1967] E.A. 116 at 123.

The import from the above cited cases; is that judicial discretion is unlimited and unrestricted; it is to be exercised to avoid injustice, hardship, resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist to obstruct or delay the course of justice.

1ST DEFENDANT’S SUBMISSIONS

THE FACTS

The 1st Defendant submitted that the facts surrounding the Plaintiff’s Notice of Motion dated 31st January 2019 arose from the proceedings in this suit which in turn gave rise to the Notice to show cause why the case should not be dismissed under **order 17 Rule 2** of the **Civil Procedure Rules 2010**.

The said notice to show cause dated 20th September 2018 was served upon the Plaintiff’s Advocates on 20th September 2018 and on the 1st Defendant’s advocate on 21st September 2018.

The aforesaid notice to show cause categorically stated that;

“whereas in this suit no application has been made or step taken by either party for over a year, you are hereby called upon to show cause by way of an affidavit why this suit should not be dismissed.”

That the Plaintiff did not file any affidavit whatsoever to show cause why this suit should not be dismissed. Further on 9th October 2018 when the Notice to show cause was set for hearing, the Plaintiff’s Advocates were absent whereas the 1st Defendant’s Advocate was represented by Mr. Leteipan Advocate who urged, on behalf of the 1st Defendant, that the suit be dismissed for want of prosecution.

That prior to the foregoing facts, there are a number of corresponding facts that will surely demonstrate to this Honourable Court the lack of interest on the part of the Plaintiff to pursue the hearing and determination of this suit and the same are captured below.

That the Plaintiff instituted this suit way back on 23rd December 2014 as a **“fast-track claim”** under certificate of urgency. After the Plaintiff secured a temporary injunction to prevent the sale of the suit property on 16th May 2017, the Plaintiff has never made any effort at all to prosecute this suit.

Despite the Plaintiff averring on oath at paragraph 9 of her Supporting Affidavit sworn on 22nd December 2014 and filed in court on 23rd December 2014 that “she was in the process of selling various parcels of land registered in her name to enable her repay the loan with the 1st Defendant”, the Plaintiff has to date not made any attempt at all to repay the loan to the 1st Defendant.

Despite the Plaintiff being given by this Honourable Court **14 days** from 16th May 2017 to amend her pleadings and serve the 1st Defendant with the amended pleadings, the Plaintiff has never adhered to this Honourable Court's directive.

That this Court already made a decision on the Plaintiff's application for temporary injunction by forbidding the 1st Defendant from Selling, offering for sale whether by public auction or otherwise the Charged Property known as **L.R. No. 12149/9, I.R No. 86747** situated in Kahawa Wendani, Kiambu County **"for a period of 90 days to permit the Plaintiff to make proposals for settling the outstanding sums."** Therefore; the Plaintiff's Notice of Motion dated 31st January 2019 is an attempt by the Plaintiff to have a second bite at the same cherry.

Despite this Court giving the Plaintiff leeway of 28 days from 16th May 2017 to present an Affidavit in court setting out the details of her repayment plans to redeem the suit property, the Plaintiff has not adhered to this honourable court's directive aforesaid.

DETERMINATION

The issue for determination is whether the suit ought to be reinstated and/or the Applicant is granted injunction pending hearing and determination of the suit.

The Court record confirms the following uncontroverted facts;

The plaintiff filed Plaint on 20th December 2014 and sought an injunction against the 1st Defendant, setting aside notification of sale of 10th December 2014, the Notice served under Section 90 of Land Act 2012 and substitute order to appoint Receiver Manager with any other remedy.

On 21st December 2014, the Court granted interim injunction pending and determination of application. The Applicant was granted leave to amend the pleadings.

The Court record is not clear as to what transpired from thereon; except for the fact that on 20th September 2018, a Notice of Dismissal was issued to Plaintiff/Applicant and Defendant/Respondent through their respective advocates who were duly served as confirmed by both law firms' stamps, on the served documents. The Applicant alleged that the date was erroneously diarised as 19th October 2018 instead of 9th October 2018.

The matter was scheduled on 9th October 2018, on which day Counsel for the Defendant was present and the Plaintiff/Applicant's advocate was not present.

The issue of the Notice to show Cause to the Plaintiff/Applicant and service through the Applicant's advocate on record is not contested.

The absence on the scheduled date 9th October 2018 is explained as inadvertent and mistaken entry of date as 19th instead of 9th October 2018 by the Plaintiff's advocate by the secretary.

He who alleges must prove; no single document has been attached to verify the alleged mistake, nor the subsequent request, search, retrieval of the Court file and/or attendance in Court to inform/correct the mistake. The Applicant did not write to Deputy Registrar on the apparent loss/misplacement of Court file and /or apply to appear before Court to explain the mistake. For now, the mistake, contact with the Registry and/or Court cannot be verified.

For the Court to exercise judicial discretion; it ought to be based on verifiable facts. The alleged fact is not verifiable. Not even a single correspondence from Applicant/Advocate to Registry Personnel on enquiry is availed.

Judicial discretion is unlimited and unrestricted and is to be exercised to avoid injustice, hardship, resulting from accident, inadvertence, or excusable mistake or error. In the instant case the mistake was/is not proved and the efforts to inform the Court of the same and rectify at the earliest opportunity have not been demonstrated by the Applicant.

Secondly, on the merits of the case; the Applicant was granted temporary injunction on 21st January 2015 by L. J. Farah pending hearing and determination of the Applicant's application; Notice of Motion of 23rd December 2014. The matter cannot remain abeyance indefinitely; litigation ought to come to logical conclusion. The plaintiff/applicant did not pursue determination of the claim from 2014-2018. I find no legal basis to reinstate the suit and the application filed on 4th February 2019 is dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MUGAMBI FOR THE APPLICANT

ADVOCATE FOR RESPONDENT

MS. JASMINE - COURT ASSISTANT