



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 360 OF 2009

LYDIA MWIKALI SHADRACK.....PLAINTIFF

VERSUS

ANTHONY MWAKA.....DEFENDANT

RULING

1. In the Notice of Motion dated 13th December, 2018, the Plaintiff is seeking for the following orders:

- a. The dismissal order herein in dated 29th September, 2017 be set aside and the suit herein be reinstated for hearing and determination.***
- b. That there be stay of execution of this court's decree dated 6th August, 2018 pending hearing inter-partes of this Application.***
- c. That cost of this Application be provided for.***

2. The Application is supported by the Plaintiff's Affidavit in which she has deponed that it is only after she was served with a Warrant of Attachment that she became aware of the dismissal of the suit for want of prosecution; that she was never notified when the case was coming up for dismissal of the suit and that she is willing to deposit money as a security for the Defendant's costs.

3. In reply, the Defendant's advocate deponed that since the institution of the suit, the Plaintiff has never exhibited any desire to prosecute the suit; that subsequent to the dismissal of the suit, several court processes were undertaken and that the Defendant's Bill of Costs has been taxed.

4. The Defendant's advocate finally deponed that the Applicant is an indolent litigant who is underserving of the prayers sought in her Application and that the firm of King'oo Wanjau & Company Advocates are not properly on record.

5. In her submissions, the Plaintiff's advocate submitted that the dispute between the Plaintiff and the Defendant can only be resolved by the court; that with the dismissal of the suit for want of prosecution, the dispute remains unresolved and that it should be noted that the High Court had stopped hearing land cases thus the delay in the hearing of this suit. Counsel submitted that the Plaintiff regrets the omission on the part of his advocates and that the Plaintiff is willing to deposit security for costs in court.

6. In his submissions, the Defendant's advocate submitted that the Plaintiff never bothered to pursue her case; that it is the Defendant who took the initiative of fixing the matter for mention on several occasions and that the Applicant should not be heard groaning under the weight of her self-inflicted distress.

7. The record shows that after this suit was filed on 27th October, 2009, the matter was fixed for the hearing of a Preliminary Objection by the Defendant's advocate on 11th October, 2011. The matter did not proceed for the hearing of the Preliminary Objection. When the matter came up on 8th December, 2011, the Application dated 24th February, 2011 for the amendment of the Plaint was allowed.

8. From the time the Amended Plaint was filed by the Plaintiff in the year 2011, the Plaintiff never fixed the matter for hearing. Indeed, it is the Defendant's advocate who fixed the mention dates of 18th April, 2013 and 3rd March, 2014. The last time that this matter was in court was on 15th July, 2015 when neither the Plaintiff's nor the Defendant's advocates were in court.

9. On 29th September, 2017, and after the Plaintiff's advocate had been served with the Notice to show cause why the suit should not be dismissed for want of prosecution, the court dismissed the suit.

10. The Plaintiff has not informed the court why she never made a follow up to ascertain the position of her suit since the year 2011 when the Plaintiff was amended. Indeed, the Plaintiff, did not bother to personally fix the matter for hearing or get another advocate to prosecute the matter timeously and expeditiously.

11. Considering that the Plaintiff never attempted to fix this matter for hearing since the year 2009 when the suit was filed, and in view of the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules which mandates the court to dismiss the suit which is not set down for hearing for a year, I find that the Plaintiff has not given any plausible reason why the orders dismissing the suit for want of prosecution should be set aside.

12. For those reasons, I dismiss the Application dated 13th December, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE