



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 6 OF 2015 (O.S)

HAMIS HAMADI MWADENDE & 15 OTHERS.....APPLICANTS

VERSUS

MAMA HASINA MOHAMED & 4 OTHERS.....RESPONDENTS

RULING

(Application for reinstatement of a suit that was dismissed for want of prosecution; no appearance on the date of the notice to show cause by counsel for the applicants; counsel stating that he was engaged in other matters; reasons not convincing; NTSC being the sort of matter that urgent and immediate attention ought to be given by counsel; application also filed after 7 months which would constitute unreasonable delay in absence of reasonable explanation of which none convincingly given; no grounds upon which to allow the application; however apparent that the order of dismissal was made when all respondents had died and the suit had abated; there was therefore no suit upon which the order of dismissal could be made; instead, the order of dismissal of the suit substituted with the order that the suit has abated; no orders as to costs)

1. The application before me is that dated 11 July 2019 and filed on 12 July 2019 by the applicants under the provisions inter alia of Order 12 Rule 7 of the Civil Procedure Rules, 2010. This suit was dismissed for want of prosecution on 1 November 2017, and what this application seeks is for the setting aside of the order of dismissal and for the suit to be reinstated. The application is opposed.

2. To put matters into context, this suit was commenced through an Originating Summons which was filed on 14 January 2015. In the Originating Summons, the applicants sought orders that it be declared that they have acquired, through the doctrine of adverse possession, title to the land parcel Kwale/Ng'ombeni/1104.

3. The Summonses were served and the 2nd and 5th respondents appointed counsel. I have not seen on record any appearance by the 1st, 3rd and 4th respondents, and on 23 June 2015, the suit against them was withdrawn as it transpired that they were deceased when the suit was filed. I have not seen a reply on record filed by the 2nd and 5th respondents though from the record of 21 July 2015, I can see that Mr. Tindika, learned counsel for the 2nd and 5th respondents did state that he has filed his clients' reply.

4. The matter was fixed for hearing on 27 September 2016 before my predecessor, A. Omollo J, when PW-1, one Hamisi Hamadi Mwadende started giving evidence. She was however stood down with the learned judge pointing out that the land is jointly registered and some owners are deceased. The applicants were advised to reconsider their claim or issue a citation for the deceased respondents and the matter was given the mention date of 1 November 2016. On that day, counsel for the applicants stated that he wished to proceed against the 2nd respondent as the personal representative of the other respondents. No proof that the 2nd respondent is legal representative was given and the applicants were advised to make a decision on the fate of their suit. The matter was stood over generally. On 29 June 2017, counsel for the applicants took a hearing date of 15 November 2017. On 15 November 2017, parties appeared before Komingoi J, for hearing of the suit. Ms. Mwangeka who held brief for Mr. Aboubakar for the applicants, stated that they wished to take out the matter, as it had come to their attention that all the respondents are now deceased. The matter was then stood over generally.

5. Nothing happened to the case until 17 September 2018 when the court on its own motion issued a notice for the applicants to show cause why the suit should not be dismissed for want of prosecution under Order 17 Rule 2. The notice to show cause (NTSC) was fixed for hearing on 15 November 2017 before Waithaka J. On that date, there was no appearance on the part of both counsel for the applicants and the respondents and the case was thus dismissed for want of prosecution.

6. This application was then filed on 12 July 2019.

7. The supporting affidavit is sworn by Yusuf M. Aboubakar learned counsel for the applicants. He has averred in his affidavit that the applicants have been ready to proceed but the suit adjourned at the instance of the defendants (respondents). He has deposed that the

applicants are still interested in the suit. He has acknowledged that the suit was dismissed as he was absent and he has urged that the mistakes of counsel not to be visited upon his clients. He has deposed that he could not immediately file this application as he was involved in various election petitions.

8. The application is opposed by the replying affidavit of Randolph M. Tindika, learned counsel for the 2nd and 5th respondents. He has deposed that all the respondents are deceased. He has deposed that the 1st respondent died on 14 February 1990; the 2nd respondent on 31 December 2016; the 3rd respondent on 27 November 2007; the 4th respondent on 13 October 1997; and the 5th respondent on 14 November 2015. He has annexed the Certificates of Death. He has stated that no details have been given on the election petitions that counsel for the applicant has claimed that he was engaged in and no indication that they fell on the same date that this matter was dismissed for want of prosecution. He does not see any reason why the application should be allowed.

9. I invited counsel to file written submissions but none were filed by Mr. Aboubakar, learned counsel for the applicants. I however allowed him to make oral submissions in support of the application. Mr. Aboubakar asked the court to consider Article 48 of the Constitution on Access to Justice; Article 50 on the right to be heard; and Article 159 (2) (b) on the wider interests of justice. He stated that the case involves the emotive issue of land and that as humans we do make mistakes.

10. Mr. Busieka, who held brief for Mr. Tindika, learned counsel for the respondents, relied on Mr. Tindika's written submissions. In his written submissions, Mr. Tindika pointed out that this suit was not dismissed for non-attendance, but for want of prosecution. He has reiterated that no particulars of the election petitions that counsel claimed he was engaged in have been provided. He has further averred that the application has been filed more than 7 months after the suit was dismissed which he thought was unreasonable and had not been explained. He further submitted that there is no suit capable of being reinstated as the suit has abated.

11. I have considered the rival submissions. This application has been brought pursuant inter alia to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. Order 12 applies to hearings and consequences of failing to attend at a hearing. Under Order 12 Rules 1, 2 and 3, a suit can be dismissed if the plaintiff fails to appear at the hearing. When such suit is dismissed, the plaintiff has leeway to apply under Rule 7 for the reinstatement of such dismissed suit. As correctly pointed out by Mr. Tindika, learned counsel for the respondents, this suit was not dismissed under Order 12 but under Order 17 Rule 2. Order 17 Rule 2 gives the court the discretion to dismiss a suit for want of prosecution where no action has been taken for a year. I agree with Mr. Tindika, that Order 12 Rule 7 does not apply in the circumstances of this case.

12. Nonetheless, I can consider the application under the wider discretion granted to me especially under Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. What I need to be persuaded is that good reason has been given for failure to attend the hearing of the NTSC on 1 November 2018 and that it is just that this application be allowed. In his affidavit, Mr. Aboubakar has deposed that he was involved in various election petitions which he named. However, there was no indication of when these election petitions were concluded and whether their hearings clashed with the date of 1 November 2018 when the NTSC was due for hearing. I am thus not persuaded that good reason has been given for failure to attend the hearing of the NTSC. I am in fact rather disturbed that Mr. Aboubakar did not deem it fit to give priority to the NTSC, even assuming that he had other matters listed elsewhere, whether they be election petitions or not. An NTSC is among those matters where one must give seriousness to, because there is a risk of dismissal of the suit, and nothing could be more tragic to a litigant than to have his/her suit dismissed. An NTSC is not the sort of matter that any counsel worth his salt (or should I say fees) would take casually. It is one of those issues that would call for immediate and urgent attention to any keen counsel. If Mr. Aboubakar was not present, then the reasonable thing to do would have been to instruct counsel to hold his brief. For any counsel to convince court that he/she failed to attend an NTSC because he had other pressing matters would in my view, be a very difficult call to make. That aside, this application has been filed more than 7 months since the order of dismissal was made. The delay of 7 months before this application was filed has also not been adequately accounted for. For all intents and purposes, I really see no reason for me to set aside the order of dismissal of this suit for want of prosecution.

13. Nevertheless, there is the fact that the respondents in this matter had died when the order of dismissal of the suit was made. From the Certificates of Death displayed by Mr. Tindika in his replying affidavit, the last of the respondents died on 31 December 2016. Pursuant to Order 24, the suit abated on 31 December 2017. The order of dismissal was made on 1 November 2018, when this suit had already abated. When the order of dismissal was made, there was actually no suit that could be prosecuted and thus no suit worthy of dismissal for want of prosecution. The fact that all the respondents had died more than one year before the date of the NTSC was not brought to the attention of the court when the court made the order of dismissal. If the same had been brought to the attention of the court, the court would instead have made the order that the suit had abated. The order of dismissal was thus made without the benefit of all material facts and in absence of critical evidence. There is now discovery of new evidence that was not available when the order of dismissal of this suit for want of prosecution was made and in my discretion I will direct the review of the order of dismissal of the suit for want of prosecution. I will set that order aside and instead substitute it with the order that this suit has abated under the provisions of Order 24 Rule 4 of the Civil Procedure Rules.

14. I think Mr. Tindika deserves the costs of the application herein and in my discretion I award him the sum of Kshs. 15,000/= payable by the applicants. On the costs of the abated suit, I make no orders as to costs. The final order therefore is that this suit is marked as abated with no orders as to costs save for the sum of Kshs. 15,000/= being costs of this dismissed application payable to Mr. Tindika.

15. Orders accordingly.

DATED and delivered this 22ND day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA