



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 423 OF 2012

BENSON NJERU MURIRIA.....PLAINTIFF

VERSUS

SYOKIMAU FARM LIMITED.....1ST DEFENDANT

GILBERT MAGERA NORU.....2ND DEFENDANT

AND

JOHN KILOLO MANG'ELI.....1ST INTERESTED PARTY

CHIEF LAND REGISTRAR.....2ND INTERESTED PARTY

RULING

1. In the Notice of Motion dated 31st July, 2019, the Plaintiff is seeking for the following orders:

- a) *That the order of the Honourable Justice O. Angote made on the 29th day of July, 2019 dismissing the suit filed herein be reviewed, varied or set aside.*
- b) *That the suit herein filed on 14th November, 2012 be reinstated and reopened for trial and orders that the hearing of the main suit be on 30th September, 2019.*
- c) *That the injunction and/or status quo orders be reinstated as at the time of the ruling of Hon. O. Angote on the 9th day of November, 2017.*
- d) *That upon reinstatement of the suit a prayer for leave to amend the *Plaint*, *List of Documents*, *Witness Statements* and to file a *Defence* to the *Counter-claim* out of time be granted.*
- e) *That the Chief Land Registrar, Nairobi be enjoined in these proceedings as an Interested Party.*
- f) *That costs of this application be in the cause.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that this case dates back to 2011 when the parties were engaged before the Chief Magistrate's Court; that he has since obtained the original documents from his former advocate and that he is a fairly old man and very anxious to have this matter concluded.

3. The Plaintiff deponed that there is serious professional misconduct by the firm of Githinji & Kamunda Associates Advocates since the law firm was acting for him in ELC No. 358 of 2011; that currently, the said firm is acting for the 2nd Defendant and that Mr. Kamunda advocates is conflicted in this matter.

4. The Plaintiff deponed that there is need to protect the suit properties L.R. No.12715/132 and 12715/1333 and to enjoin the Chief Land Registrar; that Mr. Christopher Nzimbe and the late Maingi were only members in the 1st Defendant's company but had no authority to sell the land and that the said Nzimbe should be enjoined in this suit because the 2nd Defendant has a claim against him which can be recovered in damages.

5. According to the Plaintiff, his former counsel, Mr. Gichigi advocate, abdicated his duty to file documents and closed his practice after joining politics and that the current advocate for the 2nd Defendant, Mr. Kamunda, had a close working relationship with his then advocate, Mr. Gichigi advocate.
6. In the Grounds in support of the Application, it was argued that the Plaintiff was not afforded a chance to be heard before the order of 29th July, 2019 was issued and that on the hearing day, counsel for the Plaintiff was represented by Mr. Mutuku, holding brief for Mr. Langat, who was attending Anti-Corruption Criminal Case No. 18 of 2019 and 21 of 2019 in which he was on record for the accused persons.
7. The Plaintiff averred that on 5th June, 2018, the Chief Justice issued a directive that Graft cases be heard and determined on priority basis and that the current suit is tenable in law having attracted a Defence that has brought into the limelight the particulars of fraud on the part of the 2nd Defendant.
8. In his Replying Affidavit, the 2nd Defendant deponed that since 11th June, 2015, the Plaintiff or his advocates, failed to set the matter down for hearing; that out of the inordinate delay, he applied to have the suit dismissed for want of prosecution; that the matter is now seven (7) years old and that the matter has always been adjourned at the behest of the Plaintiff.
9. According to the 2nd Defendant, the Plaintiff's advocate was granted three days to familiarize himself with the matter; that on 29th July, 2019, when the matter was called out, it is only his advocate and the 1st Defendant's advocate who were present and that the 1st Defendant's advocate expressed difficulties in proceeding with the matter.
10. The 2nd Defendant deponed that the 1st Defendant's advocate has no client because the 1st Defendant was wound up vide gazette notice of 18th August, 2013 through a notice of Voluntary Winding up of 26th July, 2013.
11. It was deponed that for the last six (6) years, neither the Plaintiff nor the Defendants have bothered to file a reply to Defence and a Defence to the Counter-Claim and that a delay of six (6) years to file a Defence to the Counter-Claim is unreasonable and inexcusable.
12. The 2nd Defendant deponed that pre-trial took place on 2nd May, 2018 in the presence of the Plaintiff's advocate and that the Plaintiff failed to file a Defence to the Counter-Claim even after being granted 30 days to comply with order 11 of the Civil Procedure Rules.
13. The 2nd Defendant finally deponed that this suit is time barred; that the share certificates the Plaintiff is relying on are not genuine and that the Plaintiff applied for review of the orders of 29th July, 2019 and exhausted his chances. It was deponed that what remains is for the Plaintiff to file an Appeal. The 2nd Defendant denied that his current advocate worked with firm of Gichigi and Kamunda Advocates, as alleged.
14. In his submissions, the Plaintiff's advocate submitted that under Order 12 Rule 7, and Order 51 Rule 1 of the Civil Procedure Rules, the court has the discretion to allow the suit to be reinstated for hearing on merit; that there is no evidence of failure to comply with the rules of procedure on the part of the Plaintiff and that the concern of the court is to do justice to the parties.
15. Counsel relied on the cases of ***Chemwolo & Another vs. Kubendi [1986] KLR 492; Lee G. Muthoga vs. Habib Zurich Finance (K) Limited & Another Civil Application No. 236 of 2009***, among others.
16. Counsel submitted that this court has powers under section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules to enlarge time fixed by the Rules to do certain acts and that the provisions gives the court the power to allow pleadings to be filed out of time, especially where there are no *mala fides*.
17. The Plaintiff's counsel finally submitted that the Applicant is an innocent litigant; that the Applicant has complied with Order 11 of the Civil Procedure Rules and that the Applicant wishes to canvass this suit by introducing new parties to the proceedings.
18. The 2nd Defendant's advocate submitted that this is an old matter; that the matter has been pending since the year 2012 and would remain so because the Plaintiff is in the habit of changing advocates and seeking adjournments and that the 2nd Defendants is an old man who should be reaping the fruits of his labour. Counsel relied on the case of ***Brikett vs. James [1978] A.C 297*** which spelt out the principles to be considered for setting aside a dismissal order.
19. The 2nd Defendant's advocate submitted that Mrs. Nzilani advocate has no client because the 1st Defendant was wound up on 18th August, 2013 by way of a Gazette Notice and that neither the Plaintiff nor the 1st Defendant filed a Defence to the 2nd Defendant's Counter-claim.
20. Counsel submitted that enjoining the Chief Land Registrar in this suit is unreasonable because there was no Registrar in the year 1983 when the alleged transfer of land to the Plaintiff occurred and that an Interested Party is one who has a stake in the proceedings, which is not the case herein. Counsel relied on the case of ***Trusted Society of Human Rights vs. Mumo Matemu & 5 Others [2014] eKLR***.
21. The 2nd Defendant's counsel submitted that this court dismissed the Plaintiff's suit for want of prosecution on 29th July, 2019 and stayed these proceedings to allow the filing of a formal application for a stay; that the application for a review was heard orally and that the current Application is *res judicata*.

Analysis and Findings:

22. This suit was commenced by way of a Plaint dated 19th October, 2012. In the Plaint, the Plaintiff averred that on 2nd February, 1980, he bought 10 shares from the 1st Defendant and bought another 10 shares on 4th February, 1980; that on 6th August, 1981, the 1st Defendant issued him with two letters of allotment for plots Nos. 68 and 69 within L.R. No.7149/11R and that after the subdivision of the land was completed, the two plots became L.R. No.12715/132 and 133 respectively.

23. The Plaintiff's case is that the 1st Defendant fraudulently had the two titles issued in favour of the 2nd Defendant. The Plaintiff is seeking for a declaration that he is the lawful owner of L.R. Nos.12715/132 and 133.

24. In his Defence, the 1st Defendant averred that the Plaintiff was allotted Plot Nos. 68 and 69 which upon sub-division become L.R. No.12715/132 and 133; that the 2nd Defendant forged documents and presented himself as a shareholder of L.R. 12715/132 and 133 and that the 2nd Defendant is an imposter.

25. On his part, the 2nd Defendant averred that he was issued with Allotment Letters for Plot numbers 68 and 69 within 7149/11R on 1st September, 1983; that the Allotment Letters were processed way back in 1985 and that any Allotment Letters in the name of the Plaintiff are forgeries. In his Counter-claim dated 30th October, 2013 and filed the same day, the 2nd Defendant averred that he should be declared the sole owner of the suit property.

26. The record shows that on 30th October, 2013, the 2nd Defendant filed an Application of the same date seeking for injunctive orders. The 2nd Defendant also filed his list of documents on the same date.

27. Although the Plaintiff's suit was filed by the firm of J.M. Muthami & Co. Advocates, the firm of Oduor H. John Advocates filed a Notice of Change of Advocates on 15th April, 2014.

28. At some point, this matter was transferred to Nairobi before it was re-transferred to Machakos on 14th September, 2014 by Nyamweya J. On 9th November, 2017, this court delivered its Ruling in respect to the 2nd Defendant's Application for injunction dated 30th October, 2013. In its Ruling, this court held as follows:

“The prevailing status quo in respect of L.R. No. 12715/132 and 12715/133 to be maintained pending the hearing of the suit, meaning that neither the Plaintiff nor the Defendants their agents or servants should transfer, alienate or develop the suit property.”

29. After the Ruling of 9th November, 2017, the 2nd Defendant filed an Application dated 26th January, 2018 on 31st January, 2018, in which he sought for an order dismissing the suit for want of prosecution. On 15th November, 2018, the 2nd Defendant filed his list of witnesses and a bundle of documents. The Plaintiff's current advocate filed his Notice of change of Advocate on 23rd July, 2019 while the 1st Defendant's advocate filed her Notice of Change of Advocates on 29th July, 2019.

30. It is true, as submitted by the 2nd Defendant's advocate, that after the Ruling of 9th November, 2017, the parties took pre-trial directions on 2nd May, 2018. On the said date, the court directed all the parties to comply with Order 11 of the Civil Procedure Rules within 30 days by filing comprehensive witness statements and documents. That explains why the 2nd Defendant filed the documents and witness statements on 15th November, 2018.

31. After pre-trial directions, the matter came up for hearing for the first time on 30th July, 2018. On the said date, the Plaintiff's advocate sought for adjournment on the ground that his client had missed a flight from Mombasa. The suit was then adjourned by the court to 27th November, 2018, on which date the court was not sitting.

32. When the matter came up for hearing on 28th May, 2019, the Plaintiff's advocate again sought for adjournment on the ground that the Plaintiff was diabetic and was ailing. The court adjourned the matter and fixed it for hearing on 24th July, 2019.

33. On 24th July, 2019 the current advocate for the Plaintiff informed the court that he had just been instructed by the Plaintiff. The Plaintiff's advocate sought for adjournment for three (3) days to enable him study the file. The court granted counsel the three days he had sought and fixed the hearing for 29th July, 2019.

34. On 29th July, 2019, the 1st Defendant's advocate appeared in court for the first time and asked for time to peruse the court file. The court was also informed of an Application dated 26th July, 2019 filed by the Plaintiff's seeking for an order of the court to visit the locus quo.

35. The Plaintiff's counsel, holding brief for Mr. Langat advocate, asked the court to deal with the Notice of Motion dated 26th July, 2019 first by visiting the *locus quo*. The court declined to adjourn the matter and fixed the matter for hearing at 12.30Pm. At 12.30Pm, the Plaintiff was not ready to proceed with the prosecution of his claim. The court dismissed the Plaintiff's suit with costs.

36. After dismissal of the suit, the Plaintiff's counsel applied for a stay of proceedings pending the hearing and determination of the yet to be filed appeal. The court proceeded to stay the proceedings for 21 days pending the filing of a formal Application for a stay of proceedings.

37. The Plaintiff then filed the present applicant seeking for an order to set aside the order dismissing the suit for want of prosecution and for an order to amend the Plaint and file his Defence to the Counter-claim out of time.

38. The 2nd Defendant's advocate has submitted that when a suit is dismissed for want of prosecution, the Plaintiff cannot seek to review the orders of the court, and that the Application is *res judicata*.

39. An issue or matter is *res judicata* if it is identical, the parties in the suits are substantively the same; there is a concurrence of jurisdiction of the court; the subject matter is the same and there is a final determination as far as the previous decision is concerned.

40. The record shows that after dismissing the Plaintiff's suit for want of prosecution, the Plaintiff sought for an order staying the proceedings. The Plaintiff did not apply for an order to review or to set aside the order dismissing the suit. That being the case, and the court having not considered an Application, oral or otherwise, to set aside the order dismissing the suit for want of prosecution, the Application before me cannot be said to be *res judicata*.

41. Indeed, an issue or matter can only be said to be *res judicata* if there is a final determination on record, which determination was heard on merit, and between the same parties. Having not heard on merit an Application for setting aside the order of 29th July, 2019 dismissing the Plaintiff's suit, I find and hold that the current Application is not *res judicata*.

42. The Plaintiff has sought for an order to set aside the order dismissing his suit on the ground that his counsel was attending to Graft cases in Anti-Corruption Criminal Cases Nos. 18, 19, 20 and 21 of 2019; that the Chief Justice had issued directives that Graft cases be heard and determined on priority basis and that there are triable issues in this matter which should be heard on merit.

43. Order 12 Rule 7 provides that where Judgment has been entered or the suit has been dismissed, the court may set aside or vary the Judgment or order upon such terms as may be just. In the case of ***Basil Criticos vs. Third Engineering Bureau of China City Construction Group Company Limited [2018] eKLR***, the court held that the decision whether a suit should be reinstated for trial is a matter of justice and depends on the facts of each case.

44. In the case of ***Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR***, Gikonyo J. held that what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues:

a) ***Whether the delay has been intentional and contumelious;***

b) ***Whether the delay or the conduct of the plaintiff amounts to an abuse of the court;***

c) ***Whether the delay is inordinate and inexcusable;***

d) ***Whether the delay is one that gives rise to a substantial risk to fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and***

e) ***What prejudice will the dismissal cause to the Plaintiff.***

45. It is trite that the court has unfettered discretion to either allow or refuse to set aside the order of dismissal, which discretion is to be exercised on principles. In the case of ***Shah vs. Mbogo (1967) EA 116***, it was held that discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice.

46. The evidence before me shows that although this suit was filed in the year 2012, it was not until the 9th November, 2017 that the 2nd Defendant's Application for injunction was decided. The matter was therefore not ready for hearing between the years 2012 and 2017.

47. When the matter came up for hearing thereafter, and before 29th July, 2019, the same was adjourned at the behest of the Plaintiff for good reason. Although this court declined to adjourn the matter on 29th July, 2019, it has now been informed that the Plaintiff's advocate was involved in several anti-corruption matters in Nairobi. It is common knowledge that the Chief Justice had directed courts and advocates to prioritize anti-corruption matters over and above other court matters.

48. That being the case, and considering that the 2nd Defendant has not prosecuted his Counter-claim, I shall exercise my discretion in favour of the Plaintiff. I say so because there is no evidence before me to show that the delay in prosecuting this suit since it was filed in the year 2012 has been occasioned by the Plaintiff solely.

49. Indeed, land being an emotional issue in this country, the dismissal of the suit before hearing it on merit for the mistake of counsel, who took up too many matters in different courts on the same day, will be prejudicial to the Plaintiff. For those reasons, the order of 29th July, 2019 dismissing the Plaintiff's suit is set aside.

50. In the case of ***Central Kenya Limited vs. Trust Bank & 4 Others, C.A. No. 222 of 1998***, the Court of Appeal held that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder will not prejudice or cause injustice to the other party which cannot be compensated for in costs.

51. Having set aside the order of the court dismissing the Plaintiff's suit, and in view of the provisions of Order 8 Rules 5 (1) of the Civil Procedure Rules which provides that the court may order any document to be amended for the purpose of determining the real question in controversy between the parties, I shall allow the Plaintiff's prayer to amend its Plaint, which they purported to file on 23rd September, 2019.

52. The Amended Plaintiff which was purportedly filed on 23rd September, 2019 can only pass as a Draft Amended Plaintiff because the same could and should not have been filed without the leave of the court. That also applies to the Reply to Defence and Defence to the Counter claim which was filed out of time and after the Plaintiff's suit had been dismissed for want of prosecution.

53. In the interest of justice, and to enable this court to effectively adjudicate the dispute before it, I shall grant the Plaintiff leave to file his Reply to Defence and Defence to the Counter-Claim out of time. Considering that an order of *status quo* granted on 9th November, 2017 is still on record, the prayer for an injunction is declined.

54. For those reasons, I make the following orders:

- a) The order of this Court of 29th July, 2019, dismissing the Plaintiff's suit for want of prosecution be and is hereby set aside.*
- b) The Plaintiff is granted leave to file and serve a Reply to Defence and Defence to the Counter-claim within 30 days of the date of this Ruling.*
- c) The Plaintiff is granted leave to file and serve his Amended Plaintiff within 30 days of the date of this Ruling.*
- d) The Defendants are at liberty to file and serve their Amended Defence and Counter-claim within 30 days of service of the Amended Plaintiff.*
- e) The Plaintiff to pay to the 1st Defendant thrown away costs of Kshs. 20,000 before the next hearing date.*
- f) This suit to be fixed for hearing on a priority basis.*
- g) Each party to bear its costs for the Application.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE