



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CAUSE NO. 239 OF 2017

(FORMERLY NAIROBI 808 OF 2003)

TELPOSTA PENSION SCHEME

REGISTERED TRUSTEE.....PLAINTIFF/APPLICANT

-VERSUS-

VICKY KHADAKA LIYAI.....1ST DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR THIKA.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **27th May 2019**, by the Plaintiff/Applicant seeking for orders that;

- 1. THAT the honourable court be pleased to set aside the order made on 30th October, 2017, dismissing the suit herein and all consequential orders.***
- 2. THAT this honourable court be pleased to reinstate the plaintiff's suit for hearing on merit.***
- 3. THAT cost of this application be provided for.***

The Application is premised on the grounds that the suit herein was dismissed for want of prosecution on **30th October 2017**. That neither the Plaintiff/ Applicant nor its advocates on record were made aware that the same was fixed for **Notice to Show Cause** on the said **30th October 2017**. Further that the plaintiff's / Applicant's advocates had been diligently attending court on the various occasions when the matter came up in Nairobi until when the matter was transferred to Thika Environment and Land Court. That there is no evidence that the court made any effort to trace and serve the **Notice to Show Cause** on either the Plaintiff or its advocates. Therefore, the failure to attend court on the material date was not deliberate or all as the Plaintiff's/Applicant's advocates were not made aware that the matter was coming up for **Notice to Show Cause** why the suit should not be dismissed for want of prosecution. It was further contended that the plaintiff's / Applicant's counsel only learnt of the dismissal order on **4th March, 2019**, when she sent her clerk to file an application seeking that the Land Registrar does implement the directive of the **National Land Commission**, by revoking the title that was issued in favour of the **1st Defendant/Respondent**.

The Application is supported by the supporting Affidavit of **Anne Mathenge** the Plaintiff's/ Applicants Counsel on record. She averred that their Law Firm filed the suit herein on behalf of the Plaintiff/ Applicant in the year **2007**. That the plaintiff has all along been desirous to prosecute the same. It was her contention that the law firm only learnt that the matter was transferred from Milimani Environment & Land Court to the Environment & Land Court at Thika sometime in the year **2018**, when they made attempts to fix the matter for pre-trial directions.

She further averred that the matter was fixed for mention before Hon. **Lady Justice Gacheru** on **2nd October 2017**, but neither the plaintiff nor its advocates were served with a Mention Notice. that there is no evidence on record indicating that the Court made any effort to trace and serve the plaintiff or its advocates with any notice. She further averred that the matter again came up on **30th July 2018**, for a Notice to Show Cause but they did not enter appearance due to lack of notification from court. She further averred that the Plaintiff/ Applicant had on various occasions fixed the matter in court prior to the same being transferred to Thika Environment and Land Court as the plaintiff has

always been ready to prosecute the same.

It was her contention that they instructed their staff to file an Application dated **1st March, 2019**, and that is when they realized that the suit had been dismissed for want of prosecution. That upon perusal of the court record, it was evident that the matter had been fixed for mention on several occasions, but neither the plaintiff nor its advocates had been served with the mention notice as instructed by court. She averred that failure to attend court was not deliberate or in bad faith as no mention notice was served upon them as ordered by court.

It was her contention that the plaintiff has a strong case which should be allowed remain active and go for full trial and determined on merit.

That the orders sought will not prejudice the defendant and it is in the interest of justice that the application be allowed and the suit herein be reinstated.

The Application is opposed and the Defendant/ Respondent filed a Replying Affidavit dated **23rd September 2019**, and averred that she is the current legal owner of all that piece of land situated in **Thika Municipality** known as **Thika/Municipality/Block 9/302**. It was her contention that the Plaintiff/Applicant has been delaying the matter in bad faith and it is evident from the record that on **23rd of March, 2015**, was the last time that the Applicant appeared in court and the matter was active and the learned judge directed that the matter be mentioned for further directions and pre-trial on **4th June, 2015**. That Since then, Plaintiff/Applicant has not taken any action in the matter, until it was dismissed for want of prosecution. She further averred that it is not true that the matter came in court on **30th of July 2018** as the same had been dismissed for want of prosecution by the learned **Lady Justice Gacheru** .

It was her contention that they were served with a Notice to show cause from the Deputy Registrar, **Environment & Land Court at Thika**, on **16th October, 2017**, indicating that no application nor any step had been taken in the matter by either party for one year and parties were required to appear in court on **30th October, 2017**, to **show cause** why the suit should not be dismissed. Further that on the **30th of October, 2017**, when the matter came up in court, the Plaintiff/Applicant did not attend court to **show cause** and the suit was dismissed for want of prosecution. She further averred that the plaintiff/applicant has produced a letter dated **19th February, 2018**, and marked as AM-1 addressed to the Deputy Registrar, Milimani, Environment and Land Court and upon perusal, it is noted that the face of the letter has comments to the effect that the matter had been transferred to the **Environment & Land Court at Thika** on **14th February 2017**; That despite the advice, the applicant filed this instant application on **31st May, 2019**, and served the same upon her advocates on **12th September, 2019**, indicating the applicant's obvious delay in prosecuting this matter. She further averred that the Plaintiff/Applicant has delayed in the prosecution of this as the last time the plaintiff/applicant attended court for the matter before its dismissal was on **30th October, 2017** was on **23rd March, 2015**, a record 2 years with no further action on the matter. Further that though the applicant was advised that the matter had been transferred to Thika Environment and Land Court by Court order on **8th February, 2017**, the Plaintiff/Applicant has never taken any steps to apply to court sooner than **31st May, 2019**, when they filed the instant application. That the instant application has been filed 7 months after letter dated **19th February, 2019**, and 2 years after dismissal of the matter on **30th October, 2017**. Further that on **23rd March 2015**, the Court directed that the matter undergoes pre-trial directions and the same has not been done. That the instant application was filed on **31st of May, 2019**, meaning a 2 month delay.

It was contended that there was no good reason advanced for the delay in filing the instant application and to make matter worse, no cause has been shown why the matter remained inactive over a lengthy period of time. The Court was urged to dismiss the application with costs.

The Application was canvassed by way of written submissions which this Court has now carefully read and considered together with the affidavits and the annexures thereto. The Court finds that the issue for determination is **whether the Applicant is entitled to the orders sought**.

Order 12 Rule 7 of the Civil Procedure Rules provides that where under this Order, Judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the said Judgment. The power to set aside **ex parte orders** are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in **Patel...Vs...E.A Cargo Handling Services Ltd (1974) EA 75**, held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

Further, it is this Court’s considered view that in deciding on whether or not to grant the orders sought and exercise its discretion, the Court is also guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed and thereby prejudice occasioned to the Respondent. See the case of **Wachira Karani ...Vs... Bildad Wachira (2016) eKLR**, in allowing an application to set aside an *ex parte* judgment, the Court held that:-

“The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing.”

In the instant case the Plaintiff/ Applicant is seeking to have the orders dismissing its suit be set aside. The anchor upon which the Plaintiff/ Applicant is relying on the said orders is premised on the facts that they were never served with the **Notice to Show Cause**, when the matter was set down on the **30th October 2017**. Further the Plaintiff has alleged that it was not aware that the matter had been transferred from **Nairobi Environment & Land Court** to **Thika Environment & Land Court** and it is only when they sought for a mention date that its Advocate learnt that the matter had been transferred. Further that they only learnt that the matter had been dismissed when they sought to file an Application.

However, the 1st Defendant/Respondent is opposed to the Application for reinstatement of the suit and has averred that the Plaintiff/Applicant has failed to prosecute the suit and is acting in bad faith as the last time the Plaintiff/ Applicant was in Court was in 2015. It was further averred that the instant Application has been brought two years after the suit was dismissed and seven months after the Plaintiff/ Applicant was informed that the matter had been transferred to Thika.

It is not in doubt that the instant Application was necessitated by the fact that the Plaintiff's/ Applicants suit was dismissed for want of prosecution. When the Court on its own Motion called upon the parties to **show cause** why the suit should not be dismissed for want of prosecution, a Notice to such effect should be served. The Court has perused the Court filed and notes that the Mention Notice issued by this Court dated 2nd October 2017, was to be served upon the parties for the hearing of the Notice to show Cause and was served upon the Law Firm of **J.A Guserwa & Company Advocates** who are the Advocates for the 1st Defendant. Further alongside the Law Firm of **Kale Maina Bundotich & Company Advocates**, It has been indicted that they had relocated their offices to an unknown place, thereby evidencing that they had **not** been served.

Order 17 Rule 2(1) of the Civil Procedure provides that;

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

Therefore, it is clear that it is a requirement that the parties to the suit ought to be served with the said **Notice**. It has been the Plaintiff's / Applicant's contention that it was never served with the **Notice to Show Cause**. As already held above, it is not in doubt that the Plaintiff/ Applicant through its Advocate were **never** served with the Notice to Show Cause, and consequently did not get a chance to **Show Cause** why the suit was **not** to be dismissed as required in law.

Further, the Court finds that the reason as to why parties are called upon to show cause is so that the Court is able to determine whether the suit ought to be dismissed or not and if there is a satisfactory explanation, then the parties **may** be allowed to prosecute their case with conditions. In this instant case, it is evident that the Applicant never got that chance and therefore, for the interest of justice and equity, the Plaintiff/ Applicant should be allowed to prosecute its case within the confines of time limitations. See the case of **Eunice Soko Mlagul...Vs...Suresh Parmar & 3 others (2018)eklr** where the Court held that;

“it is clear from the above that notice was not issued to either party before the suit was dismissed. In the circumstances the dismissal of the suit under Order 17 Rule 2(1) was to say the least unfortunate and unprocedural.”

This was clearly not done in the present case rendering the dismissal without Notice prejudicial to the Plaintiff. The rules of natural justice require that before an order adverse to any party is made by a court that party ought to be heard and allowed to make representations.

In the case of **Shah...Vs...Mbogo (1967) EA 166**, the Court stated that:-

“this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.”

With the above in mind, this Court finds and holds that the Defendants/Respondents will not be prejudiced, if the suit is reinstated as she will have a chance to present her case. Therefore, the Court finds that this is a case which warrants it to exercise its discretion in favour of the Plaintiff/ Applicant.

Having now carefully read and considered the instant Application, the affidavits and annexures thereto together with the rival written submissions, the Court finds that the Notice of Motion Application dated 27th May 2019, is **merited** and the same is allowed entirely in terms of prayers **No. 1 & 2** with costs being in the cause

It is so ordered.

Dated, signed and Delivered at Thika this 25th day of June 2020.

L. GACHERU

JUDGE

25/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this **Ruling** has been delivered to the parties online with their consents. They have

waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of and virtual appearance via zoom

M/s Nyabete for the Plaintiff/Applicant

M/s Musere Holding brief for Guserwa for the 1st Defendant/Respondent

No consent for the 2nd Defendant

No consent for the 3rd Defendant

L. GACHERU

JUDGE

25/6/2020