



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 87 OF 2017

(FORMERLY MILIMANI ELC NO.562 OF 2009)

ELIZABETH MUMBI.....PLAINTIFF/APPLICANT

VERSUS

TIMOTHY KIMANI MUIGAI.....1ST DEFENDANT/RESPONDENT

VIRGINIAH WANJIKU KIMANI.....2ND DEFENDANT/RESPONDENT

NJENGA WAHU-CHAIRMAN

AWENDO COMPANY LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **11th February 2019**, by the Plaintiff/ Applicant seeking for orders that;

- 1. THAT the Plaintiff/ Applicant be granted leave to reinstate this suit.***
- 2. THAT the Court be pleased to vacate or vary/set aside the orders issued on the 26th November 2018.***
- 3. THAT the Court be pleased to reinstate the suit for hearing and determination on merit.***
- 4. THAT the costs be provided for.***

The Application is premised on the grounds that the matter was issued with a notice to show cause dated **13th August 2018** instructing the Applicant to appear in Court on **9th October 2018**. However the suit was dismissed on **26th November 2018** without cause and it is therefore in the interest of Justice that the Application is allowed.

In his supporting Affidavit **Kimani Kagwima**, Advocate for the Plaintiff/ Applicant, averred that the Plaintiff instructed his Law Firm to represent her who in turn filed a notice of Change of Advocates dated **19th June 2017** and filed on **20th June 2017**. That on the **13th August 2018**, the Court decided on its own motion to issue a **Notice to show cause** as to why the matter should not be dismissed for want of prosecution. It was his contention that on the **9th of October 2018**, they attended Court but by the time the court session was coming to an end, the Court file could not be traced. He further averred that during filing of pleadings, he discovered that the suit had been placed before the Court at least 3 times after the initial **Notice to Show Cause** dated **13th August 2018**, was served upon them without their knowledge.

He further averred that the Court sought to dismiss the suit on **26th November 2018**, without any Notice to them. It was therefore his contention that the Applicant has a claim that the Court should hear and determine on merit and it would be just that the orders for dismissal be vacated.

The **2nd** Defendant/ Respondent seemed to support the Application and filed a Replying Affidavit and averred that the Plaintiff's/ Applicant's Advocate gave a plausible explanation justifying in part action as he was only appointed on **19th June 2017**, and therefore the delay should not include the time that lapsed when the matter was not in his hands. She further averred that the Plaintiff/ Applicant has triable issues. Further that there was no Notice of intention to dismiss the suit on **26th November 2018**, that was served upon the Plaintiff's/Applicant's Advocate notifying them of the new date. She contended that the Court should consider safeguarding the right to be heard as the instant Application was brought without reasonable delay.

The 3rd Defendant filed a Notice of Preliminary objection on 3rd April 2019, and averred that the Plaintiff/ Applicant's Application is premature, unprocedural and misconceived and that the Court should not allow itself to be misused by the Applicant to continue to benefit her selfish illegal interest over the suit property. Further that the Applicant has never shown any serious efforts to expeditiously continue prosecuting the suit as her Application could not have taken this long period since the suit was filed. He further averred that the Application is misconceived as it is not **Justice L.Gacheru**, who dismissed the suit but **Justice Ongondo** .

The Plaintiff/ Applicant filed a further affidavit and averred that the delay for prosecution of the suit was occasioned by the Court's diary which had been totally booked. She further averred that there were times that the Court file could not be traced and that sometime in **February 2017**, she learnt that the matter had been transferred to the **Environment & land Court at Thika** and it was not until she appointed her instant Advocates that it was discovered that the Court had issued a **Notice to Show Cause** on 5th April 2017. She further averred that the matter could not proceed on 27th September 2017, when it was coming up for hearing as they learnt of the passing on of the 1st defendant. She reiterated the averments made in her counsels supporting affidavit and contended that she has been serious and that it is not her fault that the Court file went missing.

The 3rd Defendant filed a Replying Affidavit sworn on 14th July 2019 by its Managing Director and averred that the Plaintiff's / Applicant's counsel admits that he was served with the Court's Notice to Show Cause dated 13th August 2018. It was his contention that the Applicant has not demonstrated serious diligent in prosecuting her claim and the allegations in the instant Application should not be entertained as they are an afterthought. He further averred that the orders of dismissal issued should not be vacated as the Plaintiff/ Applicant has never demonstrated any seriousness in prosecuting the suit from the year 2009 as against the Defendants.

The 3rd Defendant/Respondent filed a **further Affidavit** in reply to the 2nd Defendant's /respondent's **Replying Affidavit** and averred that it was mysterious why the 2nd Defendant/ Respondent is turning against her fellow defendants. He further averred that as a result of the Plaintiff's/ Applicant's actions of non-compliance of the Court's directions, the Court dismissed their suit for want of prosecution and all her allegations in her Replying Affidavit are misleading hence unmerited.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered.

This Court will first and foremost state that the said suit was dismissed by **Hon. Justice G.W Ongondo**, during the service week that was held in this Court in the year 2018. The said **Honourable Judge** is not a resident in this station and though ordinarily the matter ought to be determined by the said Judge who dismissed the matter this Court is allowed by **Order 45** to hear and determine the same. That **Order 45 Rule 1 of Civil Procedure Rules** makes provisions for applications for review of a decree or order. The application should be made to the court that **"passed the decree or made the order without unreasonable delay."** That **Rule 2(1)** provides that;

"An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred in Rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed."

That **sub-rule 2** goes on to provide that;

"If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing."

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. From the annexures and the proceedings in the Court file, it is clear that there were various **Notices** that were sent out to the parties but on various occasions it would seem that the parties 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit"

It is therefore clear that the 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 she was never served with the **Notice to Show Cause**. This Court has gone through the Affidavit of service dated 26th November 2018 sworn by **Moses Ojwang**, the Court's Bailiff and noted that he indicated that when he sought to serve the Plaintiff's Advocate he found that the offices had been locked and therefore, he did not effect service. It is this Court's considered view that the Plaintiff/ Applicant 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 they **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 Plaintiffs/ Applicant should be allowed to prosecute her 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.

Having now carefully read and considered the Application, the affidavits and annexures thereto together with the written submissions, the Court finds that the Notice of Motion Application dated **11th February 2019** is merited and the same is allowed entirely in terms of prayers **No.1, 2 & 3** with costs being in the cause

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of June 2020.

L. GACHERU

JUDGE

15/6/2020

In the presence of

No Consent for the Plaintiff/ Applicant

No Consent for the 1st Defendant/Respondent

No Consent for the 2nd Defendant/Respondent

No Consent for the 3rd Defendant/Respondent

Jackline - Court Assistant

L. GACHERU

JUDGE

15/6/2020