



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 28 OF 2012

JOHN MUCHIRI MAGONDU.....PLAINTIFF

VERSUS

THE CHAIRMAN, BOARD OF GOVERNORS

ST. PAUL'S PRIMARY SCHOOL.....1ST DEFENDANT

MWEA LAND DISTRICT TRIBUNAL.....2ND DEFENDANT

SENIOR RESIDENT MAGISTRATE WANGURU.....3RD DEFENDANT

KIRINYAGA COUNTY COUNCIL.....4TH DEFENDANT

KIRINYAGA COUNTY GOVERNMENT.....5TH DEFENDANT

RULING

INTRODUCTION

The plaintiff vide a plaint dated 4th June 2010 and filed on 7th June 2010 sued the 1st defendant for a declaration that the judgment adopting the elders award dated 12th November 2009 at Wanguru SRMC Arbitration Case No. 14 of 2009 is null and void as the proceedings before the Mwea Land Disputes Tribunal were incompetent and void abinitio as the Tribunal had no jurisdiction to order that the title deed issued to the plaintiff be revoked in favour of the defendant. In an amended plaint dated 12th October 2010, the plaintiff enjoined the 2nd, 3rd and 4th defendants as parties to this suit. The plaintiff also amended the prayer in the judgment.

On 12th November 2010, the 1st defendant filed her statement of defence and on 3rd December 2010, the 4th defendant filed her defence to the claim. On 31st October 2010, the plaintiff Re-amended the plaint by enjoining Kirinyaga County Government as the 5th defendant herein. The plaintiff also amended the prayers in the plaint as follows:

(a) A declaration that the judgment adopting the elders award dated 12th November 2009 at Wanguru SRMC Arbitration Case No. 14 of 2009 is null and void abinitio as the proceedings before the Mwea Land Disputes Tribunal were incompetent and void abinitio as the tribunal had no jurisdiction to order that the title deed issued to the plaintiff be revoked in favour of the defendant..

(b) A declaration that Mwea Land Disputes Tribunal acted ultra vires on adjudicating on matter relating to the ownership of the land parcel No. KABARE/NYANGATI/128 in Mwea Land Disputes Tribunal Arbitration Case No. 403 KABARE/NYANGATI/128 and that its award dated 30th June 2009 is null and void.

(c) A declaration that the revocation of the plaintiff's title to land parcel No. KABARE/NYANGATI/128 was unlawful and the ownership should remain as it was before the orders of the Court were effected following the adoption of the award which was null and void abinitio and the plaintiff's name should be restored in the register by the Land Registrar, Kirinyaga and revoke the current registration of Kirinyaga County Council and reserved for St. Paul's Primary School.

On 21st March 2019, this matter came up for directions when the parties confirmed that they had duly complied and that the suit was ripe for hearing. The parties then took a hearing date by consent on 17th July 2019. On the said date, the defendant and her counsel were present but

the plaintiff and his counsel were absent. There being no explanation for their absence, this suit was therefore dismissed for non-attendance and for want of prosecution. On August 2019, the plaintiff filed this application under certificate of urgency seeking to reinstate the suit.

APPLICANT’S CASE

The applicant in his supporting affidavit confirmed that when this case came up for mention on 21st March 2019, he was present with his advocate on record. The applicant also confirmed that a hearing date was given in Court for 17th July 2019. However, he stated that his advocate was expected to effect a hearing notice upon the defendant. The applicant further deponed that sometime in the month of May 2019, his advocate called him saying that there was a notice indicating the Court would not be sitting and that there was no need to effect service upon the other parties. He also deponed that his lawyer was to fix a fresh hearing date at the registry and inform him. On 17th July 2019, he called his advocate’s offices and he was informed that his case had been dismissed. He stated that he has been diligent and desirous on fixing the suit for hearing and given a second chance, he shall have the matter heard without further delays. He further stated that there will be no prejudice caused on the part of the defendant if this application is allowed.

RESPONDENTS CASE

The 5th respondent through the firm of Maina Kagio filed grounds of opposition in opposing the application dated 25th September 2019.

ANALYSIS AND DECISION

I have considered the affidavit evidence and the submissions by the counsels. This is an application for setting aside a dismissal of a suit for non-attendance and also for want of prosecution under **Order 12 Rule 3 CPR. Order 12 Rule 7** gives the Court discretion to set aside and/or vary the dismissal of a suit upon such terms as may be just. Numerous precedents have been set by this Court and the Superior Courts on the grounds upon which a Court can set aside a dismissal order. Such grounds and/or reasons include the explanation given for failing to attend Court during the hearing of the suit. In this case, the applicant and his counsel were present in Court on 21st March 2019 when the hearing date was taken by consent of all parties. There is absolutely no plausible explanation given why the applicant and his advocate did not attend Court during the hearing on 17th July 2019. The overriding objective of the **Civil Procedure Act** is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes in our Courts. The Act also enjoins the advocates and all parties in the dispute to participate in the processes of ensuring that the overriding objective is achieved. Having said that, I am alive to the fact that in the discretion that a Court of law has in deciding whether or not to set aside an order of dismissal is meant to ensure that a litigant is not removed from the seat of judgment from any mistake or error or inadvertence provided the opposite party is compensated by an award of costs. In the result therefore, I exercise the Court’s discretion and allow the application in the following terms:

- (1) The order of this Honourable Court issued on 17th July 2019 dismissing the Plaintiff’s suit for non-attendance and for want of prosecution is set aside.***
- (2) The Plaintiff’s suit is hereby reinstated.***
- (3) The Plaintiff/Applicant to pay the 5th Defendant/Respondent thrown away costs of Ksh. 10,000/= within 14 days from today.***
- (4) The Plaintiff/Applicant to take steps to prosecute this suit within three months from today failing which the suit shall stand dismissed for want of prosecution.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 12th day of June, 2020.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Wambui holding brief for Maina Kagio for 5th Defendant
2. Ms Magara holding brief for Mr. Chomba
3. Mr. Mbogo – Court clerk.