



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 448 OF 2009

ELIZABETH MARY KENDALL.....PLAINTIFF

VERSUS

THOMAS MWINZA MANGI.....DEFENDANT

RULING

(Application to reinstate a counterclaim that was dismissed for non-attendance; hearing date issued by court and counsel served 50 days to the hearing date; at the hearing, counsel stating that the defendant could not be traced; court not persuaded and suit dismissed for non-attendance; now application filed to reinstate suit; affidavit sworn by counsel; nowhere does the defendant feature; doubt as to whether the defendant is now available to conduct the hearing; no explanation coming from the defendant on where he has been all along; affidavit by counsel in the circumstances not good enough; court not persuaded to reinstate the suit; application dismissed)

1. The application before me is that dated 7 March 2019 filed by the defendant. The application seeks orders to reinstate the counterclaim of the defendant which was dismissed on 7 November 2018 for failure to prosecute. The application is opposed.

2. To matters into perspective, this suit was commenced through a plaint which was filed on 2 December 2009. In her plaint, the plaintiff pleaded that she is native to the United Kingdom whereas the defendant is Kenyan. She averred that they met sometimes in the year 2006, and through funds that she channelled from the United Kingdom, she purchased the land parcel LR No. Subdivision No. 1628/III/MN (Original No. 146/III/MN) (the suit property) situated in Mtwapa. She avers that the defendant informed her that since she was a foreigner she could not hold property in her name in Kenya. She contended that the property is thus being held in trust for her by the defendant though she pleaded that the property is yet to be transferred into her name or that of the defendant. She pleaded that a house was put up on the suit land and the defendant took possession and barred her from it. In the suit, the plaintiff sought orders inter alia for a declaration that she is the sole and beneficial owner of the suit land.

3. The applicant filed defence where he denied the claims of the plaintiff. Without prejudice, he pleaded that the suit property is jointly owned by the two parties. In his counterclaim, he sought an order for a declaration that the suit property is jointly owned with each party owning a half share in the same.

4. On 28 February 2017, the plaintiff filed a notice withdrawing her suit.

5. The counterclaim was listed for hearing on 7 November 2018 before Waithaka J when she visited the station for service week (a program where old cases are listed for hearing before a visiting Judge in order to clear case backlog). On that day, there was no appearance on the part of the law firm of M/S G.A Okumu & Company Advocates for the plaintiff. Mr. Obwa was present holding brief for Mr. Kenga for the defendant. Mr. Obwa told the court that Mr. Kenga could not trace his client and asked for two more weeks to trace him. The court was not persuaded to adjourn the case and dismissed the applicant's counterclaim for failure to prosecute. It is following that event that this application was filed. The supporting affidavit is sworn by William C. Kenga, who is counsel on record for the defendant. He has deposed that his law firm was served on 17 September 2018 with the hearing notice for 7 November 2018. He has mentioned that the court ordered the dismissal of the counterclaim despite counsel's request for additional time as the defendant was unreachable on phone. He has deposed that failure to avail the defendant was not intentional and that the defendant has a good and merited case. He has deposed that the defendant stands to suffer irreparably.

6. The plaintiff filed Grounds of Opposition to oppose the application in the following fashion :-

(i) The applicant is guilty of laches.

(ii) The application is an abuse of the court process.

(iii) *The dismissal of the suit was in accordance with Order 12 of the Civil Procedure Rules.*

7. I invited both counsel for the plaintiff and counsel for the defendant to file written submissions which they both did. In his submissions, Mr. Kenga, learned counsel for the defendant, reiterated that the defendant could not be traced for the hearing, and that he had less than two months to look for his client, since being served with the hearing notice by the court. He submitted that the reasons for the non-attendance of the defendant are genuine and/or valid. He submitted that the application has been made without unreasonable delay as it was filed about three months from the date of dismissal. He relied on the case of *Sosiani Builders vs Charter House Investment Limited & Another, Eldoret ELC, Case No 225 of 2016 (2020) eKLR*.

8. On the other hand, Ms. Okumu, learned counsel for the plaintiff, submitted that the defendant is required to satisfy the court that he had a good and sufficient cause why no steps were taken to list down the counterclaim for hearing. She submitted that there is no sufficient cause. She submitted that the suit was dismissed in 2017 which is three years ago and no explanation has been given for the delay in filing this application.

9. I have carefully studied the record in this file and considered the application. I have already mentioned that the plaintiff withdrew her suit on 28 February 2017. Upon the withdrawal of the suit, it was now incumbent upon the defendant to pursue his counterclaim if he so wished. There were a couple of mentions before the hearing date of 7 November 2018. I have affirmed from the record that the hearing notice was served upon counsel on 17 September 2018. The notice was served about 50 days to the hearing date. That indeed was more than sufficient notice, in as much as counsel for the defendant tried to argue that the notice was too short for him to contact his client. There was therefore more than ample time for the defendant to be contacted. The defendant was not present in court at the hearing date and that is why the suit was dismissed. The record does not show under which provision of the law the suit was dismissed, but I believe that it was dismissed for non-attendance under Order 12 Rule 1, for none of the parties attended court. Order 12 Rule 1 states as follows :-

1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.

10. Order 12 Rule 7 does provide an avenue for reinstatement of a suit that has been dismissed under Order 12. It states as follows :-

7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

11. There is therefore discretion to reinstate a suit that has been dismissed for non-attendance. However, as in all other discretions, the court must be satisfied that it is just in the circumstances to give the order.

12. In our case, it is counsel for the applicant who has deposed the supporting affidavit to this application and has claimed that he could not trace his client for the hearing. What disturbs me is that nowhere is the defendant himself in the picture. If indeed counsel could not trace the defendant to attend at the hearing, has he now been traced? If he has been traced, why is it that the defendant has not sworn any affidavit stating where he was all this time? We should not forget that this application is supposed to be the defendant's application, not an application by his counsel. To me, it looks as if it is now counsel who is the applicant and nowhere does the defendant feature, yet it is the defendant's case. This being an application to reinstate the defendant's counterclaim, I think it was incumbent upon the defendant to give reasons as to where he has been all this time, and why he could not attend the hearing date as scheduled. He has not done so. As matters stand, I do not even know whether the defendant is available to conduct a hearing if his suit is reinstated. I am afraid that in the circumstances of this case, an affidavit solely sworn by counsel is not good enough. I have read the decision of my brother, Kibunja J, in *Sosiani Builders Limited vs Charterhouse Limited & Others* referred to me by Mr. Kenga. In that case, a suit was dismissed because counsel was unwell. An application followed to reinstate the suit and the same was allowed. In this instance, my difficulty is with the presence of the defendant, not counsel. It has not been demonstrated to me that the defendant where the defendant has been and that he is now available to prosecute his case if the same is reinstated. The circumstances in this suit are therefore distinguishable from those in the case of *Sosiani Builders*.

13. In any event, I see no serious prejudice to the defendant for there is leeway for him to file a fresh suit, if he is so minded, given the provision of Order 12 Rule 6 which prescribes as follows :-

6 (1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

14. I have stated in my ruling herein, that the order of dismissal could only have been made under Order 12 Rule 1. Thus, there is no bar to the defendant filing a fresh suit if he is so minded. If he is serious enough, he can proceed to file a fresh suit to pursue what he intended to pursue in the counterclaim. I have otherwise not been persuaded that I should set aside the order of dismissal made in this case.

15. For the above reasons, this application fails and is hereby dismissed with costs. The result is that the order of dismissal of the counterclaim as made on 7 November 2018 stands. The plaintiff's suit had already been withdrawn and there is therefore nothing more left of this matter.

16. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA