



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 4 OF 2019

DUBEY MOHAMED GODAD.....PLAINTIFF

VERSUS

MOHAMED OMAR AHMED.....1ST DEFENDANT/RESPONDENT

AHMED G. GABOR.....2ND DEFENDANT/RESPONDENT

KUSOW HASSAN KHALIB.....3RD DEFENDANT/RESPONDENT

IBRAHIM MOHAMED ABDULLAHI.....4TH DEFENDANT/RESPONDENT

NOOR KASAY.....5TH DEFENDANT/RESPONDENT

ADEN MOHAMED MOHAMUD.....6TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The applicant by way of a Notice of Motion dated 18th June, 2020 sought an order that the orders of this court given on 31st January, 2020 dismissing the plaintiffs/applicants Notice of Motion dated 29th April 2019 be set aside and that the said Notice of Motion be reinstated and set down for hearing.

2. The application is supported by the affidavit of Paul Amuga advocate and the following grounds;

(a) That the plaintiff's advocate failed to attend court on 31st January 2020 due to unavoidable circumstances.

(b) The plaintiff's advocate failed to attend on 31st January 2020 due to unavoidable circumstances.

(c) The failure by the plaintiff's advocate to attend court was fully explained to the court when the case was mentioned on 28th February 2020.

(d) It is in the interest of justice that the plaintiff's said application is reinstated and heard for a determination on merit.

(e) This application has been filed late due to the covid-19 pandemic and its effects on court operations.

3. The application is opposed with a fairly two paragraphs replying affidavit sworn by Ibrahim Mohamed Abdullahi.

APPLICANT'S CASE

4. According to Counsel for the applicant, he was unable to attend court when the said application came up for hearing on 31/01/2020 but the plaintiff was present on the fateful day. He stated that he tried to call counsel for the defendants Mr. Nyandieka so that they can agree on how to deal with the application but he did not pick his calls. He even sent him a text message to request that they canvass the application by way

of written submissions but Mr. Nyandieka only called him later informing him that the matter had been dealt with. He was later sent a copy of the formal order dismissing the application with costs for want of prosecution.

5. The counsel for the plaintiff further stated that before receiving the formal order, his client had called him complaining bitterly that the court had dismissed her application in her presence even after unsuccessfully requesting the court to grant her the opportunity to prosecute her application in the absence of her advocate. The learned counsel also stated that he wrote a formal letter to the counsel for the defendant complaining how they procured the dismissal order. He deponed that he has now been informed by his client that the defendants are committing acts of trespass and waste on her land and even blocked access to the plaintiff's land.

DEFENDANTS/ RESPONDENTS CASE

6. The 4th Respondent Ibrahim Mohammed Abdullahi and Mr. Alfred Nyandieka counsel for the respondents filed replying affidavits in response to the plaintiff's/applicant's application. The defendants stated that when the plaintiff's/applicants application dated 18th June 2020 came up for hearing on 31/1/2020, the same was regularly dismissed after her counsel failed to attend court or sent another counsel to hold her brief. She stated that failure by his counsel to attend court or sent another counsel to hold his brief is a clear indication that the plaintiff was no longer interested in prosecuting the aforementioned application.

ANALYSIS AND DECISION

7. An application for setting aside an order and reinstating an application dismissed for want of prosecution is a discretionary power which must be exercised on sound principles set out in law and various precedents. The principles for setting aside ex parte judgements or orders are set out in the celebrated case of Shah –Vs- Mbogo (1967) EA 116 where the court held that the 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.

8. I have perused the application brought by way of Notice of Motion dated 18th June 2020 and the annexures thereto. I have also perused the court record and note that the application which is sought to be reinstated came up for hearing on 31/1/2020. The counsel for the defendant was present. The plaintiff in person was present but his counsel Mr. Amuga was absent.

9. Ordinarily, interlocutory applications and other procedural directions are canvassed by affidavit evidence and legal submissions where a party has appointed a legal counsel to act for him in the matter, without attendance of the client. In this case, Mr. Amuga, counsel for the plaintiff/applicant did not attend court on 31/1/2020 but the plaintiff was present in person. If counsel for the plaintiff knew that he was not going to attend court, he should have instructed another counsel to hold his brief to either prosecute the application or seek any orders as instructed by the instructing lawyer. A client who has instructed an Attorney to conduct his case has no audience to address a court unless she withdraws instructions from his advocate and files a Notice to Act in person. On the material day the plaintiff was indulged by this Honourable court only to explain the whereabouts of his counsel but instead sought adjournment which was properly rejected by the court.

10. This application is brought under Section 1A, and 3A CPA. Section 1A provides as follows;

“1A (1) The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

(2) The court shall, in the exercise of its powersunder this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (4)

(3) A party to Civil proceeding or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court.....”

11. It is explicit from the above provisions of the law that an advocate who is instructed by a party in a Civil dispute is required to participate in the processes of the court and to comply with directions and orders issued by the court. The presence of the plaintiff and his application for adjournment when he had instructed counsel was uncalled for unless he withdrew his instructions and filed a formal notice to act in person. The lawyer who was properly instructed was expected to attend court or send another counsel authorized in law to address the court. I have considered the application and the annexures thereto. I have also considered the presence of the plaintiff in court during the hearing of the interlocutory application which shows her seriousness in prosecuting the application and the suit herein.

12. I therefore allow the application dated 18/6/2020 and set aside the dismissal order issued on 31/1/2020 with a rider. The plaintiff/applicant to pay the defendant/respondent throw away costs assessed at Ksh.10,000/= within 7 days from today failure which the orders shall be vacated. It is so ordered.

Read, delivered and signed in the Open Court this 29th day of October, 2020.

.....

E. C Cherono (Mr.)

ELC JUDGE