



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

ELC NO. 112 OF 2018

ASSETS & CARGO LIMITED.....PLAINTIFF

VERSUS

THE ESTATE OF GURDEV SINGH BINDI..... 1ST DEFENDANT

THE LAND REGISTRAR, MOMBASA..... 2ND DEFENDANT

RULING

(Application by plaintiff to reinstate a suit that was dismissed upon an application by the 1st defendant; counsel for the plaintiff not making an appearance at the hearing of that application; plaintiff arguing that he was effectively abandoned by his counsel and that the mistakes of counsel ought not to be visited upon him; court reinstating the suit but in the circumstances of the case, making an order for deposit of security for costs and payment of auctioneer's fees as condition for reinstatement)

1. The application before me is that dated 28 February 2020 filed by the plaintiff. Among the prayers sought are for the law firm of M/s Gachiri Kariuki & Company Advocates to come on record in place of M/s Omollo Onyango & Company Advocates on behalf of the plaintiff, which prayer is not really contested and I allow it. The substantive prayer in the application seeks that orders that dismissed this suit be set aside and the suit be reinstated and heard on its merits. The applicant also wishes to have orders to respond to the preliminary objection raised by the 1st defendant and a motion dated 12 March 2019, which precipitated the dismissal of the suit. These prayers are contested by the 1st defendant.

2. To put matters into context, the applicant commenced this suit via a plaint filed on 16 May 2018 through the law firm of M/s Omollo Onyango & Company Advocates. It is its case that it purchased from Gurdev Singh Birdi (now deceased) the land registered as MN/III/571 CR No. 16178 measuring approximately 4 Ha, and paid the purchase price, through an agreement dated 24 April 2014. It however could not take immediate possession as one Makazi Mbwiya was operating a school in it. The applicant pleaded that the vendor was to evict him but the tenant filed the suit ELC No. 264/2016 against the vendor to stop the eviction. She averred that the application was heard and dismissed. In February 2018, before he could complete the transaction, the vendor died. I have seen that in the applicant's witness statement, the applicant's director has stated that before he died, the vendor had tried to transfer the title to the applicant but the land parcel file went missing in the Lands Registry. In this case, the plaintiff wishes to have the administrator of the vendor complete the transaction and transfer to it the title to the suit land. It also wants the 2nd defendant, the Land Registrar, to reconstruct the parcel file and register her as proprietor.

3. An appearance under protest was entered on behalf of the 1st defendant. A defence and a preliminary objection were also filed. It is the case of the 1st defendant that the deceased never sold the suit property and the plaintiff is merely attempting to grab it. The 1st defendant also contested service of process and averred that it is by sheer luck that he came to know of this case. He contended that the applicant is acting fraudulently. In the preliminary objection, it was averred that the suit is a nullity having been filed against an estate which has no legal capacity to sue or to be sued. It was also contended that the suit should be struck out for failure to serve summons. In the Preliminary objection it was argued that the plaintiff cannot sue "The Estate of Gurdev Singh Birdi" and that the person with capacity to be sued is the legal representative of the estate. An application dated 12 March 2019 was also filed seeking to have the suit dismissed. That application came up for hearing on 13 June 2019. On that day, there was no appearance on the part of counsel for the plaintiff. In her notes, the learned Judge noted that Ms. Onyango, counsel for the plaintiff, had walked in and walked out of the court without attending to this matter. She noted that the application was not opposed and she allowed it. She dismissed the plaintiff's suit and awarded costs to the 1st defendant. Subsequently, the 1st defendant filed a bill of costs which was taxed on 2 December 2019. Again, despite being served, there was no appearance on the part of the plaintiff or his counsel on the taxation. The bill was taxed in the sum of KShs. 562,865/=.

4. In this application, the applicant avers that she was abandoned by her erstwhile counsel, who failed to prosecute her case, or respond to the

application and the preliminary objection. It is pointed out in the supporting affidavit that indeed counsel was present in court but walked out. She also failed to attend court subsequently for the taxation. It is averred that the plaintiff has a case that raises triable issues. It is further the view of the applicant that any defects in the pleadings can be corrected by way of amendment.

5. In opposing the application, Mr. Kavraj Singh Birdi, the legal representative of the estate of Gurdev Singh Birdi, deposed that the suit was dismissed because the court thought that the suit is frivolous and discloses no cause of action. He deposed that counsel for the applicant did not attend and also did not respond to correspondences for confirmation of the decree or on costs. He has pointed out that all along counsel were served. He has asserted that it is not that counsel abandoned the applicant, but that the applicant lost interest in the case. He believes the judgment on record is a regular judgment.

6. When the application first came before me, I issued stay orders in respect of the execution of the bill of costs and directed the applicant to deposit the sum of KShs. 250,000/= as security. The money was deposited. I further directed that the application be canvassed through written submissions and I have seen the submissions of Mr. Owino, learned counsel for the plaintiff and those of Ms. Moolraj, learned counsel for the 1st defendant. Mr. Makuto, learned State Counsel, who appeared for the 2nd defendant aligned himself with the submissions of Ms. Moolraj. I have considered these submissions before arriving at my decision.

7. It will be observed that it is the position of the applicant that he was abandoned by his counsel and it is not the position that he has lost interest in the case. Mr. Owino did submit that the mistakes of counsel ought not to be visited upon litigants. I agree with this principle though of course the court has wide discretion depending on the particulars of each case. The case of the plaintiff is that he purchased the suit land. The 1st defendant refutes this. I opt to go to the record to see whether the plaintiff has a case for trial. I have seen the sale agreement, but what strikes me as absent, is proof of any payment of the purchase price. The purchase price in the sale agreement indicates the sum of KShs. 27,000,000/= of which KShs. 3,000,000/= was paid. The balance was to be paid subsequently. You would expect that there be proof of payment of such a colossal sum of money, but as I have pointed out, there is no proof of any within the plaintiff's documents. I am prepared to give the plaintiff an opportunity to be heard and reinstate the suit, but I think given the special circumstances before me, I will demand that the plaintiff deposits security for costs as taxed, that is the sum of KShs. 562,865/=. Since the applicant had deposited KShs. 250,000/= he needs to add a further KShs. 312,865/=. This amount of money be deposited in court within the next 14 days.

8. There was nothing wrong with the attachment in execution for the taxed costs. I observe that the 1st defendant had appointed an auctioneer who deserves his fees. His fees to be agreed within 7 days from today, or be taxed if there is no agreement, and the applicant to pay the auctioneer's fees in full within 14 days of agreement or taxation as the case may be.

9. Thus this application is allowed subject to the following conditions :-

(a) That the plaintiff/applicant will deposit in court the sum of KShs. 312,865/= within the next 14 days to bring to KShs. 562,865/= as the sum deposited in court which will be held as security for costs in favour of the 1st defendant.

(b) That the plaintiff/applicant to pay the auctioneer's fees within 14 days of agreement or within 14 days of taxation. The fees be agreed within 7 days from today and there is no agreement be taxed.

(c) That if the plaintiff/applicant complies with the above two orders, the proceedings that led to the dismissal of this suit and the order of dismissal be set aside alongside the order on taxation of costs, and the plaintiff's suit be reinstated with the plaintiff being at liberty to respond to the application dated 12 March 2019 and the preliminary objection.

(d) That if the plaintiff/applicant does not abide by the above, then its suit will stand dismissed with costs and the defendants will be at liberty to execute for their costs and the sum of KShs. 250,000/= deposited will be released to the 1st defendant to defray part of his costs.

10. The only issue now left is the costs of this application which I award to the 1st defendant.

11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN THE PRESENCE OF:

Mr. Owino for the plaintiff

Ms. Moolraj for the 1st defendant

No appearance for 2nd defendant

