



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 79 OF 2010

SOPHIE FEIS LWANGU.....PLAINTIFF

VERSUS

BENSON WAFULA NDOTE.....1ST DEFENDANT

JOHN LWANGU.....2ND DEFENDANT

JANE WANJIRU MWANGI.....3RD DEFENDANT

VIOLET KIRIZIA KIBWANA LWANGU....4TH DEFENDANT

RULING

1. This suit has had quite an interesting history: the plaintiff prosecuted and closed her case on **16/11/2011**. Instead of prosecuting their defence the defendants filed an application to amend the defence which was allowed on **23/4/2012** granting the defendant leave to file the amended defence within **14 days** and the plaintiff **7 days** from date of service to respond. There is on the record a joint defence and counterclaim filed on **7/5/2012** and a reply to defence and counterclaim filed on **24/5/2012**.
2. The suit then came up before court for various purposes on numerous occasions, and on one such occasion the plaintiff's counsel, Mr. Ingosi, informed court that parties had agreed to have the plaintiff's case reopened. No express order of court confirming that that direction was issued appears on the record.
3. As per the record, Mr. Ingosi at one time entertained the idea of consolidating the instant suit with several other suits but Ms. Munialo for the defendant was not for the idea, which was finally not implemented nevertheless after Mr. Ingosi told court on **21/1/2016** that he could not trace the other files.
4. Between **30/9/2015** and **23/7/2018** proceedings show an understanding that it was the plaintiff's case that was being prepared for hearing with Mr. Ingosi indicating, which is not borne by the particulars of the previous record, that the matter had been transferred to this court from the High Court for hearing *de novo*.
5. By an order dated **23/7/2018**, this suit was dismissed for want of prosecution. On the same date the defendants were allowed to effect any necessary substitution as it was understood that one of them was deceased. The substitution was to be effected within **60 days** and the defendants' counterclaim was to be set down for hearing within **90 days** of the order.
6. There is on the record a consent dated **2/3/2020** and signed by the parties stating that the 2nd - 5th defendants acknowledge **Trans Nzoia/Sinyerere/715** to be the plaintiff's property and that they would instead testify in favour of the plaintiff.
7. On **23/3/2020** the plaintiff filed an application seeking orders setting aside the dismissal order and that the plaintiff's suit be reinstated; that upon such reinstatement the suit be adjusted by discontinuing the suit against the 2nd 3rd, 4th and 5th defendants; that the plaintiff be allowed to adduce evidence in her defence against the counterclaim and that the suit do proceed to its formal logical conclusion against the 1st defendant.
8. The instant application was brought pursuant to **Order 12r. 7, Order 17 r. 4, Order 25 r.2, Order 25 r. 5, Order 51 r. 1, 3 and r. 4** of the **Civil Procedure Rules 2010, Sections 1A, 1B and 3A** of the **Civil Procedure Act and Article 159(2)(d)** of the **Constitution of Kenya**. The application is supported by an affidavit of the plaintiff dated **18/3/2020**.
9. The application came up before court on **8/10/2020** when the parties were ordered to file their respective written submissions. The plaintiff filed submissions on **19/10/2020**. The 1st defendant filed submissions on **29/10/2020**.

10. One of the grounds that the application is based on is that the plaintiff's case had been closed by the time the 1st defendant filed a counterclaim; from the record, that allegation is correct.

11. Others are that the plaintiff's case was re-opened in 2015 with the plaintiff's evidence still on the record, which is true as no order is evident on the record stating that the case be heard *de novo*; breakdown of communication between the plaintiff and her erstwhile advocate which occasioned the plaintiff's non-attendance; ignorance on the plaintiff's camp of the existence of the dismissal order, which led her into conceding to the defendant's application for revival; that as the 2nd - 5th defendants' denunciation of the counterclaim necessitates an adjustment of the suit, and that proceeding with the suit as it is would bar the plaintiff from giving evidence in the counterclaim, it would be necessary to re-open the plaintiff's suit. Finally it is averred that the suit involves a land dispute between siblings and it would be just to allow the suit proceed on its merits.

12. The 1st defendant filed his sworn replying affidavit dated 7/10/2020 in opposition to the instant notice of motion. He blamed the plaintiff for delayed finalization of the case and admitted that the counterclaim was raised after the plaintiff's suit was dismissed. He stated that the plaintiff, having been given 7 days to respond to the counterclaim failed to do so; that subsequently the plaintiff's case was reopened, transferred to this court and subsequently dismissed for want of prosecution. The 1st defendant avers that no sufficient reason has been given for the reopening of the plaintiff's case, and casts doubt on the impression created to the effect that it took the plaintiff two years to learn that her suit had been dismissed. The 1st defendant also cast doubts on the allegation of breakdown between the plaintiff and her counsel.

DETERMINATION

13. The main issue for determination in the instant application is whether the dismissal order should be vacated. It should be remembered that it is the last resort of any court of law to shut out a litigant from being heard. In the instant case the plaintiff had called evidence and closed her case by the time it was dismissed for want of prosecution. In addition, a counterclaim and a reply to defence and counterclaim were filed after the hearing of the plaintiff's case. A counterclaim is essentially a separate suit and contrary to the usual procedure, there are no directions on the record in this suit as to how the counterclaim should be heard. This was an essential step that was inadvertently missed, given that the counterclaim came after the plaintiff's case had been heard, and it is not a very regular occurrence, to have a counterclaim filed after the plaintiff's suit is closed.

14. Having prosecuted a case, a plaintiff should only be deemed to await the defendant to prosecute their case, and thereafter the court's judgment. The utmost limits of this court's discretion in a situation where the plaintiff has closed her case is to proceed to hear the defendant's case in the absence of the plaintiff and thereafter render a judgment on the basis of the evidence on the record. In circumstances where the plaintiff absents himself from the defence hearing, he would in the opinion of this court be deemed to have by his absence allowed an *ex parte* hearing of the defence case.

15. According to the **Civil Procedure Rules** the plaintiff in the main suit has an automatic right to respond to the counterclaim. The defence filed on 7/2/2011 in the instant suit was amended to include a counterclaim on 9/3/2012. From the court record the plaintiff had closed her case on 16/11/2011. On 30/9/2015 the parties consented that the plaintiff's case be reopened but no evidence or further evidence of the plaintiff was called by the date of dismissal of the suit for want of prosecution.

16. With the further amended defence having been ordered to be filed and served within 14 days from 21/3/2019 that order threw the parties into a fresh compliance mode. The defendant filed an amended joint defence and counterclaim but the plaintiff failed to respond to it. Soon thereafter the plaintiff's then counsel sought to cease acting and was granted leave to withdraw on 4/11/2019.

17. The uncontested application dated 29/1/2019 seeking substitution of the 1st defendant and revival led to the revival of the suit against the estate of the deceased 1st defendant and the amendment of the defence to reflect the substitution. The amended pleading filed also retained a counterclaim.

18. This court has confirmed from the court record that on 18/10/2019 the 2nd - 5th defendants disowned the counterclaim through a sworn affidavit.

19. I have said enough regarding the background to the instant application. There are so many events in this suit that so greatly affect the hearing of the suit and the counterclaim on their respective merits and errors some of which amount to inadvertent errors that cannot be entirely blamed on the parties, which make it necessary that the court retraces its steps to the stage at which the defendants filed their counterclaim, so that the fresh steps may be taken from that point in prosecution of the counterclaim.

20. A vital observation is that though that counterclaim was initially filed by all the defendants, the 2nd to 5th defendants have taken a 180 degree turn and disowned it; it is not possible to compel them to proceed with a claim they are not willing to pursue and in this court's view the prayers in the instant notice of motion that the suit against the withdrawing defendants be discontinued and the suit do proceed against the 1st defendant only have merit. Subject to this court's findings on the rest of the application, **prayers (2) and (4)** of the instant application are merited.

21. Regarding **prayer No. (3)** I have already observed as above that a counterclaim is a suit separate from the plaint and it is always treated as such, hence the need for specific directions, which have never been issued in the instant suit, regarding the trial of the counterclaim. Since the plaintiff had filed a defence to the counterclaim in the matter, he is, whether prayer **No. (1)** in the instant application which seeks setting aside of the dismissal is granted or not, entitled to call evidence in the counterclaim. Prayer **No. (3)** is therefore, subject to the grant of prayer **No. (1)** merited.

22. However the crucial elements of justice and fairness would be lacking in this case if the dismissal order were not set aside. As stated before and despite Mr. Ingosi's unsupported oral averments, there are no clear orders stating that the suit would be heard *de novo* once

transferred to this court and neither are there any directions as to how the counterclaim should be tried. If specific directions had been made that the suit be heard *de novo* and that the counterclaim be heard either with the suit or after, this court would have been able to apportion the blame to the plaintiff for failure to prosecute his suit. Regardless of Mr. Ingosi's averments, the suit belongs to the plaintiff and in the absence of clear orders on the record, she must be accorded a benefit of doubt when it comes to the issue of whether or not the suit was to be heard *de novo* upon transfer to this court, otherwise the court risks condemning her for no fault of her own. It must have been an inadvertent error on the part of this court in omitting to consider these matters upon being urged to dismiss the plaintiff's case on **23/7/2018** which matters, if it had considered them, would have brought the court to an entirely different conclusion, the rejection of the prayer for dismissal, and this court must therefore review its decision to dismiss the suit for want of prosecution.

23. Consequently I find that **prayer (1)** in the instant application is merited.

24. The upshot of the foregoing is that the application dated **18/3/2020** has merit and is granted as prayed in **prayers No. (1), (2), (3) and (4)**. The costs of the application shall be costs in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 19th day of November, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.