



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 34 OF 2019

RUMBA KINUTHIA

t/a RUMBA KINUTHIA & CO ADVOCATES.....PLAINTIFF/APPLICANT

VERSUS

NGIMU FARM CO LTD.....1ST DEFENDANT/RESPONDENT

MICHAEL N M MUNA

MARTIN M NGURE

JOSEPH MATHENGE MUMBI

(suing in their capacities as Chairman Secretary & Treasurer of MUYENGA 2040

SELF HELP GROUP.....2ND DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR MURANGA....3RD DEFENDANT/RESPONDENT

HON ATTORNEY GENERAL.4TH DEFENDANT.....NT/RESPONDENT

RULING

1. By a Notice of Motion dated 10/2/2020 brought under Order 12 Rule 7 of the Civil Procedure Rules the Applicant urged the Court for orders to set aside the dismissal orders issued on the 27/1/2020. The orders dismissed the notice of motion dated the 8/8/19.
2. The application is supported by the grounds annexed thereto and the supporting affidavit of Mwaura Shairi, Advocate who deponed that the Applicant filed its response on the 9/10/19 and the Applicants filed their written submissions on the 11/12/19 and served the Respondent on the 15/1/19. That the hearing notice served on them by the Applicant dated the 8/8/19 indicated that the application was to be canvassed by way of written submissions. That unknown to them the orders had been varied with the effect that the application would be heard by oral arguments in Court. That the Applicants Counsel failed to serve them with the Court's directions.
3. In its Replying Affidavit the Applicant through its Counsel Rumba Kinuthia Advocate contended that directions were taken before the Deputy Registrar on filing written submissions by the 11/12/19 which directions he duly served on the parties. Come the 11/12/19 the Advocate for the Applicant did not appear and Mr. Kuria Advocate holding his brief requested the Court to review the directions for filing written submissions and give a date for the hearing of the application. The Court reviewed the directions and a date for hearing was given for the 27/1/2020 which hearing date was served on the parties.
4. On the 27/1/2020 the Advocates for the 2nd Defendant were absent and on application of the Plaintiffs Advocate the application dated the 8/8/19 was dismissed for want of prosecution.
5. The Plaintiff maintains that the Applicant has showed no interest in prosecuting the application. That it has been indolent and no reasons have been advanced to warrant the granting of the orders.
6. The parties argued the application orally in Court and reiterated the contents of their affidavit evidence.
7. The Court is empowered under Order 12 Rule 3(1) to dismiss a case as follows; -

“If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court”.

8. I have perused the record and it is correct that the Applicants Counsel was absent most of the dates when the matter came up for hearing i.e 5/11/19, 12/11/19, 11/12/19 and 27/1/2019.

9. Directions to file written submissions were given on the 12/11/19 in their absence with orders to the Plaintiffs Advocate to serve. There is an affidavit of service dated the 16/12/19 that the parties were served with hearing notice for the 27/1/2020. The Applicant contends that since they had filed written submissions on the 11/12/19, they were not aware that the directions had been varied to require the matter to be argued orally. The Plaintiff on the other hand argues that a hearing notice is clear in its meaning and need not be interpreted otherwise. In my view the Advocate of the Applicant is at fault to ignore a hearing notice on a matter that they have conduct of. Such conduct is dereliction of duty as an officer of the Court.

10. The decision to set aside or vary a judgment or order is guided by the provisions of Order 12 Rule 7 which is discretionary depending on the circumstances of the case. It states as follows; -

“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. By dint of Order 12 Rule 7 aforesaid this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of **Patel Vs East Africa Handling Services Limited (1974) E.A** where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties.

12. In the case of **Shah – v- Mbogo & Anor (1967) E.A 470** the Court of Appeal for Eastern African held: -

“applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

13. That said the Court has not been showed evidence that the conduct of the Applicant was meant to obstruct or delay the cause of justice. It is appreciated that the Plaintiff has been inconvenienced by the delay and as pleaded and seen on record the Applicant’s absence in Court leaves a lot to be desired with respect to their seriousness to prosecute their application.

14. The Court is inclined the reinstate the application dated the 8/8/19 on the following conditions;

- a. The application dated the 8/8/19 should be fixed for hearing within the next 15 days in default it shall stand dismissed.
- b. The Applicant shall pay the Plaintiff throw away costs in the sum of Kshs 5,000/- payable before the next hearing date.
- c. Costs of the application shall be in favour of the Plaintiff/Respondent.

15. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 3RD DAY OF DECEMBER 2020.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Mbugua HB for Kuria for the Plaintiff/Respondent

Ms. Kangethe for Shairi for the 1st & 2nd Defendants

3rd & 4th Defendants - Absent

Njeri and Kuyiki, Court Assistants