REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT. NO. 298 of 2013(O.S.)

IN THE MATTER OF: LAND PARCEL NO.819/II/MN

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THAT THE APPLICANTS HAVE OBTAINED OWNERSHIP OF (314.0) HA OF THE SAID LAND BY WAY OF ADVERSE POSSESSION.

BETWEEN

1. MUHAMBI KALINGA

2. KENGA MASHA alias MUHAMBI

3. IDD ABDALLAH

4. KENGA NGARI KOMBE

5. EPHRAIM KITSAO BAYA.....APPLICANTS

VERSUS

1. MAHMOOD KASSAM

2. JAFFER KASSAM

3. ESMAIL KASSAM

4. MUSA KASSAM

5. ESSAK KASSAM.....RESPONDENTS

RULING

1. The application before me is the Notice of Motion dated 16th November 2016 brought by the plaintiffs under order 12 rule 7 of the Civil Procedure Rules and Section 3A and 87 of the Civil Procedure Act. The applicants are seeking the following orders:

a) Spent

b) The plaintiffs are granted leave to change advocate; now that this is dismissed.

c) The dismissal of suit order made on 4th November 2014 be and is hereby set aside; or reviewed with the result that the suit is reinstated and heard alongside other pending actions touching on the suit land/property.

d) The costs of this application be provided for.

2. The application is based on the grounds set out on the face of the motion, namely:

i. The plaintiffs have irreconcilable differences with their advocates and thus require to change;

ii. The plaintiffs or at least some of them were all along unaware of the hearing and mention dates in this case;

iii. There is a melody of errors manifest on the record of court which are amenable to an order of review, or setting aside of the proceedings taken in October and November, 2014;

iv. The suit was dismissed prematurely: before it was ready for hearing or before the interlocutory matter had been disposed of;

v. The defendants had an indefinite ex-parte hearing on dates when the case was set for mention only;

vi. The learned judge erroneously assumed that the case had come on for hearing of the main suit on several occasions before the 22nd of October 2014 hence the order allowing last adjournment on 22nd October 2014, a date when the case was before court for mention only;

vii. There was a miscarriage of justice when the court proceeded the way it did in this case; on the erroneous assumption that the case was ready for trial, yet there were pending before court undetermined interlocutory application and need to comply in the rules of court on preparation of case for trial;

viii. The plaintiffs were never informed of the mention and hearing dates and it would occasion grave injustice to allow the dismissal order to stand.

3. The application is supported by the affidavit of Eprahim Kitsao Baya, the 5th plaintiff sworn on 16th November, 2016. He depones inter alia that their then advocate abandoned their case and invited the court to make necessary orders as it deemed appropriate in the circumstances, and never disclosed to the court that he had not notified the applicants of the hearing date on 4th November 2014. Giving chronology from the court record, he avers that the case was not ready for hearing when the same was dismissed. That there was an error apparent on the face of the record for the learned judge to fail to hear David Kitula who was before court with 3 others who wanted to defend their structures on the suit land.

4. The application is opposed by the defendants. They filed a replying affidavit sworn by Esmail Kassam, the 3rd defendant, on 25th September 2018 in which he depones inter alia, that the application is an utter abuse of the court process and the applicants do not deserve the discretionally orders sought. That on 22nd October 2014, the court directed that the main suit be heard by oral evidence on 4th November 2014 at 8.00 a.m. by consent and that there will be no adjournment and that all the parties be present during the hearing, adding that the directives were given in the presence of the plaintiffs' advocate, Mr. Kenga. That on 4th November 2014 only 3 individuals were in court namely, David Kitula, Christine Wekesa and Pauline Wawuda but only David Kitula had been named as a plaintiff but had not signed the letter of authority.

5. It is the defendants' contention that the plaintiffs advocate did not challenge the claim that Mr. David Kitula had not instructed him and did not at any time inform the court that he was in disagreement with the plaintiffs or that he had failed to inform the plaintiffs of the hearing date.

6. The defendants further contend that the suit was properly dismissed and that the application has been brought after two years with no explanation given for the delay.

7. In his submissions, Mr. Kimani submitted that this is a case that requires the court to tamper justice with mercy. He added that the order of 4th November 2014 was made under order 17 rule 4 yet the applicable law is rule 3. That the court made the order on invitation of the defendant which had drastic measure as the order could only be appealed against with the leave of the court which leave could have been sought by the advocate who abdicated his role as an advocate. It was his submissions that the court never addressed itself to the mandatory requirement of rule 3 of the Order 17 and Order 12 of the Civil Procedure Rules, arguing that the court should have heard the plaintiff who was in attendance. He admitted that two years is a very long time but urged the court to exercise its discretion and administer justice and show mercy.

8. I have considered the application, the rival affidavits and the submissions made. The application is expressed to be brought under Section 3A and 87 of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules. Section 87 of the Civil Procedure Act deals with assessors. I do not see how the said provision is relevant to the application before the court. In my view, the same is not relevant as the application before court relates to the reinstatement of a suit which was dismissed. The applicants also seek leave to change advocate.

9. I have perused the court record. The same shows that on 4th November 2014 the matter came before Mukunya, J when Mr. Kenga advocate for the plaintiffs and Mr. Ndegwa, advocate for the defendants were present. The defendants' witnesses were also present in court and were ready to testify. There were also three other persons, namely, Daniel Kitula, Christine Nekesa and Paulina Wawuda. Only Mr. Kitula was named as a plaintiff though he did not sign the authority to act and had not instructed Mr. Kenga. When Mr. Kenga addressed the court, the record shows that he stated as follows:

> "***If Mr. Paul Kitula has denied instructing me and he is the only one who has appeared, the other plaintiffs are not here, you may proceed and make the necessary orders***"

10. The record further shows that after hearing the defendant's counsel who urged the court to dismiss the plaintiffs suit with costs, the court stated as follows:

"***This matter has come to court on four separate occasions. In all those times, the plaintiffs who has had the benefit of Counsel Mr. Kenga, an advocate who has appeared on all those occasions have not attended. Their counsel Mr. Kenga has been diligent and has been in court on all the occasions. Indeed, this court even visited the suit premises when it found that only eight houses 3 under construction were in the suit land. 3 people who are not parties to the suit have come to court to say they are the owners and have not instructed Mr. Kenga. On that site visit only Mr. Kenga appeared, none of the plaintiffs appeared. From what I saw on the ground, that there are no squatters except 8 (eight) houses) 3 under construction and the non-appearance of ALL the plaintiffs I am convinced beyond any doubt, that the plaintiffs are not at all squatters. That is why they have refused to come to court even when given over four opportunities to appear in court. I therefore dismiss this suit under Order 17 rule 4. Each party shall bear its own costs."***

11. Order 12 Rule 3 (1) provides as follows:

"***(1) If on the date 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.***"

On the other hand, rule 4 of the Order 12 provides that:

"***If only some of the plaintiffs attend, the court may either proceed with the suit or make such other order as may be just.***"

12. It is clear that Order 12 rule 3 allows the court to dismiss a suit for non-attendance. Rule 4 on the other hand gives the option to proceed with the suit or make such other order as may be just. In my view, the expression "or make such other order as may be just" includes an order for dismissal of the suit as was the case in the instant case. In this case, the court made elaborate observations before finally making an order dismissing the suit. Order 12 rule 7, however allows the aggrieved party to apply to set aside the order for dismissal and reinstate the suit.

13. The applicants herein have moved the court seeking to set aside or review the order made on 4th November 2014 with the result that the suit is reinstated. In the application, the applicants are faulting the judge for making the order of 4th November 2014 dismissing the suit. In my view, the dismissal of the suit was not unprocedural. It was done in compliance with the law. The applicants have not explained why they failed to attend court on the material date and on other occasions as was observed by the court before the order for dismissal. The explanation that they had disagreement with their advocate is not convincing. Why did they not appoint another advocate or why did they not attend court and apply for time to engage another advocate or even proceed on their own?

14. In the case of **National Bank of Kenya Ltd –v- Ndungu Njau (1997)eKLR,** the Court of Appeal held that:

"***A review may be granted whenever the court considers that it is necessary to correct an apparent error of omission on the part of the court. The error or omissions must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review.*** "

15. The applicants' counsel has submitted that the court did not address itself to the mandatory requirement of Order 17 rule 3 and Order 12 of the Civil Procedure Rules. The advocates for the plaintiffs and for the defendants had made submissions before the learned judge who, after hearing them, made a conscious decision dismissing the suit. I would be sitting on appeal against a judgment of this court if I was to decide otherwise, which is against the law. If there was an error, the same is not self –evident that would not require an elaborate argument to be established. In this regard, I am guided by the court of Appeal decision in National Bank of Kenya case (supra) where it held inter alia, that it cannot be a ground for review that the court proceeded on an incorrect exposition of the law.

16. I am aware that dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them, especially where justice would still be done and fair trial had despite the delay. However, any explanation for the non-attendance and the delay should be given for evaluation by the court to see whether it is reasonable. That notwithstanding a court of law should not hesitate to decline to set aside an order dismissing a suit where no explanation or no reasonable reason has been offered.

17. Looking at the material before me, the applicants have not even attempted to explain the reason why it took them over two years from the time the order for dismissal was made to the time of bringing the present application.

18. For the reasons stated above, I find the Notice of Motion dated 16th November 2016 without merit.

It is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of January, 2019.

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C. YANO

JUDGE

IN THE PRESENCE OF:

Owino holding brief for Kimani for plaintiffs/applicants

No appearance for respondents/defendants

Yumna Court Assistant

C.K. YANO

JUDGE

31/1/19