



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 120 OF 2017 (O.S)

JOSPHINE WANJIKU MITHAMO.....PLAINTIFF

VERSUS

JOHN KANGANGI MITHAMO.....1ST DEFENDANT

GLADYS MUTHONI KANGANGI.....2ND DEFENDANT

RULING

The applicant who is also the plaintiff has moved this Court to review and/or set aside its orders made on 30th July 2018. The applicant is also seeking the costs of the application to be provided. In her affidavit in support of the application sworn on 11th September 2018, Mr. James Igati Mwai advocate appearing for the plaintiff stated that he failed to attend Court on 30th July 2018 due to unavoidable circumstances. He deponed that his office was served with the Notice to Show Cause on 11th July 2018 but his court clerk failed to bring the same to his attention. The learned counsel also stated that the Notice to Show Cause was drawn on 24th June 2018, thirty six (36) days before the expiry of the mandatory period of one year for such an action to be taken. By implication, the learned counsel states that the order dismissing this suit for want of prosecution was premature. The counsel stated that since the mistake was occasioned by counsel, the Court of Equity should not let the plaintiff to suffer because of a mistake of his counsel.

In a replying affidavit sworn by John Kangangi Mithamo on 11th October 2018, the Respondent opposed the application and stated that the application is incompetent, bad in law and an abuse of the Court process. The respondents contend that the averments contained in the supporting affidavit are full of falsehood as they have never been issued with an invitation letter for fixing a hearing date. The respondents also deponed that the applicant's annexures marked JWM 3 and JWM 4 must have been crafted purportedly for this application as the same do not bear a Court stamp to show they were presented to Court before this application was filed. The respondents also stated that the alleged annexure marked JWM 4 could not be genuine as the Court had not granted leave to the applicant to serve them by way of substituted service. It is further stated that there is no good reason why the applicant and his advocate did not attend Court on 30th July 2018 despite having been served with a notice to show cause. The respondents cited the case of *Chandaria Industries Ltd Vs Conal Holdings (K) Limited & another (2014) e K.L.R.*

In conclusion, the respondents deponed that this suit was properly dismissed and that in *Order 17 C.P.R.*, there is no provision for reinstatement of a suit which has been dismissed under the said order.

I have considered the affidavit both in support and in opposition to the application. I have also considered the cited case by the counsel for the respondents and the applicable law. Under *Section 17 C.P.R.*, the law provides as follows:

“17 (2) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(3) If cause is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain explanation, hearing of the suit”.

This suit was filed on 1st August 2017 and on 15th August 2017; the defendants in person filed a memorandum of appearance. On 30th August 2017, the 1st defendant on his behalf and that of the 2nd defendant filed a replying affidavit opposing the suit herein. On 19th June 2018, the firm of IGATI MWAI & CO. Advocates filed a notice of appointment of advocate. The Court on its own motion invited the plaintiff through her advocate on record to attend Court on 30th July 2018 to show cause why the suit cannot be dismissed for want of prosecution pursuant to *Order 17 Rule 2 (2) CPR*. On the said 30th July 2018, neither the parties nor their advocates were present. The Court in its wisdom dismissed the suit for want of prosecution under *Order 17 Rule 2 (2) CPR*.

The applicant through her advocate on record has given some reasons for failure to attend Court and show cause on the said 30th July 2018. First, the plaintiff's advocate has stated that though his court clerk received the hearing notice, the same was not brought to his attention. The purported court clerk attached to the plaintiff's advocate office has not sworn an affidavit confirming the averments by the advocate. It was important for the purported court clerk to swear a supplementary affidavit to explain why she failed to bring the hearing notice to the attention of the advocate. The plaintiff's advocate has not also attached a copy of his office diary to show that the instant case was not noted in their diary for 30th July 2018.

The plaintiff through her advocate on record also stated that on 21st June 2018, he invited the defendants for fixing a suitable hearing before the Court registry on 28th June 2018. However, the purported letter dated 2nd May 2018 is not received from the ELC registry as no such letter is in the Court file. The same letter has no official stamp from the registry as an acknowledgment that it was received. The same applies to the purported letter dated 2nd August 2018. The same does not contain the official Court stamp from the ELC registry acknowledging receipt of the same. I have also noted the receipt issued by the Post office for delivery of a parcel by the firm of Igati Mwai & Co. Advocates to the 2nd defendant. It is not conceivable how the plaintiff would serve the 2nd defendant with Court document by substituted service without leave of the Court. The plaintiff did not even supply the ELC Court registry with a copy of the purported letter. I agree with the averments contained in the supporting affidavit sworn by counsel for the defendants. It is not candid enough. The plaintiff herself has not also shown what step she took to remind her advocate to prosecute this case expeditiously. The recent amendment of the **Civil Procedure Act** and the rules made thereunder call upon all stakeholders in the Civil Justice System indicating Advocates have a duty to assist the Court in furthering the overriding objectives of facilitating the just, expeditious, proportionate and affordable resolution of civil disputes in our Courts. It is no longer available for a party to argue that the mistakes of an advocate should not be visited upon his client. Having said that, I have observed that this suit was filed on 1st August 2017 and the same was dismissed on 30th July 2018. The law under **Order 17 Rule 2 (2)** provides for the dismissal of a case where no steps have been taken towards its prosecution for more than one year. The dismissal of this suit under **Order 17 Rule 2 (2)** was pre-mature as the same had not remained dormant for more than one year. I find the application merited.

Consequently, I take the Court's discretion and set aside the order issued on 30th July 2018. Consequently, the application dated 11th September 2018 is allowed in the following terms:

(1) The Plaintiff/Applicant to take steps to prosecute the case within six (6) months from today failing which the same shall stand dismissed for want of prosecution.

(2) The costs of the application to be costs in the cause.

READ and DELIVERED in open Court at Kerugoya this 18th day of January, 2019.

E.C. CHERONO

ELC JUDGE

18TH JANUARY, 2019

In the presence of:

Mr. Mwai for the Plaintiff/Applicant

Defendants/Respondents absent