

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 280 OF 2013

MARY COLLETTA.....PLAINTIFF/APPLICANT

VERSUS

ALFONCE ONG'AYO.....DEFENDANT/RESPONDENT

RULING

The application is dated 13th September 2018 and is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and order 12 rule 7 of the Civil Procedure Rules seeking the following orders:-

1. That service of this application be dispensed with, the same be certified as urgent and heard ex parte in the first instance.
2. That pending the hearing and determination of this application inter-partes, there be a stay of execution of the decree herein.
3. That there be a stay of execution of the decree herein.
4. That the orders of this court made on 6th November, 2017 dismissing this suit be set aside.
5. That the plaintiff's suit be reinstated and the same do proceed to hearing.
6. That costs of this application be provided for.

It is supported by the annexed affidavit of Mary Colletta Makatia, plaintiff/applicant and the following grounds that, the hearing notice for 6/11/2017 was served on M/s. Mango & Company Advocates on 15/9/2017 when the said advocates had ceased acting on 11th May, 2017. That neither the plaintiff/applicant nor her advocates then on record was served with the hearing notice for 6/11/2017. That procedural lapse/technicality should not override the fair administration of justice. That it will be in the interest of justice if this application is allowed.

The respondent submitted that, this suit was filed in September, 2013 and I filed a defence on 20/10/2013. That after several adjournments on the 20/1/2015, the parties by consent referred the dispute to the Land Registrar and surveyors, who visited the site filed their report dated 24/2/2015, annexed marked AO-1 and 2 are copies of the order and report respectively. That the report which in his view settled the disputed. That it became evident the plaintiff lost interest in the case after the aforesaid report. That the plaintiff was duly served to attend court on 6/11/2017 as disclosed in the hearing notice and affidavit of service annexed marked AO-3 & 4. That on 6/11/2017 the court waited for the plaintiff and her counsel upto 12.05 p.m. when the case was duly dismissed for the non attendance of the plaintiff. That his advocates did file the bill of costs dated 20/11/2017 which was duly served on the plaintiff. That on the 5/9/2018 the firm of Nandwa & Company Advocates was served with the bill and taxation notice for 4/10/2018 annexed marked AO-5 & 6 are copies of the notice and affidavit of service. That it was upon receipt of the bill of costs and taxation notice that this application was filed. That the plaintiff has taken a period of about 11 months to file the present application, the applicant is guilty of inordinate delay which is not explained. That the applicant has woken up in respond to counter the bill of costs.

This court has considered the application and the submissions herein. I have perused the court file in great detail. Indeed the record shows that Mango Advocate was in court and or represented on the 3rd April 2017 and 5th May 2017 when directions were taken. On the 6th November 2017 he was served with the hearing notice which he acknowledged. What is strange is that there is a notice of withdrawal of the services of Mr. Mango filed on 11th May 2017 by the applicant. I give the applicant the benefit of doubt although there was no evidence that she served the respondents. I therefore grant this application on condition that a hearing date is taken within the next thirty (30) days from the date of this ruling. Costs to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE