



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 651 OF 2013

ELIZABETH WANGECHI MWAI

Suing as the Administrator of the Estate of

PETER MWAI MBURATI (DECEASED).....PLAINTIFF

VERSUS

JAMLECK MWANGI NJOKA.....1ST DEFENDANT

EDWARD NJAGI MURIITHI.....2ND DEFENDANT

JOSEPH MUCHIRI.....3RD DEFENDANT

LAND REGISTRAR KIRINYAGA.....4TH DEFENDANT

RULING

In an application brought under certificate of urgency dated 27th July 2018, the applicant seeks to set aside an order issued on 25th July 2018 dismissing this suit for want of prosecution and reinstate the same for hearing. The applicant in her supporting affidavit stated that the dismissal by the Court was pre-mature as she had fixed the suit for hearing. She stated that the last Court action was on 18th April 2018 when the same had been fixed for hearing but the Court was not sitting. The applicant also stated that on 12th July 2018, she filed an application to amend her pleading by enjoining a party by the name Beatrice Muriithi. On the same day, she received a notice to show cause why the suit should not be dismissed. The applicant deponed that the reasons for failing to prosecute this suit since 18th April 2018 was due to the interlocutory applications to substitute the necessary party in respect of the Estate of Muriithi Nyaga who had bought land that had been sold by fraudsters who had impersonated the deceased as the registered owner. The applicant further stated that this case is part-heard where the plaintiff has testified and that he stands to suffer substantial loss since her daughter who has received part of the compensation for the land that was compulsorily acquired by the National Irrigation Board will be forced to repay back unless this case is heard on merit. She contends that the reasons for the delay in concluding this matter was beyond her control and that she is willing to abide by any conditions this Honourable Court may give.

In reply to this application, the 1st defendant filed a replying affidavit and stated that this suit was filed way back in the year 2003 and that the same has never been prosecuted until the notice to show cause was issued. The 1st respondent also deponed that the applicant was given upto 25th July 2018 to address the Court on this application but she did not turn up. The 3rd respondent filed grounds of opposition in opposition to the application.

I have considered the application and the supporting affidavit. I have also considered the replying affidavit by the 1st respondent and grounds of objection in opposition thereto. I have equally considered the submissions by the counsels.

Order 17 Rule 2 (1) CPR states as follows:

“17 2 (1) 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 the satisfaction, may dismiss the suit”.

“17 2 (2) If cause is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit”.

From the Court record, this suit was filed on 24th February 2003 in Nairobi and registered as HCCC No. 168/2003. The case was later transferred to Embu where it was registered as HCCC No. 75 of 2005. The case was subsequently transferred to this Honourable Court where it was registered as ELC No. 651 of 2013. Since the filing of the suit, there has been no activity towards the prosecution of this case and on 28th June 2018, the Court issued the plaintiff's advocate notice to show cause why this suit should not be dismissed for want of prosecution on 23rd July 2018. On 17th July 2018, just six days to the date fixed to show cause, the plaintiff filed an application under certificate of urgency seeking to amend the plaintiff. The application as usual was placed before the duty Judge who after perusal observed that there was no urgency demonstrated. The applicant was directed to take dates at the registry in the usual manner. On 23rd July 2018, the case came up for Notice to Show Cause when Mr. Asimwa holding brief for Ms Ann Thungu for the plaintiff stated that there was an application filed on 17th July 2018 under certificate of urgency and that the matter was not dormant but active and that they shall be fixing a convenient hearing date for the hearing of that application. The Court was not satisfied with the explanation and granted the plaintiff another opportunity to give satisfactory reasons for failing to take steps to prosecute the case. The matter was adjourned to 25th July 2018. When the matter was called out, the counsel for the plaintiff was missing in action and their office file was left with a Court clerk who requested Ms Kiragu advocate to hold her brief. Ms Kiragu advocate stood and addressed the Court saying that she did not know anything else about the file. This Court then made its findings which the plaintiff is now seeking to set aside.

I have looked at the Notice of Motion dated 27th July 2018 and the supporting affidavit. I have also considered the response by the 1st and 3rd respondents together with their submissions. The application before me is brought under **Order 17 Rule 2 (2) CPR** which provides as follows:

“17 2 (1) 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 the satisfaction, may dismiss the suit”.

“17 2 (2) If cause is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit”.

The plaintiff in this case was given notice to show cause why the suit should not be dismissed on 23rd July 2018 but the explanation was not sufficient and was given another chance to bring more satisfactory reasons. The matter was then adjourned to 25th July 2018. On the said date, the counsel who was requested to hold brief Ms Kiragu stated that she knew nothing concerning the file. Having failed to provide sufficient explanation, the Court did the inevitable by dismissing the suit under **Order 17 Rule 2 (1) CPR**. The present application is seeking to set aside the orders dismissing the suit purportedly under **Order 17 Rule 2 (2) CPR**. That order is not available to the applicant. The law does not provide for setting aside a dismissal order under **Order 17 Rule 2 (1) CPR**. That informs the reason why the plaintiff filed a Notice of Appeal on 7th August 2018. That in my view is the way to go. I agree with the submissions by Mr. Kagio that orders for setting aside and the appeal are mutually exclusive in that both cannot go together. The applicant has to decide to pursue one.

In the circumstances of this case, I find that the application dated 27th July 2018 lacks merit, is incompetent and an abuse of the Court process. The same is hereby dismissed. I make no order as to costs

READ and SIGNED in open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

ELC JUDGE

15TH FEBRUARY, 2019

In the presence of:

1. Mr. Kagio for 3rd Defendant
2. Mr. Chomba for 1st Defendant
3. Ms Ann Thungu for Plaintiff
4. 2nd Defendant's Advocate - absent
5. Mr. Kabuta – Court clerk – present