



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 62 OF 2003

CHARITY VANESSA GATHONI KAMAU.....PLAINTIFF

VERSUS

1. MARY PAYMAN

2. KEZIAH PYMAN

3. GEORGE TIMOTHY PYMAN.....DEFENDANTS

RULING

1. The Notice of Motion dated **28th September, 2018** seeks the following orders:

(1) ...spent

(2) ...spent

(3) That the status quo obtained before the **11th day of April, 2018** be maintained pending the hearing and final determination of this application and thereafter the suit.

(4) That this honourable court be pleased to review and/or set aside the order made on **8th July, 2014** dismissing the plaintiff's suit for want of prosecution.

(5) That this honourable court be pleased to review and/or set aside the order made on **11th April, 2018** authorising the eviction of the plaintiff from parcel land LR No. 12949 situated at Milimani Kitale.

(6) That this honourable court be pleased to make such other orders that it deems fit in the interest of justice for the preservation of the suit property and/or disposal of the suit.

(7) Costs of this application be provided for.

2. The applicant has brought the application under **Order 45 Rule 1, Order 10 Rule 11, Order 24 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya.**

3. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant. In brief the grounds are that upon the death of the advocate dealing the matter, the office of Ms Mwangi Wahome advocates were closed without the knowledge of the applicant; that process served upon the firm, and in particular, the applications dated **6/6/2011** and **11th December 2017**, were not brought to her notice; that the application for dismissal for want of prosecution was brought to her notice much later by Mr. Ingosi the advocate currently on the record; that the plaintiff and her witnesses had testified in the matter by the time the application for dismissal for want of prosecution was filed; that it would have been just to order that her case be closed and the defendants to call their evidence; that the defendant's counterclaim has never been set down for hearing; that the order made on **11/4/2018** was made without revelation to the court that the defendants had not prosecuted their counterclaim; that dismissal of the suit did not amount to granting of judgment in that the defendants were yet to prosecute their counterclaim; that granting the application dated **11/12/2017** amounted to granting the defendants judgment without hearing the plaintiff and is against the wording and spirit of the constitution and that if the orders sought are not granted the defendants would execute the order of **11/4/2018** and the plaintiff would suffer irreparable loss. It is argued that the court ought not to have been called upon to make the order of eviction of the plaintiff while there was no judgment or decree for

execution and that the order was sought on a wrong interpretation of the decision dismissing the plaintiff's suit.

4. The sworn affidavit of Keziah Pyman the 2nd defendant is on the record, having been filed on **17/10/2013**.

5. Besides going into the merits of the main suit, which this court is not concerned with at this stage, the deponent states that the application for dismissal was served upon the firm of M/s Mwangi Wahome, advocates and the court had indeed dismissed the suit. These facts are not disputed by the plaintiff. It is averred that the said firm of Wahome Mwangi was given leeway to file a response to the application for eviction but they failed to do so, and that eviction has already taken place and the defendants have taken possession of the suit land.

6. The defendants also filed grounds of opposition dated **16/10/2018**. Other than those in the replying affidavit, the new grounds therein are that there is no file for the purpose of further orders by the court, that the court is now *functus officio* and that there is inordinate delay.

7. The defendants filed their submissions on **14/11/2018**. I have perused through the court record in this matter and found no submissions filed on behalf of the plaintiff.

8. In this matter, the plaintiff's suit was partly heard before it was dismissed for want of prosecution at the instance of the defendant.

9. A bill of costs was filed notwithstanding that the counterclaim had not been heard, and taxed. On the **19th March 2018** Mr. Ngeiywa holding brief for a Mr. Amadi sought time to withdraw from acting. No application was filed within the time granted and on **11/4/2018**. Mr. Nyamu for the defendants, urged that the application for eviction be allowed. The court, noting that the firm of Mwangi Wahome were still on record, and that the application was unopposed, granted it. Thereafter the instant application was filed.

10. It is not denied that there was a counterclaim or that the plaintiff had testified by the time the suit was dismissed for want of prosecution. On my part, having gone through the entire record I confirm that there is a counterclaim filed on **13th April 2004** and that the same has not been heard. There is therefore no decree from either the dismissed plaint or from the counterclaim for execution in this matter.

11. I have considered the application before me and the response. Whether or not the plaintiff was served with the process in respect of the application for dismissal and eviction respectively, these facts, which appear to have been overlooked in the process of the prosecution of the two applications, now alter the landscape of this litigation a great deal.

12. To begin with, there is no insistence that the counterclaim was ever heard. A counterclaim is a different suit, separate from the main suit. I am mindful of the fact that normally, where there is a counterclaim, the dismissal of the main suit does not lead to a decree before the hearing of the counterclaim. Besides, it is usually the practice that a counterclaim is heard together with the main suit in order to attain the overriding objective of **Section 1A of the Civil Procedure Act**. In the case of **Fidelity Commercial Bank Limited -vs- Azim Jiwa Rajwani [2012] eKLR** the court stated as follows:

“Whilst I am in agreement ... that the proposed counterclaim is a separate cause of action, I do not however agree ... that the same ought to be tried separately. I believe that since the issues are intertwined, the documents to be relied will be the same and that the witness may well be the same. In my view, in terms of Section 1A of the Civil Procedure Act, it will be prudent to try the issues between the parties at the same time since that will save judicial time. Holding separate trials in my view will not be achieving the overriding objective of the Civil Procedure Act of expeditious, proportionate and affordable disposal of this civil dispute between the parties herein”.

13. In view of the observations in the above cited case, I agree with the plaintiff that the usual step after dismissal of the plaintiff's suit is to fix the counterclaim for hearing, which was never done in this case.

14. In this case the application dated **6/6/2011** merely sought the dismissal of the suit for want of prosecution, which was granted. There was no prayer that the counterclaim be set down for hearing in that application.

15. I have also noted that there is an application for leave to serve the plaintiff by way of substituted service dated **20/5/2014**. It is based on the grounds that the plaintiff's advocate had passed on sometime in **2011** and that it was impossible to serve him as his office was no longer in existence. It was also alleged that the respondent can not be reached and efforts to do so had been futile. The supporting affidavit to that application does not explain what efforts had been made to obtain the plaintiff or her advocates. It is on the basis of that insufficient evidence that this court declined to grant the said application on **20/5/2014**. It stated that the applicants have not made any effort to serve and adjourned the application dated **6/11/2011** to **17/6/2014** and ordered that the same be served on the firm of Mwangi Wahome advocates in Nairobi. On **17/6/2014** the defendant's counsel stated to the court that the service on that firm had been effected as ordered and produced an affidavit of service.

16. It is noteworthy that the defendants are not insisting that the application dated **17/6/2014** was brought to the attention of the plaintiff by that firm.

17. The very fact that substituted service had been sought is indicative of the fact that the defendants for some reason not disclosed, knew or suspected there could be a problem if they served the Nairobi office of that firm. Nevertheless the application dated **26/6/2011** was argued on **17/6/2014** and ruling was delivered on **8/7/2014**. The problem that the defendants had been apprehensive about has now been revealed by the filing of the instant application.

18. In my view it can not be understood why, knowing that the plaintiff's counsel was deceased, the defendants, besides seeking other means of service, never served the plaintiff personally with the application dated **17/6/2014** and **11/12/2017**. That reason can only be in the realm of speculation. However it can not be gainsaid that the lack of awareness of the steps being undertaken in this matter on the part of the plaintiff

led to her inaction, and judgment, and orders of eviction.

19. The situation herein is not savoury for any lover of justice. The omission to note in the ruling of **8/7/2014** and **11/4/2018** that the counterclaim had to be fixed for hearing before any execution could be undertaken is an error on the record that should be corrected forthwith, for it can not be said that any step taken in execution in the absence of a decree is legal. However all the illegal steps undertaken were with the knowledge of and at the promptings of the counsel for the defendants.

20. In view of the foregoing I find that the plaintiff's application dated **28/9/2018** has merit. I grant it and order as follows:

(1) The status quo obtaining before the 11th day of April, 2018 shall be restored pending the hearing and final determination of this the suit.

(2) The order made on 8th July, 2014 dismissing the plaintiff's suit for want of prosecution is hereby vacated and the plaintiff's suit is hereby reinstated for further hearing.

(3) The order made on 11th April, 2018 authorising the eviction of the plaintiff from parcel land LR No. 12949 situated at Milimani Kitale is hereby vacated and if already effected, the plaintiff shall be restored into the suit premises forthwith.

(4) The defendants shall not interfere with the suit property in any manner whatsoever pending the hearing of the suit.

(5) Costs of this application be borne by the defendants.

Dated, signed and delivered at Kitale on this 5th day of February, 2019.

MWANGI NJOROGE

JUDGE

5/02/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picot

Mr. Teti holding brief for Ingosi for the plaintiff/applicant

N/A for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

5/02/2019