REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 21 OF 2018

MARGARET WANGARI WAWERU.....PLAINTIFF

VERSUS

KIMANI MWANGI.....1ST RESPONDENT

HUDSON MOFAT KAMAU.....2ND RESPONDENT

KIMANI MWANGI.....3RD RESPONDENT

RULING

The appellant brought a suit in the Principal Magistrate's Court at Thika namely, Thika PMCC No. 38 of 1995 against the respondents seeking an order that the 2nd and 3rd respondents do transfer to her all those parcels of land known as Loc. 2/Makomboki/828 and Loc. 2/Makomboki/829 ("the suit properties"). The appellant contended at the lower court that her deceased husband one, James Waweru Gakinya had purchased the suit properties from the 1st respondent on 5th January, 1089. The appellant averred that the suit properties were initially part of the original parcel of land known as Loc. 2/Mokomboki/566 ("plot No. 566"). The appellant averred that instead of the 1st respondent transferring the suit properties to her deceased husband, he sold and transferred the same to the 2nd and 3rd respondents although the appellant had taken possession of the suit properties and erected thereon her residential house. The appellant who alleged to be a representative of the estate of her deceased husband averred further that the sale of the suit properties to the 2nd and 3rd respondents was effected after the lower court suit had been filed and was pending. The 2nd and 3rd respondents were added to the lower court suit that had been filed initially as against the 1st respondent only through an amendment to the plaint that was affected in 1996.

The respondents filed a joint statement of defence and counter-claim against the appellant in the lower court. The 2nd and 3rd respondents averred that they were the registered owners of the suit properties which they acquired lawfully from the 1st respondent and that the appellant had forcefully entered the suit properties on or about 1993 and had since then remained in unlawful possession thereof. The respondents sought by way of a counter-claim, vacant possession of the suit properties and mesne profits.

In a judgment delivered on 6th July, 2001, the lower court dismissed the appellant's suit and allowed the respondents' courter-claim. The appellant was ordered to give vacant possession of the suit properties to the 2nd and 3rd respondents.

Following that decision of the lower court, the appellant filed the present appeal against the same on 19th July, 2001. The appellant filed the appeal in person. On 12th November, 2001, the appellant appointed the firm of Wokabi Murage & Co. Advocates to act for her in the appeal. On 4th December, 2001, the appellant changed advocates and appointed the firm of Thuku & Co. Advocates to act for her in the appeal. From the lower court file which is before this court, the appellant applied for certified copies of the proceedings which were supplied to the appellant on 10th September, 2001.

The appellant did not obtain an order for stay of execution of the lower court judgment and a warrant of eviction was issued against her on 7th September, 2001 which was successfully executed through her forceful eviction from the suit properties.

The appellant filed an application for stay of execution before this court. When the said application came up for hearing on 7th March, 2003, the appellant's advocate informed the court that the appellant had been evicted from the suit property and that the appellant wished to amend her memorandum of appeal. The appellant's application for stay of execution was adjourned and the matter stood over generally. For a period of over 5 years from the time the appeal was adjourned on 7th March, 2003, the appellant took no steps with a view prosecuting the appeal. The appellant neither amended the memorandum of appeal nor filed a record of appeal.

On 19th May, 2008, the court served the parties with a notice to appear in court on 25th July, 2008 and show cause why the appeal should not be dismissed for want of prosecution. When the matter came up for the notice to show cause on 25th July, 2008, only the respondent's advocate attended court. After satisfying itself that the appellant was duly served with the notice and had failed to attend court to show cause why the appeal should not be dismissed, the court dismissed the appeal for want of prosecution.

On 27th April, 2009, the appellant appointed a new firm of advocates C. G. Waithima & Co. Advocates to represent her in the appeal that had by then been dismissed for want of prosecution. The appellant's new firm of advocates participated in the taxation of the respondent's bill of costs which was filed after the dismal of the appeal. The respondent's bill of costs was taxed at Kshs.42,303/= on 31st July, 2009.

What is now before the court is the appellant's Notice of Motion application dated 11th May, 2009 seeking the setting aside of the order that was made on 25th July, 2008 dismissing the appeal for want of prosecution and all consequential orders. The appellant has also sought the reinstatement of the appeal for hearing on merit. Although the application was filed on 12th May, 2009, the same was listed for hearing for the first time on 20th February, 2018 after almost 9 years from the time the application was filed. The application was brought on the grounds that the appeal herein was dismissed as a result of the fault of the advocate whom the appellant had instructed and that the appellant had been keen on prosecuting her appeal. In her affidavit in support of the application, the appellant averred that she had instructed the firm of Thuku and Company Advocates to conduct the appeal on her behalf and that before the appeal was set down for hearing, Mrs. Grace Njeri Thuku advocate who was handling the matter became sick and was hospitalised for almost a year after which she lost her sight. The appellant averred that following her eviction from the suit properties, she was unable to follow up on the status of her case with the said firm of advocates and as such she just sat back waiting for the said firm of advocates to inform her of the progress of the case.

The application was opposed by the respondents through grounds of opposition dated 27th November, 2018. The respondents contended that the appellant's application was misconceived and amounted to an abuse of the process of the court. The respondents contended that the appeal was dismissed more than 10 years ago for want of prosecution and that the appellant was guilty of indolence in the prosecution of the application. The respondent contended that the appellant had not met the conditions for grant of the review orders sought.

The appellant filed written submissions on 25th October, 2018 in support of the application while the respondent's advocate made oral submissions. In her submissions, the appellant contended that her advocates were not served with a notice to show cause before the appeal herein was dismissed. The appellant contended that since her advocates then on record were not served, she was condemned unheard and as such denied justice. The appellant submitted further that her advocates then on record did not prosecute the appeal because the advocate who was handling the matter in the firm became ill. The appellant contended that the delay in the prosecution of her appeal was caused by an act of God for which neither she nor her advocates then on record could be blamed. The appellant contended that she was still willing and ready to prosecute the appeal and that the respondents would suffer no prejudice if the appeal was reinstated for hearing on merit.

In his oral submissions made on 27th November, 2018 in opposition to the application, Mr. Njeru who appeared for the respondents submitted that the appellant had not met the conditions for granting an order for review. Mr. Njeru submitted that before the appeal was dismissed on 25th July, 2008, it had remained dormant for over 6 years. Mr. Njeru submitted that the respondents had already taken possession of the suit properties following the execution of the lower court decree and as such it would not be in order to disrupt that status quo. In conclusion, he submitted that there must be an end to litigation.

I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the respondents in opposition to the application. What I need to determine is whether valid grounds have been put forward to warrant the setting aside of the orders made herein on 25th July, 2008. There is no doubt that the court has power to set aside the said orders. The power is however discretionary. Before exercising the power, the court has to satisfy itself that the applicant deserves the exercise of the court's discretion. In the case before me, I am not persuaded that it would be appropriate for the court to exercise its discretion in favour of setting aside the orders made herein on 25th July, 2008. As I have mentioned at the beginning of this ruling, this appeal had remained dormant for a period of over 5 years before a notice to show cause was issued by the court for the parties to appear and show cause why the appeal should not be dismissed for want of prosecution. The reasons put forward by the appellant to justify the delay are not adequate in my view to exonerate the appellant from her failure to take active role in the prosecution of her appeal. There is no contestation that the appellant's advocate became sick and ultimately lost her sight. There is no evidence on record as to when the appellant learnt of the said advocate's illness. The medical report annexed to the appellant's affidavit is dated 10th May, 2004. As of that date, the said advocate had already lost her sight and was under rehabilitation program by the Kenya Society for the blind. This suit was dismissed on 25th July, 2008, 4 years after the date of the said report. The appellant has not explained why no action was taken by her to appoint another firm of advocates to take over the conduct of the matter until after the appeal was dismissed. In her submissions, the appellant had contended that her advocates were not served with the notice to show cause. As I have mentioned earlier, before dismissing the appeal, the court had observed that the appellant had been served. I have noted from the back page of the Notice to show cause dated 19th May, 2008 that the appellant's and the respondents' advocates were duly served with the same and that they acknowledged service.

The appellant did not raise the issue of service in her application. The issue was raised at the submission stage. No material was placed before the court to suggest that one, Erick N. Klanyoro who received the Notice to Show Cause on behalf of the firm of Thuku and Co. Advocates on 4th June, 2008 had no authority to receive such notice. There was also no evidence that by that date, the firm of Thuku and Company Advocates had closed down.

Due to the foregoing, I am of the view that no plausible explanation has been given by the appellant for her failure to prosecute the appeal before it was dismissed. I am also of the view that after the appeal was dismissed, the appellant took unreasonable time to file and prosecute the present application. The appeal herein had been pending for 7 years as at the time it was dismissed in 2008. The judgment the subject of the appeal was delivered on 6th July, 2001 about 17 years ago and was executed in the same year. I am in agreement with the respondents that there must be an end to litigation.

In conclusion, I find no merit in the appellant's Notice of Motion application dated 11th May, 2009. The application is dismissed with each party bearing its own costs.

Delivered and Dated at Nairobi this 30th Day of April 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Appellant

N/A for the Respondents

C.Nyokabi-Court Assistant