



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 222 OF 2013

AMISI MASHA MKWEHA (suing as Attorney of

NYEVU MBITA KAEMBENI).....PLAINTIFF

VERSUS

BEATRICE MORAA GICHANA.....DEFENDANT

RULING

1. The Application before court is the notice of motion dated 23rd November, 2018 brought by the plaintiff/applicant under Section 1, 1A, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 (1) of the Civil Procedure Rules and all other enabling provisions of the law. The applicant is seeking an order to reinstate the suit.

2. The application is premised on the grounds:

a. That the plaintiff/applicant filed and served a suit against the defendant/respondent

b. That on the 20th April 2016, the plaintiff/applicant herein filed an application to amend the plaint which application was dated 12th April 2016.

c. That the application was finally heard and allowed on the 25th May 2017 by this Honourable Court.

d. That due to the plaintiff/applicant's difficulties in life, he was unable to raise funds to cater filing the amended plaint and other charges and consequently this matter was dismissed.

e. That it is therefore only fair, just and equitable that this suit be reinstated.

3. The application is supported by the affidavit of Joyce Chesaro advocate for the plaintiff sworn on 23rd November, 2018. It is deponed that the applicant filed an application to amend the Plaint which was finally heard and allowed by the court on 25th May, 2017. That the amended plaint was prepared and assessed by the court at Kshs.3,075/= on 6th June 2017. The plaintiff was informed of the court filing fees and was requested to pay together with other expenses. It is deponed that due to difficulties of life, the plaintiff could not raise the funds in time to enable the filing of the amended plaint and hence the suit was dismissed. That the plaintiff has now brought fees for filing the amended plaint and that it is in the interest justice that the suit be reinstated. It is further deponed that the application has been brought without inordinate delay.

4. The application is opposed by the respondent through a replying affidavit sworn by the respondent on 5th February, 2019. The respondent depones that the application is misconceived, frivolous, vexatious and otherwise an abuse of the court process. That the suit was rightly dismissed for want of prosecution. That it is clear that the plaintiff thought very little about this case and has never even bothered to defend the notice to show cause why the suit should not be dismissed. It is deponed that this suit was filed in the year 2013 a period of over 5 years and the delay to prosecute the same is obviously inordinate, and that the plaintiff has been delaying the prosecution of her own suit by filing application which she would then take time to prosecute. That on 25th May 2017, the plaintiff was granted leave to amend her plaint within 14 days but to date has never filed the same. That the reasons given that the plaintiff could not raise Kshs.3,075 for over one year to file the amended plaint is not tenable at all since in any event there is no application made in court for the applicant to sue as a pauper. The respondent states that she is the duly registered proprietor of the suit property in which she has done extensive developments and therefore the suit has no merit.

5. On 5th February, 2019, the court gave directions that the application be canvassed by way of written submissions. The applicant was granted leave to file a further affidavit and was to file and serve her further affidavit and submissions within 7 days while the respondent was to file hers within 7 days of service. The application was then fixed for hearing on 7th March, 2019. By then the applicant had not filed the supplementary affidavit and her submissions, and applied for more time which was granted. Again when the matter came up for hearing on 9th April, 2019, the applicant and her advocate were not present and had neither filed the further affidavit nor submissions.

6. I have considered the application. This suit was filed on 3rd October 2013 together with an application brought under certificate of urgency. The defendant entered appearance on 30th October, 2013 and filed defence on 29th November, 2013. By 21st April, 2016 the plaintiff's application dated 10th September, 2013 had not been heard. The court, having noted the age of the said application, directed that the status quo prevailing be maintained and the parties to comply with Order 11 of the Civil Procedure Rules so that the suit can be set down for hearing.

7. The record shows that on 20th April 2016 the plaintiff filed an application seeking leave to amend the plaint. On 25th May, 2017 the court granted the applicant 14 days to file her amended plaint. To date, the plaintiff has not filed the amended plaint, either as directed or at all. On 18th September, 2018 the court issued a notice to show cause why the case should not be dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules. When the matter came up on 7th November, 2018 none of the parties was present in court and the court dismissed the suit for want of prosecution.

8. In the application herein, it is stated that the applicant was unable to raise funds to cater for filing the amended plaint and other charges. The averments are contained in an affidavit sworn by the Plaintiff's counsel and not the applicant herself. Furthermore, the applicant has not explained why she failed to attend court on 7th November, 2018 when the suit was dismissed for want of prosecution. The only explanation given is for failure to file amended plaint. Order 17 Rule 2 of the Civil Procedure Rules allows the court to dismiss a suit for want of prosecution where no cause is shown to the satisfaction of the court. I have looked at the affidavit in support of the application. There is no reason given why the plaintiff and her advocate failed to attend court on 7th November, 2018. Even during the hearing of the present application on 9th April 2019, there was no appearance on the part of the applicant. This clearly shows that the applicant has lost interest in the case. In my view, the court cannot exercise its discretion in favour of a party who is taking the court process very casually. The overriding objective of the court would not come to the aid of a party who has not given an explanation for failing to attend court when the suit was dismissed. I am therefore not satisfied with the explanation for non-attendance which in any event relates to filing of pleadings and not attendance.

9. The upshot is that the application before court lacks merit and is hereby dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Bakari holding brief for Kenzi for defendant

No appearance for applicant

Yumna Court Assistant

C.K. YANO

JUDGE