



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 614 OF 2009

STANLEY MUNGAI WAWERU.....PLAINTIFF

=VERSUS=

KEZIAH WAMAITHA WAWERU.....1ST DEFENDANT

SUZANNE NYAMBURA NUNGI.....2ND DEFENDANT

RULING

The plaintiff and the defendants are related. The 1st defendant is the plaintiff's mother while the 2nd defendant is the plaintiff's sister. The 1st defendant died on 9th December, 2010 and was not substituted by her legal representative. The case against her has since abated. The dispute before the court relates to the parcel of land known as Karai/Karai/818 ("the suit property") which was initially registered in the name of one, David Waweru Wanuma deceased who was the father of the plaintiff and the 2nd defendant.

The plaintiff brought the suit against the defendants on 1st December, 2009 contending that before his death, David Waweru Wanuma had promised to give him a portion of the suit property measuring 2.0 acres. The plaintiff averred that after the death of David Waweru Wanuma the defendants fraudulently caused the suit property to be transferred to the 1st defendant. The plaintiff averred that he was entitled to a portion of the suit property measuring 2.0 acres which he was promised by his deceased father David Waweru Wanuma and which the 2nd defendant was claiming.

The plaintiff sought an injunction restraining the defendants from in any manner dealing with the suit property and from interfering with his quiet possession of the same. The plaintiff also sought a declaration that the suit property was registered in the name of the 1st defendant fraudulent and as such the same should revert to the original owner. Finally, the plaintiff sought an order that he be given his share of the suit property as per the agreement that he had with his deceased father.

Together with the plaint, the plaintiff filed an interlocutory application for injunction which was heard and determined on 17th June, 2010. The matter was thereafter listed for hearing on 3rd December, 2010 and 24th January, 2011 and in both occasions the hearing of the matter did not take off. For a period of about 4 years from 24th January, 2011 when the matter came up for hearing last, the plaintiff took no steps to fix the suit for hearing.

On 19th March, 2015 the suit was dismissed for want of prosecution. On 13th November, 2015 the plaintiff filed an application for reinstatement of the suit. On 7th April, 2016 the court allowed the plaintiff's application for reinstatement of the suit and ordered the plaintiff to set down the suit for hearing within one (1) year from the date of the order in default of which the suit was to stand dismissed without any further reference to the court. That order was made in the presence of the plaintiff.

The plaintiff took no steps with a view to fixing the suit for hearing. The matter remained dormant until 29th March, 2017 when the Deputy Registrar on his own motion fixed the same for mention before him on 30th May, 2017 for directions. By this time, the one (1) year within which the suit was to be listed for hearing had lapsed and the suit stood dismissed in accordance with the order made by the court on 7th April, 2016. On that date, the Deputy Registrar listed the matter for mention before this court on 12th October, 2017 in the presence of the plaintiff.

When the matter came up on 12th October, 2017 neither the plaintiff nor the defendants turned up in court and the court directed that the plaintiff be served with a notice to appear in court on 15th January, 2018 to show cause why the suit should not be dismissed. This order was not necessary at all as the suit as I have stated earlier stood dismissed at the expiry of one (1) year from 7th April, 2016. From the record, a notice to show cause was taken out by the Deputy Registrar and served upon the plaintiff by post at his postal address of service which he

gave when he filed the suit.

On 15th January, 2018, the parties once again did not turn up in court and for the third time, the suit was dismissed for want of prosecution. What is now before me is yet another application by the plaintiff seeking to reinstate the suit for hearing on merit. The application was filed on 28th September, 2018, several months after the dismissal of the suit. The application which was brought by way of Notice of Motion dated 28th September, 2018 was brought on the grounds that in case the orders sought were not granted, the plaintiff would suffer substantial loss and that there was need to protect the suit property. In his affidavit sworn on 28th September, 2018 the plaintiff contended that he was not served with the notice to show cause and that he only came to know that the suit was dismissed by chance when he visited the court registry to peruse the file.

The plaintiff's application was opposed by the 2nd defendant through grounds of opposition dated 8th November, 2018 and a replying affidavit of the same date. In her grounds of opposition, the 2nd defendant contended that the application had been brought after inordinate delay and the same was unmerited. The 2nd defendant contended further that the plaintiff was guilty of laches and obstruction of justice. In the replying affidavit, the 2nd defendant stated that since this was the second time that the suit had been dismissed, it was an indication that the plaintiff was not keen on pursuing the matter diligently. The 2nd defendant averred that the notice to show cause was served upon both parties and that there should be an end to litigation. The 2nd defendant stated that no good explanation had been given by the plaintiff to warrant the reinstatement of the suit. The 2nd defendant contended further that the 1st defendant who was registered as the owner of the suit property died on 9th December, 2010 and was not substituted and that the 2nd defendant was unnecessary party to the suit.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the response by the 2nd defendant to the application. At the hearing, the parties relied on their affidavits and left the matter for determination by the court.

There is no dispute that the court has power to reinstate a suit that has been dismissed for want of prosecution. The power is however discretionary. An applicant for reinstatement of a suit has to satisfy the court that he deserves the exercise of the court's discretion. I have at the beginning of this ruling given the history of the dispute between the parties and the progress of the case. The picture that emerges from the foregoing depicts the plaintiff as an indolent litigant. As was contended by the 2nd defendant in the grounds of opposition, equity aids the vigilant and not the indolent. An indolent litigant does not deserve the exercise of the court's discretion. I am not satisfied that the plaintiff was not served with the notice to show cause as he has claimed. The plaintiff did not give his physical address. What he gave was his postal address. Evidence before the court shows that the plaintiff was served with the notice through the post.

Taking all factors into account, I am in agreement with the 2nd defendant that the plaintiff's application dated 28th September, 2018 has no merit. The application is accordingly dismissed with costs.

Delivered and Dated at Nairobi this 27th day of June 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Apolot h/b for Mr. Kahuthu for the Defendants

Mr. Waweru-Court Assistant