



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 87 OF 2017

FRANCISCA WANZA NTHENGE.....1ST PLAINTIFF/APPLICANT

TABITHA SYOMBUA MAINGI.....2ND PLAINTIFF/APPLICANT

VS

MWANA WIKIO COOPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion as filed seeks orders to set aside orders made on 31/10/18 and reinstate the suit for hearing and determination. It is grounded on the following provisions of the law; Art 159 and section 1A and 2A of the Civil Procedure Act. That the suit abated on 31/10/18 for failure to file an amended plaint within 14 days and that the mistake of counsel ought not be visited on the Plaintiff.
2. The application is supported by the supporting affidavit of counsel for the Applicant where he deponed that the suit was filed on 2/11/16. That Phylis Katoti Maingi passed away on 24/8/17 and was substituted by Francisca Wanza Nthenge and Tabitha Syombua Maingi. On the 13/10/18 the suit was decreed to have abated as no amendment of the plaint was done within 14 days. That the failure to amend was an oversight by the counsel of the Applicant and urged the Court not to visit this infraction on the litigants.
3. The application was opposed by the Respondent who faulted the Applicants for failure to amend the plaint within the period of 14 days' despite being granted leave to do so. That the delay of 5 months has not been explained by the Applicants and urged the Court not to reinstate the matter as the Respondent will suffer prejudice in costs. That the Applicant has even failed to attach a copy of the draft amended plaint for the perusal of the Court.
4. Parties have each filed written submissions which I have read and considered in the ruling.
5. I have reviewed the proceedings in the case and note that upon the death of Phylis Katoti Maingi, the intended substitutes moved the Court vide a Notice of Motion dated the 3/4/18. The same being unopposed, was allowed by orders of the Court on the 17/5/18. Upon substitution, the Applicants had 14 days then to file an amended plaint. This was not filed until the Court raised the matter with the parties on the 27/11/18.
6. The provisions of order 24 as applied together with Section 3A ,1B and 1C gives the Court unfettered discretion which must be exercised judiciously and within the law. The Court acts to prevent an injustice, hardship or inadvertence or excusable mistake on the one hand. On the other hand it must also be keen not to assist a party who is out to abuse its process or overreach or defeat the overriding objectives of the Court. In this case, when the application was allowed, the parties did not go to slumber but actively worked towards having the matter set down for hearing.
7. The supporting affidavit narrates that there was an error and inadvertence when counsel failed to amend the pleadings. That the error was excusable given the fact that the parties proceeded without noticing the omission until the hearing date when the Court raised the anomaly.
8. The suit had not abated given that as at the time of filing suit there had been evidence of substitution (by consent) and the remaining part of amendment may be done anytime before judgment. There is no evidence that the error was such that it was intended to delay or subvert the cause of justice. The Respondent has not showed how he stands to be prejudiced if the application is granted so that the matter may be heard on its merits. There is no evidence of inordinate delay and /or such delay that would override the need for fair trial, a supreme right to be heard and matter determined before this Court and further obligation of the Court to uphold justice where there is good ground.
9. I exercise my discretion to allow the application.
10. The Plaintiff is directed to file an amended plaint within 14 days from the date herein. The Defendant shall have corresponding leave of 14 days to file any response thereto, if need be. Thereafter parties to set the matter for hearing.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiffs/Applicants: 1 – Present in person

Advocate is Absent

2 - Present in person

Ms Maina HB for Maranga for the Defendant/Respondent

Irene and Njeri, Court Assistants