



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 175 OF 2014

SAGALLA RANCHERS LTD.....PLAINTIFF/APPLICANT

VERSUS

IZERA ENTERPRISES LTD.....1ST DEFENDANT/RESPONDENT

GITONGA WAMBUGU KARIUKI.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion application dated 28th December 2017 and filed in court on 15th January 2018. The application is brought under the provisions of Section 1A, 1B & 3A of the Civil Procedure Act and Order 12 rule 7, Order 17, Order 40, Order 50 & Order 51 of the Civil Procedure Rules. The orders sought are;

(a) Spent.

(b) That this Honourable Court be pleased to set aside the order for dismissal of this suit issued on 11th October 2017.

(c) Spent.

(d) That pending the hearing and determination of this suit this Honourable Court grant a temporary injunction restraining the defendants by themselves, their agents and or servants, legal representatives, agents or howsoever from entering into, remaining on, erecting structures or any manner interfering with or wasting the plaintiff's property's property being LR No. 12177, or any portion illegally hired therefrom, situated in south Voi town in Taita Taveta County.

(e) That the costs of this application be provided for.

2. The application is supported by the grounds listed on the face of it inter alia;

(i) That on 18th December 2017, the defendants/respondents invaded the plaintiff/applicant's property L.R No. 12177, situated in south Voi Town and effectively taken possession of the suit property.

(ii) That upon perusal of the court file, by Kurgat & Associates advocates they learnt that on 11th October 2017, this Honourable Court dismissed this suit for want of prosecution, under Order 17 rule 2 of the Civil Procedure Rules.

(iii) That the notice to show cause dated 7th September 2017 in the court file is addressed to the firm of Kinoti & Kibe advocates, who have since confirmed that they never received the said notice to show cause, or otherwise been notified of the intention to dismiss the matter for want of prosecution.

3. The application is further supported by an affidavit sworn by Clorent Mwacharo Isack who deposed that he is a director of the plaintiff. Mr Isack deposed that on 18th December 2017 the defendants invaded the plaintiff's land L.R No. 12177 situated in Voi town and effectively took possession of the suit property purporting to possess title deeds for a portion of the suit property. Further that they were not served with the notice to show cause for dismissal of their suit.

4. Mr Isack deposed further that in 2009, the plaintiff agreed to sell to the 2nd defendant two parcels one of which is land measuring 20000 acres that was to be excised from L. R 12177 for the sum of Kshs100,000,000/= @ Kshs5000 per acre. Clause 18 of the agreement provided

mode of payment of the purchase price. That there is still outstanding a balance of Kshs31,650,000/= due and owing. That notwithstanding the outstanding balance, the 2nd defendant trading as the 1st defendant procured by way of an instrument of transfer made on 2nd November 2012 in respect of L. R Nos. 12177/7 and 12177 in favour of the 1st defendant. The plaintiff avers that the transfer was procured in a fraudulent manner and has challenged the same. Further that the plaintiff has never utilised the so called purchase price monies as the same were secretly paid to its bank account several years after the completion date.

5. The application is opposed by the replying affidavit of the 2nd defendant. Mr Wambugu Kariuki deposed that the plaintiff has not explained why it had not taken any steps to prosecute the suit from 2014 to 11th October 2017 when the same was dismissed for want of prosecution or why it never served the defendants with summons to enter appearance.

6. The defendants aver that the plaintiff did not annex a board resolution to file this suit or authority issued to Mr Eliud T. Mwamunga to swear the verifying affidavit thus this suit is an outright abuse of the court process. That the plaintiff did not disclose to this court the existence of her case **ELC Case No. 210 of 2013** where she had also filed an application dated 5th February 2015 seeking reinstatement of that suit. That the said application was dismissed on 8th November 2018 for want of prosecution. Further that the plaintiff did not disclose the existence of **Mombasa HCCC No. 86 of 2014** (now **Voi HCCC No. 1 of 2018**) in respect of the suit property seeking similar orders as this suit. The defendants annexed pleadings in those suits marked as “**GWK-3**”.

7. The defendants accuse the plaintiff of coming to court with unclean hands for failing to pay their assessed costs in ELC No. 210 of 2013 (annex **GWK-5**) and bombarding them with many suits in the hope that the defendants will abandon their claim over the suit property. That the plaintiff has not made out a case for granting of an injunction order and if such an order is granted, the same will be prejudicial to them. The defendants urged the court to dismiss the application on account of the grounds set out in their affidavit.

8. The parties opted to argue the application by filing of written submissions which were done on 10th March 2019 (for the plaintiff) and 28th March 2019 (for the defendants). The first issue for the court’s determination is whether there is sufficient cause for the court to set aside its orders of dismissal of the suit for want of prosecution made on 11th October 2017 by Justice Odeny M. A. The plaintiff argues that the court did not serve her advocates then on record Ms. Kinoti & Kibe advocates with the notice to show cause.

9. The dismissal of old matters was an initiative of the judiciary to decongest the court system with inactive matters. It was therefore the responsibility of the court to serve parties with notice to show cause where such files were identified. In this case, the notice to show cause dated 7th September 2017 is indicated in a copy in the court file that service was done by post. The defendants have deposed that there is no affidavit from Kinoti & Kibe advocates to state that the notice was received or not. The defendants also stated there was no explanation given why the suit was not prosecuted between 2014 to the time the suit was dismissed.

10. In the case of **Mbogo –versus- Shah (1968) EA** laid down the principles for setting aside an exparte order and or judgement i.e where the non-attendance is as a result of excusable mistake error or inadvertence. That the setting aside of such an order should not be made where the intention is to delay and or obstruct the cause of justice. The plaintiff is seeking the reinstatement of his suit so as to be accorded an opportunity to present his case on merits pursuant to her rights under article 50 of the constitution. The defendants have accused the plaintiff of abusing the court process by filing multiple suits and not prosecuting them.

11. In the case before the court, the plaint was filed on 14th July 2014. Due to uncertainty of the filing fees payable, there was delay in signing and sealing of S.T.E.A which were subsequently signed on 29th February 2016. There was inaction on the part of the plaintiff from the date of issuance of the summons to the date of listing for dismissal. The plaintiff has urged this that if there were any lapses which occurred in handling the matter, the same were inadvertent and explainable (paragraph 22 of the supporting affidavit). The explanation the plaintiff gives was that her advocate was not served with the show cause which averment is unsupported by any evidence. The plaintiff howsoever does not explain the lull between February 2016 to September 2017.

12. Assuming this court was to assume the lull, the defendant has brought to the attention of the court the existence of **HCCC No. 86 of 2014** subsequently transferred to Voi High Court and given **Case No. 1 of 2018**. On the face of those pleadings, it appears the subject matter is the same albeit that these defendants were not joined to those proceedings. The plaint in case no 86 of 2014 is dated 27th June 2014 filed on the same date while the plaint in this suit is dated 14th July 2014 (filed on the same date). It seems the applicant wants to prosecute two suits over the same subject matter in two separate courts which action as pointed out by the defendants amounts to abuse of court process.

13. Although the defence replying affidavit was filed on 23rd November 2018 after the plaintiff had filed her submissions, Mr Kurgat advocate appearing for the plaintiff made no reference to the duplex of suit allegation while highlighting his submissions. If the plaintiff has a live suit which was filed earlier and which she can pursue to resolve the matters in dispute then her request to reinstate this suit is being made in bad faith.

14. In the case of **Abud Abdalla Omar & 28 Others –versus- Kenya Ports Authority & Another**, Court of Appeal at **Malindi in Civil Appeal No. 99 of 2017** while considering an appeal against striking out a suit for abuse of court process (double filing) posed the question; were the appellants left without a remedy? Their answer was a resounding no. Similarly in this case, if I do not reinstate the plaintiff’s suit, her right under article 50 of the Constitution can still be realised in **Voi HCCC No. 1 of 2018** (previously **Mombasa HCCC No. 86 of 2014**).

15. The facts in the cases referred to by the plaintiff in support of this application are distinguishable. For instance in **Alfred Oginga Igonyi & 62 Others –versus- Ogembo Tea Factory**, the trial Judge noted that there was no record that parties were given notice in writing. Here notices were duly issued and copy of the notice in the court file show the same was served by post. The burden shifted on the plaintiff to rebut that such a letter if posted was never received. In the **John Nyagucha –versus- Patrick Ondicho, Eldoret ELC 744 of 2012**, the applicants had taken steps to set the matter down for hearing and explanation for non-attendance was given. The plaintiff herein has not explained away the lull between February 2016 – September 2017. Lastly in all the cases cited, there is no mention of an existing suit similar

to the one being sought to be reinstated.

16. The upshot is that the plaintiff has not satisfied me that she merits reinstatement of the dismissed suit. I decline to grant her prayer (2) of the motion. Once order of reinstatement is declined there is no suit before me to warrant the grant of prayer (4) of the motion on the issuance of an injunction as an injunctive order cannot be issued where there is no suit. In conclusion, the application dated 28th December 2017 be and is hereby dismissed with costs to the defendants/respondents for lacking in merit.

Dated, Signed and Delivered at Mombasa this 19th day of July 2019.

A. OMOLLO

JUDGE.