



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 55 OF 2013

JOSEPH KARIMI MURIUKI.....1ST PLAINTIFF

CATHERINE MUTHONI GACHOKI.....2ND PLAINTIFF

VERSUS

MARGARET NYAGUTHII MBUTHI.....1ST DEFENDANT

ISAIAH MUTHII MURIITHI.....2ND DEFENDANT

RULING

1. The Applicants/Defendants vide a Notice of Motion dated 13th March, 2019 sought the following orders:

(i) That the Honourable court does set aside the order of dismissal of counterclaim made on 2/11/2015 dismissing the counterclaim filed in court on 19/3/2010 by the 1st and 2nd Defendants in this suit.

(ii) That the counterclaim filed on 17/3/2010 be fixed for hearing.

(iii) That the cost be in cause.

2. The Applicants have set out four grounds shown on the face of that application and an affidavit by Margaret Nyaguthii Mbuti sworn on 16/1/2019 in support of the said application.

3. On 14/06/2019, the Plaintiffs through the 1st Plaintiff filed a replying affidavit opposing the said application.

DEFENDANTS/APPLICANTS CASE

4. The Defendants in their affidavit evidence in support of the said application deponed that this matter was in court on 19th March, 2010 when their advocate on record filed and served a written statement of defence and counterclaim to the plaintiffs' claim.

5. The Applicant deponed that when this matter was last in court on 28/9/2010, the court issued a notice to dismiss it.

6. On the said date, his advocate had notified him that he was held up with his personal matters and that he would send another advocate to hold brief. To his surprise, the purported advocate consented to the entire case being dismissed and failed to assist the court by notifying the court that they had filed a counterclaim.

7. On 2/11/2015, this court dismissed the entire suit thereby making it difficult for his advocate to fix the counter claim for hearing.

8. The Plaintiff further stated that the Plaintiffs lost interest in this matter after they disposed off land parcel No. MWERUA/GITAKU/1457 to Susan Wanjiku Karani and that the said Susan Wanjiku Karani sued him in SPMCC Case No. 27/2012 (Kerugoya).

9. The Applicants further deponed that when that other case was last in court on 9/11/2017, his advocate on record advised him that it's prudent to reinstate this case to assist the Senior Principal Magistrate in proper hearing and determination of the counterclaim.

PLAINTIFFS/RESPONDENTS CASE

10. The Plaintiffs/Respondents in their replying affidavit sworn by Joseph Karimi Muriuki on 14th June, 2019 stated that when this matter was last in court on 28/9/2010, the court issued a notice to Show Cause why the same would not be dismissed for want of prosecution. He stated that when the matter came up for notice to Show Cause on 2nd November 2015, this court dismissed the entire suit after counsel for the Defendant who had been sent to hold brief did not oppose the dismissal of the entire suit for want of prosecution. Accordingly to the Plaintiffs, this court has no powers to review the consent of the Defendants who through their legal counsel consented to the entire suit being dismissed. The Plaintiffs further contended that when they filed this case in Embu in the year 2010, both the Defendants vacated from the suit land parcel No. Mwerua/Gitaku/1099 which gave rise to other resultant parcels including LR No. Mwerua/Gitaku/1457.

11. The Plaintiffs further contended that the counterclaim dated 19th March, 2010 is in a different case No. 25 of 2010 filed in Embu by different parties in respect of a different parcel No. Mwerua/Gitaku/1099. They stated that the parties in SPMCC No. 27/2012 (Kerugoya) are different and the subject matter of that suit is also different.

12. The Plaintiff also stated that they bought land parcel No. Mwerua/Gitaku/1099 from the 1st Defendant's husband and that the counterclaim in his case has no relevance in SPMCC No. 27/2012 before the lower court. In conclusion, the Plaintiffs contend that the application dated 13th March 2019 is bad in law, frivolous and the orders sought are incapable of being granted.

ANALYSIS AND DECISION

13. I have considered the application and the supporting affidavit. I have equally considered the submissions by the parties and the applicable law. This suit was dismissed for want of prosecution under **Order 17 Rule 2 (1) CPR** which provides as follows:

“ 17 (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this order.

(3) Procedure if parties fail to appear on day fixed (Order 17, Rule 3).

Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.

(4) Where any party to a suit to whom time has been granted to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may notwithstanding such default, proceed to decide the suit forthwith.”

14. The provisions of **Order 17 CPR** under which this suit was dismissed does not provide remedy for setting aside an order of dismissal of a suit where notice to show cause was issued to the parties. The law gives elaborate procedure where any litigant in a suit for dismissal who upon giving satisfactory explanation for the delay in prosecuting the matter may be considered by the trial judge and give directions on timelines within which the litigant may produce evidence or call his witness or take any other step as the court may deem necessary in expediting the trial of the matter. Once the court hears the parties by themselves or their advocates and their submission/evidence considered in that regard, it will become *functus officio* and any party not satisfied with the order so issued may appeal against the same or apply for review if there are sufficient grounds to do so. In this case, the Defendant was represented during the hearing of the notice to show cause on 2/11/2015 and made submissions in support of the dismissal of the entire suit. It is now almost four (4) years since this suit was dismissed and the Defendant/Applicant is seeking to set aside the dismissal order and to have the suit reinstated for purposes of only prosecuting the counterclaim herein.

15. Though the law does not expressly provide for setting aside a dismissal order, this court in my view, is the gate-keeper of justice and the overriding objective of the **Civil Procedure Act** and the rules made thereunder to expedite this case in a manner that is just and proportionate to the parties. In this

regard, the Applicants must give satisfactory explanation why they did not express their intention to proceed with their counterclaim when the Plaintiffs' suit was dismissed on 2/11/2015 but wait for four years to do so. The explanation given by the Plaintiff in paragraph 10 of their supporting affidavit is not a serious submission. To my mind, the explanation is an afterthought and cannot meet the threshold for setting aside a dismissal order. Under that paragraph, Applicant deposed as follows;

“10. That the last time we were in court on 9/11/2017 at the Senior Principal Magistrate's Court, my advocate on record advised me that its prudent for us to reinstate this case to assist the Senior Principal Magistrate in proper hearing and determination of the counterclaim.”

16. From my reading of the Applicants supporting affidavit under that paragraph, the reasons to reinstate the suit herein is ill-advised. If the Defendants were interested in prosecuting their counterclaim in this suit, they should have expressed their intention the same time the Plaintiffs suit was being dismissed and not four years later.

17. This application lack merit, frivolous and vexatious and the same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in the Open Court at Kerugoya this 25th day of October, 2019.

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E.C. CHERONO

ELC JUDGE

25TH OCTOBER, 2019

In the presence of:

1. Mr. A.P. Kariithi for Defendants/Applicants
2. Okatch – Court Assistant – present
3. Plaintiffs/Respondents – absent