



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 193 OF 2015

MSANDA HOLY GHOST CHURCH AFRICA PLAINTIFF/APP

VERSUS

EMILY THOYA1ST DEFENDANT/RESP

LAND REGISTRAR, MOBMBASA 2ND DEFENDANT/RESP

R U L I N G

1. For determination is the notice of motion dated 26th March 2019 brought under the provisions of Order 51 Rule 1, Order 8 Rule 3, 5, 7 and 8 of the Civil Procedure Rules and Section 3 and 63(e) of the Civil Procedure Act. The application seeks for following orders:

(i) THAT the Honourable Court be pleased to reinstate the plaintiff's suit and the plaintiff be allowed to prosecute this suit to its logical conclusion.

(ii) THAT the Honourable Court to vacate its orders of 2nd November, 2018 and allow the plaintiff to proceed with the suit herein.

(iii) THAT costs of this application be provided for.

2. The application is supported by the affidavit of Samson Otula and grounds inter alia;

(a) THAT I and other trustees only came to know about the dismissal of our suit in the month of January 2019, when we were served with the orders of the Honourable Court.

(b) THAT I and trustees had entrusted our Advocates with the case and was waiting communication from our Advocates to attend his chambers for briefing and advice when our suit is to be heard.

(c) THAT I and other trustees did not receive any communication from our Advocates as to when the suit shall be heard by the Honourable Court.

(d) THAT the mistake of our Advocates should not be visited upon the plaintiff.

(e) AND ON the annexed affidavit of SAMSON OTULA and on the further grounds to be added at the hearing thereof.

3. The motion is opposed by the 1st defendant's replying affidavit of Emily Thoya dated 28th June 2019. Ms. Thoya stated that on 17/9/2018 the Deputy Registrar issued a Notice To Show Cause to all parties for dismissal of the suit for want of prosecution. That the plaintiff did not attend court on 2/11/2018 because she had lost interest in the matter. The 1st defendant deposed that she has since taken over possession of the plot and fenced it ready for her intended developments. That the law does not aid the indolent and the current application is an afterthought. She urged the court to dismiss the application with costs.

4. Order 12 rule 7 provides that where a suit has been dismissed for non-attendance, the court may on application set aside or vary the judgment or order upon such terms as may be just. From the court record, on 6th October 2015 the 1st defendant filed their court papers in response to the suit. On 15th September 2017, the 1st defendant moved the court for orders to dismiss the plaintiff's suit for want of prosecution.

5. The notice of motion dated 14/9/2017 was set down for hearing on 8/11/2017. However, none of the parties appeared before me on that date so I made an order of "S.O.G." in the file. It is not clear from the record & pleadings filed if this application was ever served upon the plaintiff. But after 8th Nov 2017, the matter went into a lull until the dismissal at the instance of the court on 2nd November 2018.

6. Both parties appear to have been disinterested in the prosecution of this case for two reasons. First, none of them appeared before the trial judge on 2nd November 2018. Secondly, the 1st defendant in spite of filing an application to dismiss the suit also went to slumber. She is accusing the plaintiff of indolence while she also has unclean hands.

7. The plaintiff deposed that she entrusted her advocates with the case; awaiting briefings from her which communication she never received. The Plaintiff however did not explain to this court what follow up she made from the time of giving the advocates instructions in 2015 to January 2019 when she received the dismissal order – a period of three calendar years.

8. Be that as it may, given that parties have a right under article 40 of the Constitution for protection of property and article 50 on the right to a fair hearing and the fact that the plaintiff had complied with order 11 at the time the suit was dismissed persuades me to grant her another opportunity to prosecute her case. However not to allow her eat her cake & have it at the same time, she will pay for her indolence. Consequently, I make the following orders;

(i) I do hereby set aside the dismissal order of 2nd November 2018 forthwith.

(ii) The plaintiff shall pay the 1st defendant thrown away costs which I assess at Kshs 20,000 payable within 30 days of delivery of the ruling. In default the 1st defendant is at liberty to execute for the same.

(iii) The plaintiff shall forthwith set down the suit for pre-trial directions within 30 days of this ruling.

Dated and signed at BUSIA this 7th day of October 2019.

A. OMOLLO

JUDGE

Delivered at MOMBASA this 17th Day of October, 2019

C. YANO

JUDGE