



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 257 OF 2013

ELIZABETH WAKARII NJIRU.....PLAINTIFF

VERSUS

KAMURI MUBUTA.....1ST DEFENDANT

EDITH WATORO.....2ND DEFENDANT

TABITHA WANJIKU MBOGO.....3RD DEFENDANT

BENSON NJOKA KAMURI.....4TH DEFENDANT

JOHN WACHIRA KARIITHI.....5TH DEFENDANT

PATRICK MUCHIRI GICHOBI.....6TH DEFENDANT

THE DISTRICT LAND REGISTRAR KIRINYAGA.....7TH DEFENDANT

RULING

INTRODUCTION

1. The application before me is the Notice of Motion dated 20th March 2019 brought under *Order 9 Rule 9 & 10, Order 10 Rule 11, Order 12 Rule 7, Order 22 Rule 22, Order 51 Rules 1,3 4 & 10 CPR, Section 1A, 1B, 3, 3A and 63 (e) CPA and Article 159 of the Constitution of Kenya, 2010*. The Applicant is seeking the following orders:

(i) Spent.

(ii) That the Plaintiff/Applicant's advocate M/S F. K. Omenya & Company Advocates be granted leave to come on record after judgment.

(iii) That pending the inter-parties hearing and determination of this application, this Honourable court be pleased to issue an order of stay of the execution of the warrant of arrest against the Applicants herein.

(iv) That the Honourable Court be pleased to set aside the orders of this Honourable court dismissing the Plaintiff's suit.

(v) That upon the grant of prayer (iv) above, the court be pleased to reinstate the Plaintiff's suit for hearing on such terms as the court may deem necessary for the ends of justice to be met.

(vi) That the court be pleased to make such other orders as it may deem fit and just.

(vii) That costs of this application be provided for.

2. The application is premised on 16 grounds apparent on the face of that application supported by an affidavit of the Applicant sworn on 20th March, 2019. In brief, the Applicant deponed that she was served with a notice to Show Cause why she would not be arrested and jailed for failing to pay the sum of Kshs.47,950/= being costs of this suit.

APPLICANT'S CASE

3. According to the Applicant, the Notice to Show Cause came up for hearing and the same was granted exposing her to a real danger of being arrested and committed to civil jail. She deponed that she had firmly instructed her hitherto firm of Rugaita & Co. Advocates to prosecute this matter on her behalf but her hitherto firm of Advocates did not keep her updated as to further proceedings of the case. She stated that she was not aware of further proceedings especially leading to the dismissal of this matter for want of prosecution as she was not updated by her former advocates on record M/S Rugaita & Co. Advocates until she was served with the Notice to Show Cause.

4. The Applicant further stated that since her former advocates failed to update her on the progress of this case, the mistake of her hitherto advocate should not therefore be visited upon her. The Applicant deponed that land is the subject matter of this suit which is emotive issue in Kirinyaga.

4TH RESPONDENT'S CASE

5. The 4th Respondent/Defendant filed a replying affidavit opposing the said application sworn on 27th March, 2019.

6. According to the 4th Respondent this suit was filed in Embu in 2011 and later transferred to Kerugoya in 2013 and that since inception, no attempts have been made to prosecute the case until the 1st Defendant Kamuri Mubula died and has never been substituted for more than five (5) years later.

7. The 4th Respondent further stated that after the Applicant failed to prosecute this case, they instructed their lawyer to file an application for dismissal of this suit for want of prosecution. Upon service of that application dated 19/5/2017, the Applicant/Plaintiff filed a replying affidavit sworn on 6th July, 2017 and a further affidavit sworn by the Applicants/Plaintiffs erstwhile advocate M/S Wairimu Mubari on 2/10/2017.

8. The 4th Respondent further stated that it is a blatant lie for the Plaintiff/Applicant to state that her erstwhile advocates did not update her of the progress of this case until she was served with the Notice to Show Cause.

9. The 4th Respondent further deponed that the orders being sought are discretionary in nature and that the Plaintiff/Applicant is not deserving of those orders having chosen to deliberately mislead the court. The 4th Respondent also stated that this court delivered its ruling on 20/12/2017 dismissing the Plaintiffs suit for want of prosecution and this application seeking to reinstate the suit is being filed more than one year later. He stated that the inordinate delay for more than one year has not been explained.

10. The 4th Respondent further deponed that the application for dismissal of this suit which was allowed on 20/12/2017 had been brought under **Order 17 Rule 2 (1) and (3) CPR** and that no provisions under that Order for reinstatement of a suit that has been dismissed for want of prosecution. He stated that the only option available to the Applicant was to appeal against the Order of dismissal.

APPLICANT'S/PLAINTIFF'S SUBMISSIONS

11. The Applicant through the firm of F. K Omenya & Company Advocates admitted that the legal provisions regarding dismissal of suits for want of prosecution is founded under **Order 17 Rule 2 CPR**. However, the issue of setting aside orders for dismissal of suit for want of prosecution is similar to other instances of setting aside of judgments which is properly a discretionary issue to be exercised by the courts to meet the ends of justice.

12. The learned counsel for the Plaintiff/Applicant also submitted that the Applicant was not made aware of the existence of the application for dismissal of the suit for want of prosecution by her erstwhile advocates and that she only became aware of the dismissal of her case after she was served with the Notice to Show Cause on 15th March, 2019. He cited the case of **Maritim Vs Manywele Korgoren & Another (2016) e KLR**. The learned counsel also cited the following other cases in support of his application:

(i) **Cecilia Wanja Waweru Vs Jackson Wainaina Muiruri (2014) e K.L.R.**

(ii) **Richard Nchapai Leiyanguu Vs IEBC & 2 Others (2014) e K.L.R.**

RESPONDENTS SUBMISSIONS

13. The Respondents on the other hand through the firm of Maina Kagio & Co. Advocates submitted that this suit was dismissed for want of prosecution on 20/12/2017 and the present application was filed on 20/3/2019, more than one year after the dismissal order was issued. The long period of delay has not been explained.

14. The learned counsel also submitted that **Order 17 Rule 2 (3) of the CPR** provides that in any suit in which no application has been made or step taken by either party for one year, any party to the suit may apply for its dismissal as provided in **Sub-rule 1**. He argued that if the Applicant was dissatisfied with the findings of the court issued on 20/12/2017, she had the option of filing an appeal. He submitted that this case has been in the courts for over eight (8) years and that he will greatly be prejudiced if this application is allowed. He argued that just as the saying goes, justice delayed is justice denied. He cited the case of **Elizabeth Wangechi Mwai Vs Jamleck Mwangi Njoka & 3 Others, ELC Case No. 651 of 2013 (Kerugoya)** reported in **(2019) e K.L.R.**

ANALYSIS AND DECISION

15. The Applicant in his application dated 20/3/2019 is seeking a substantive order to reinstate this suit for hearing. From the affidavit evidence and the submissions by counsels, this suit was dismissed for want of prosecution pursuant to a Notice of Motion dated 19th May, 2017 which was delivered on 20/12/2017. The ruling of the court read as follows:

(1) The Notice of Motion dated 19th May, 2017 seeking the dismissal of the Plaintiff's suit is dismissed.

(2) The Plaintiff shall within three (3) months of this ruling file and prosecute an application to substitute the 1st Defendant and fix a date for pre-trial before the Deputy Registrar.

(3) The Plaintiff shall also pay the 2nd, 3rd and 4th Defendants costs of this application assessed at Kshs.10,000/= within 30 days of this ruling.

(4) In default of any of the above, this suit shall stand dismissed with costs to the 2nd, 3rd and 4th Defendants.”

16. The orders of this court issued on 20/12/2017 gave the Plaintiff/Applicant certain conditions to be fulfilled failing which this suit was to stand dismissed for want of prosecution. When this matter came up next for hearing on 13th June, 2018, this Honourable Court confirmed the orders of 20th December, 2017 and dismissed this suit for want of prosecution after the Plaintiff failed to comply with the terms and conditions as set out thereunder. The replying affidavit opposing the application for dismissal of this suit was sworn by the Plaintiff/Applicant on 6th July, 2017. Her erstwhile advocate M/s Wairimu Mubari also filed a further affidavit in opposition thereto sworn on 2nd October, 2017. I find that the Plaintiff/Applicant is being dishonest by stating on oath that she was not aware that this case was dismissed. Though she did not attend court for the ruling on 20/12/2017, she must have enquired from her erstwhile advocate or even visited the court to find out the finding of the court in respect of that application.

17. If the Plaintiff/Applicant failed to find out the fate of the application which sought to dismiss her suit for want of Prosecution and which he swore an affidavit opposing the same, then the submissions by the 4th Respondent and his counsel that she lost interest in this suit is not further from the truth.

18. I also note that this application is brought under inter alia **Order 12 Rule 7 CPR**. That provision is only available to cases dismissed under **Order 12 CPR**. Dismissal of suits for want of prosecution under **Order 17 CPR** have no window for setting aside since it is contemplated that parties will have been heard before such dismissal are issued. That explains the scenario in this case where the parties were heard inter-parties and a ruling delivered on 20/12/2017 in which the Plaintiff was given saving conditions for the dismissal of this suit.

19. The Plaintiff/Applicant has not told this court whether he has complied with those conditions set out by the court in its ruling on 20/12/2017. The Plaintiff/Applicant has not also explained the reasons for the inordinate delay to bring this application from 20/12/2017 until 20/3/2019 which is more than one year.

20. The provisions of cited cases by the Plaintiff/Applicant cannot aid him and not even the overriding objection of the **Civil Procedure Act** under **Section 1A, 1B, 3, 3A and 63 (e) and Section 159** of the Constitution can be his saving grace.

21. The dismissal of this suit was occasioned after she failed to comply with the overriding objective of the law set out by this court on 20/12/2017. The Plaintiff has not even sought leave of this court to extent time to comply with those conditions. Instead, the Plaintiff/Applicant wants this court to rubbish its own orders issued on 20/12/2017. That cannot happen.

22. In the upshot, this application lack merit and the same must therefore fail. Suffice to say that the authorities cited by counsel for the Applicant are irrelevant and distinguishable. The final orders that comment to this court is that the application dated 20th March, 2019 lack merit and the same is hereby dismissed with costs.

Read, delivered and signed in the Open at Kerugoya this 11th day of October, 2019.

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E. C CHERONO

ELC JUDGE

11TH OCTOBER, 2019

In the presence of:

1. *M/S Githaiga holding brief for Maina Kagio for Respondents*

2. *Applicant/Advocate – absent*