REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 48 OF 2007

KENYA AIDS NGO CONSORTIUM.....1ST PLAINTIFF

CHRYSANTHUS MUCHORI GICHERU.....2ND PLAINTIFF

VERSUS

ANDREW OUKO.....1ST DEFENDANT

DAVID SCOTT ONGOSI.....2ND DEFENDANT

RULING

The plaintiffs brought this suit on 19th April, 2007 seeking a permanent injunction to restrain the defendants from remaining on or continuing in occupation of a parcel of land known as L.R No. 11877 – Nairobi (hereinafter referred to as "the suit property") and an order of eviction of the defendants from the property. The plaintiffs averred that they purchased the suit property at Kshs. 16,200,000/= on 19th January, 2006 from Kenya Commercial Bank Limited which had put the property for sale in exercise of its statutory power of sale. The plaintiffs averred that even after the suit property was transferred to them on 10th May, 2006, the defendants refused to deliver vacant possession and had expressed an intention of not complying with their request for possession of the premises.

The 1st defendant filed a defence in which he denied that the plaintiffs had purchased the suit property at a public auction conducted by Kenya Commercial Bank Ltd. ("KCB"). The 1st defendant averred that the sale of the suit property to the plaintiffs was illegal and irregular in that the estate of Jason Atinda Ouko, deceased who was registered as the owner of the property was not served with a statutory notice and that the property was sold at an undervalue. The 1st defendant termed the sale of the suit property to the plaintiffs as null and void. The 2nd defendant filed his statement of defence on 21st May, 2007 in which he adopted the 1st defendant's defence to the plaintiffs' claim.

On 5th June, 2007, the plaintiffs brought an application by way of Notice of Motion of the same date seeking an order compelling the defendants to deliver up vacant possession of the suit property to the plaintiffs in default of which they be forcefully evicted from the property. The plaintiffs' application was heard and dismissed by Onyancha J. on 11th February, 2010. The plaintiffs were aggrieved by the decision and preferred an appeal against the same to the Court of Appeal.

The matter came up in court last on 30th May, 2011 when the court ordered that the hearing of the suit could not proceed until the 2nd defendant who had died was substituted with a legal representative. No further action was taken in the matter until 4 years later on 28th May, 2015 when the suit was dismissed by Mutungi J. for want of prosecution under Order 17 rule 2(1) of the Civil Procedure Rules. From the notices on record, it appears that only the advocates for the 1st defendant were served with a Notice to Show Cause under Order 17 rule 2(1) of the Civil Procedure Rules.

A copy of the Notice to Show cause on record that was issued by the court for service upon the parties was addressed to the advocates for the 1st defendant and the 2nd plaintiff, and whereas, the process server served the advocates for the 1st defendant with a copy of the Notice to Show cause, a copy of the said notice that was to be served upon the 2nd plaintiff's advocates was returned to court with a comment that "The adv. has moved". The advocates then on record for the 1st plaintiff, Momanyi & Associates Advocates were not served at all with the Notice to Show Cause. This may explain why on 28th May, 2015 when the matter came up for Notice to Show cause, only the 1st defendant's advocates appeared in court.

What is now before the court is the 1st plaintiff's application brought by way of Notice of Motion dated 18th July, 2016 seeking the setting aside of the order that was made on 28th May, 2015 and the reinstatement of the suit for hearing inter-partes. The application was brought on the ground that the 1st plaintiff was not aware of the dismissal of the suit until 30th June, 2016 when the appeal that the plaintiffs had filed

against the decision of Onyancha J. made on 11th February, 2010 namely, Civil Appeal No. 168 of 2010 came up for hearing.

The 1st plaintiff averred that when the said appeal came up for hearing, the same did not proceed as it was brought to the attention of the court that this suit had been dismissed. The 1st plaintiff contended that its attention had shifted to the prosecution of the appeal in the Court of Appeal and that it was not indolent in following up this matter. The 1st plaintiff contended that the Notice to Show cause was served at a time when it was in the process of changing advocates and that explained why it did not raise an objection to the same. The 1st plaintiff contended that it would be highly prejudiced if the suit was not reinstated as it was waiting for the pending appeal to be heard before pursuing this suit. The 1st plaintiff averred that the delay in prosecuting the suit was not intentional and as such excusable. The 1st plaintiff averred that if the order dismissing the suit was not set aside, it would be left with no remedy in pursuing its claim against the defendants.

The application was opposed by the 1st defendant through grounds of opposition dated 27th July, 2016. The 1st defendant contended that the 1st plaintiff's application had no merit and amounted to an abuse of the process of the court. The 1st defendant contended that as at the time the suit was dismissed, it had remained dormant for over 5 years and that the application for reinstatement of the suit was brought over 1 year after the dismissal of the suit. The 1st defendant contended that the 1st plaintiff was guilty of inordinate delay and as such was not deserving of the orders sought. The 1st defendant contended that the fact that the plaintiff had preferred an interlocutory appeal against the decision of Onyancha J. was not a good reason for not prosecuting this suit. The 1st defendant contended that the 1st plaintiff would not suffer any prejudice if the orders sought were not granted because there was in existence another suit in the High Court between the parties namely, HCCC No. 558 of 2004.

The application was heard by way of written submissions. The 1st plaintiff/applicant filed its submissions on 8th February, 2019 while the 1st defendant filed his submissions on 18th March, 2019. I have considered the application and the grounds of opposition filed in opposition thereto. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. There is no doubt that the court has power to set aside an order of dismissal of a suit for want of prosecution made in the absence of a party. The power is discretionary.

This suit was dismissed under Order 17 rule 2(1) of the Civil Procedure Rules. The power of the court to dismiss a suit under Order 17 rule 2(1) of the Civil Procedure Rules is only exercisable after a notice is served upon the parties to appear and show cause why the suit should not be dismissed and they either fail to appear or no cause is shown to the satisfaction of the court. As I have mentioned earlier in this ruling, in this case, the Notice to Show cause was taken out but the same was not served upon the advocates for the plaintiffs. In the absence of service of such notice upon the plaintiffs, the court could not exercise its powers under Order 17 rule 2(1) of the Civil Procedure Rules. In view of the foregoing, the power of the court to dismiss a suit for want of prosecution was exercised erroneously or irregularly in this case. I am of the view that, if it had been brought to the attention of the court that the plaintiffs had not been served with a Notice to Show cause, the court would not have dismissed the suit. It follows from the foregoing that the plaintiffs are entitled as of right to have the order made on 28th May, 2015 set aside.

On the merit of the application, I am in agreement with the 1st defendant that the plaintiffs were guilty of inordinate delay in the prosecution of this suit. As rightly pointed out by the 1st defendant, the fact that the plaintiffs had filed an interlocutory appeal against the decision of the court was not a good or sufficient reason not to prosecute this suit. If the plaintiffs wished to keep this suit in abeyance as they pursued the appeal, they should have sought an order for stay of proceedings.

It was a blunder on the part of the plaintiffs' advocates to think that the filing of an interlocutory appeal could stay this suit. In the case of Philip Chemwolo & another *v* Augustine Kubede [1982-88] KAR 1033 at 1040, Apaloo J.A. Stated as follows:

> **"Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."**

In the case of Nchapi Leiyagu *v* I.E.B.C & 2 others, Civil Appeal No. 18 of 2013, the court stated that:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality."**

Due to the nature of the dispute between the parties, I was inclined to give the 1st plaintiff a chance of to prosecute its suit even if a Notice to Show cause had been served. I am not persuaded that the 1st defendant would suffer such prejudice that cannot be put right by payment of costs.

Due to the foregoing, I would in conclusion say that the orders sought in the Notice of Motion application dated 18th July, 2016 are merited. The application is allowed in terms of prayers 2 and 3 thereof. The 1st defendant shall have the costs of the application.

Delivered and Dated 28th Day of November 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Mr. Mc Ronald for the 1st plaintiff

Mr. Kimathi h/b for Mr. Muchoki for Defendants

C. Nyokabi-Court Assistant