



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 450 OF 2009

IN THE MATTER OF: THE SALE OF A MORTGAGED PROPERTY,

L.R NO. KITISURU 101/C101;

AND

IN THE MATTER OF: THE SHARING OF THE PROCEEDS OF SALE OF L.R. NO. KITISURU 101/101

BETWEEN

JANE W. GAKUNGU.....APPLICANT

VERSUS

MICHAEL M. GAKUNGU....RESPONDENT

RULING

Through the application dated 04/12/2018, the Plaintiff seeks to set aside this court's orders issued on 18/05/2017 dismissing her suit. She also seeks to have the Respondent ordered to deposit in court half the amount he obtained from the sale of the parcel of land known as Kitisuru-101/C/101, and that the suit be set down for *inter partes* hearing.

The application was based on the ground that the suit was dismissed on 18/05/2017 due to the Plaintiff's non-attendance and is supported by the Applicant's affidavit sworn on 04/12/2018 in which she deponed that she was the Respondent's estranged wife and that during their stay together, they acquired properties towards whose acquisition she made contributions. She deponed that in July 2005, they jointly purchased Kitisuru-101/C101 through the National Social Security Fund (NSSF) tenant purchase mortgage scheme, and annexed a copy of the agreement with NSSF. She further deponed that they were unable to complete the purchase of the property and it became necessary to dispose it and pay the amount owing to NSSF. She claimed that the Respondent colluded with officials from NSSF to fraudulently sell and transfer the parcel of land without her knowledge.

She deponed that at the time the suit came up for hearing, she was represented by the firm of Harrison Kinyanjui & Co. Advocates, who did not inform her that the suit was fixed for hearing on 18/05/2017. The advocates did not inform her that the suit had been dismissed on 18/05/2017 when she inquired from about the status of her case. She deponed that on the day her case was dismissed, her advocate, Mr. Harrison Kinyanjui was absent and the reason he gave was that he was in a different court when the matter was called out. She deponed that she should not be punished for the errors of her advocate who failed to turn up for the hearing of the suit and later declined to file an application to have the dismissal orders set aside despite the Applicant paying Kshs. 20, 000/= to his firm to enable them file the application. She annexed a receipt dated 27/03/2018 issued by Kinyanjui & Co. Advocates as proof that she followed up on the matter and paid for the filing of the application to set aside the orders dismissing this suit. She also deponed that when her advocates on record failed to act on her instructions, she sought legal advice elsewhere. She urged that it was only fair for the Respondent to deposit half of the sale proceeds he realized from sale of the suit property so that the suit can be heard and determined on its merit.

The Respondent opposed the application through an undated replying affidavit filed on 16/04/2019. Although the Applicant did not object to the filing of the undated affidavit, the court notes that it offends Section 5 of the Oaths and Statutory Declarations Act which requires every commissioner for oaths before whom any oath or affidavit is taken or made under that Act to state in the jurat at what place and on what date the oath or affidavit is taken or made. Be that as it may, the court will still determine the application.

The court has considered the application, the length of time it has taken for it to be filed and the reasons advanced for the delay. Following the judgement entered on 18/05/2017, the Respondent sold the suit property and retained all the proceeds of the sale.

Under order 12 rule 7 of the Civil Procedure Rules, this court has discretion to vary an order dismissing a suit under Order 12 of the Rules. The Applicant blames her advocates for the dismissal. The record indicates that her advocates were represented in court when the matter was dismissed. The Advocate representing her counsel told the court that they were unable to reach the Applicant. However, the Applicant denied being informed that the matter was coming up for hearing and produced the receipt dated 27/03/2018 issued by her previous advocates to confirm that she gave instructions to her advocates.

The court agrees with the Applicant's submission that she deserves a chance to be heard on the suit on merit. The application dated 04/12/2018 is allowed. The Respondent is directed to deposit half the proceeds he obtained from the sale of the suit property in court within 60 days. Costs shall be in the cause.

Dated and delivered at Nairobi this 18th day of November 2019

K.BOR

JUDGE

In the presence of: -

Ms. P. Wambugu holding brief for Mr. Kamwaro for the Applicant.

Mr. V. Owuor- Court Assistant

No appearance for the Respondent.