



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 639 OF 2016

LINUS OGANYO.....1 ST PLAINTIFF
CHRIS MWANGI2 ND PLAINTIFF
JOYCE NGINA..... 3 RD PLAINTIFF
RICHARDS BOSIRE.....4 TH PLAINTIFF
DENISE ODHIAMBO.....5 TH PLAINTIFF
MESHACK ANDERE6 TH PLAINTIFF
MICHAEL ODHIAMBO.....7 TH PLAINTIFF
ALICE SIFUNA.....8 TH PLAINTIFF
GEORGE NYAMBANE9 TH PLAINTIFF
JOHN KIMANI.....10 TH PLAINTIFF

VERSUS

HARAMBEE SACCO SOCIETY LIMITED1 ST DEFENDANT
CHIEF LAND REGISTRAR2 ND DEFENDANT
DIRECTOR OF SURVEYS3 RD DEFENDANT

RULING

1. This suit stood dismissed in early February 2019 on account of the plaintiff's non-compliance with the order made by this court on 19/11/2018, requiring the plaintiffs to file a bound, paginated and indexed bundle of pleadings, witness statements, and evidentiary documents within 60 days to facilitate trial. Early February is when the 60 days time-frame lapsed. The reckoning of the 60 days period takes into account the Christmas period when time does not run for the purpose of taking steps in civil proceedings under the Civil Procedure Rules.

2. Consequently, on 22/5/2019, the plaintiffs brought a notice of motion dated 15/5/2019 under Article 159(2) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act and Order 12 rule 7, Order 40 rules 1 (a) and 4, and Order 51 of the Civil Procedure Rules, seeking an order reinstating the suit. They also sought an order reinstating the temporary restraining order which subsisted before the suit stood dismissed. Lastly, they sought an order restraining the 1st and 2nd defendants against selling and/or transferring, alienating and/or disposing Land Title Numbers Nairobi/Block 82/8847 – 8858.

3. The application was supported by an affidavit sworn by George Nyambane, the 9th plaintiff. He deposed that the suit stood dismissed as at 19/1/2019 for non-compliance with the court orders issued on 19/11/2018. He added that on 19/11/2018, the court directed that a survey report be filed within 60 days. He averred that M/s Covenant Geo-Survey Systems were instructed by the plaintiffs to prepare the survey report and the process was conducted on the 7th to 11th January 2019 but it took time for the surveyors to prepare and compile the report. For this reason, the plaintiffs were not able to comply with the timelines given by the court.

4. The 1st defendant opposed the application through grounds of opposition dated 12/9/2019. The grounds are that: (i) the plaintiffs went

to slumber after being given sixty (60) days to prosecute the suit; (ii) the plaintiffs failed to show reasons for delay since January 2019; (iii) there are no reasons to warrant the setting aside of the dismissal order of 13th May 2019; (iv) the plaintiffs have completely lost interest in this suit hence the delay; (v) the plaintiffs were in possession of the survey report as early as January 2019; and (vi) a pending suit is prejudicial to the defendant.

5. The application was canvassed by way of oral submissions on 19/9/2019. Mr Mureithi who held brief for Mr Modi for the applicants argued that the delay in compliance was occasioned by delay in procurement of survey documents. He submitted that the survey report was obtained and filed in court on 13/2/2019. He urged the court to grant the orders sought. Mr Mureithi added that the plaintiffs had demonstrated reasons for the delay and that the delay was not deliberate.

6. Mr Chege, counsel for the 1st defendant, argued that the plaintiffs ought to have come to court and asked for more time to put in the survey documents. He stated that the plaintiffs had been sitting on the interim orders since June 2016 and the reasons given for the delay were an afterthought.

7. I have considered the application, the grounds of opposition, and the parties' submissions. I have also considered the relevant legal framework and jurisprudence relating to the key issue in the application. The only issue falling for determination in this application is whether the application for reinstatement of the suit herein, together with the orders which subsisted at the time the suit stood dismissed, is merited.

8. This court's jurisdiction to reinstate a dismissed suit is discretionary and that discretion is exercised judiciously and on well settled principles. The criteria to be adopted when dealing with the question of whether or not to lock a litigant out of the seat of justice was summed up by **Apoloo JA** in the case of **Phillip Chemweno & another v Augustine Kubede (1982 – 1988) KAR 103** as follows:

“I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

9. I have considered the explanation tendered by the plaintiffs to explain their failure to comply with the court order within the time-frame of 60 days. I have also considered the grounds of opposition. In my view, the explanation appears to be *bona fide*. Secondly, the dispute before court raises critical issues relating to environment, land planning and land use. The equity approach to take in this application would be to have the suit and the subsisting order reinstated and at the same time indemnify the 1st defendant by an award of reasonable costs. I will, in the circumstances, reinstate this suit together with the order which subsisted at the time of dismissal, on condition that the plaintiffs shall indemnify the 1st defendant by paying the 1st defendant costs of Kshs 20,000 within 60 days from today. In default, the reinstatement order shall stand vacated. The interim order having been reinstated, prayer 5 of the notice of motion is unnecessary.

Disposal Orders

10. Consequently, the plaintiff's notice of motion dated 15/5/2019 is disposed

on followings terms:

a) The suit herein and the interim order are reinstated on condition that the plaintiffs shall pay the 1st defendant throw-away costs of Kshs 20,000 within 60 days from today.

b) The plaintiffs shall comply with the order of 19/11/2018 within 30 days from today.

c) In default of payment of the costs within 60 days or compliance with the order of 19/11/2018 within 30 days, the reinstatement order herein shall stand vacated and this suit shall stand dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Chege for the 1st defendant

Court Clerk - Mr Waweru