



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 519 OF 2017

(Formerly HCCC NO. 4 of 2014 & Kisii HCCC NO. 406 B of 2014)

CELYNE ODEMBO.....1ST PLAINTIFF/APPLICANT

FRANCIS ONYANGO ODEMBO.....2ND PLAINTIFF/ APPLICANT

VERSUS

EVALINE T. OMWARE.....1ST DEFENDANT/RESPONDENT

PAUL OTIENO ODHIAMBO KUNGU..... 2ND DEFENDANT/RESPONDENT

MONICA ANYANGO JADUDO.....3RD DEFENDANT/RESPONDENT

MAGDALINE OYOO ONGOMBE.....4TH DEFENDANT/RESPONDENT

ANGELINE ODEMBO.....5TH DEFENDANT/RESPONDENT

REGISTRAR LANDS.....6TH DEFENDANT/RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....7TH DEFENDANT/RESPONDENT

RULING

Background

1. This ruling is in respect of an application by way of a Notice of Motion dated and filed on **23rd July 2019**, by **Celyne Odembo** and **Francis Odembo**, (hereinafter “**The 1st and 2nd Applicants**”) who moved the Court under Certificate of Urgency. The reasons given thereof are that their residential plots at Rapogi Post Office **Kanyamkago Katieno LR 1757** now subdivided into **LR. No. 2838** and **2839** (hereinafter “**the suit properties**”) were being irregularly demolished by Paul Otieno Odhiambo Kungu (the 2nd Respondent herein).

2. The applicants stated that the demolition was precipitated by this Court’s order of **19th December 2018**, dismissing the Instant suit for want of prosecution. They stated that they were not served with the notice of the intended dismissal hence were not accorded an opportunity to defend the suit. They further stated that the dismissal ought not to have occurred in view of the Orders of the court (Honourable Mutungi, J.) of **28th June 2017**, (I think they meant 4th November 2015) which directed the Land Registrar to register an inhibition in order to restrict any further dealings and registrations against the suit properties until further orders of the Court.

The Applicants’ Case

3. In the application, the Applicants sought orders;

1. Spent

2. That the Honourable Court be pleased to set aside the Orders of 19th December 2018 dismissing the suit prematurely and irregularly and reinstate the suit.

3. That the 2nd Defendant Paul Otieno Odhiambo Kungu who is not a family member be restrained with his servants agents or any other person(s) from intermeddling, alienating, demolishing, constructing, cultivating, interfering, digging, encroaching, possessing, attaching, distressing or in any way dealing with Kanyamkago Katieno LR. 1757 Building Housing Posta Rapogi now subdivided into LR. 2838, LR 1775 Kanyamkago Katieno formerly Housing Ministry of Education Kanyamkago Katieno 204, Suna East/ Wasweta I/ 6625 Migori, Nyajuok sub location Kademba B/Village parcel of land and Kanyamkago Katieno 1997, pending the hearing of this application.

4. That the Honourable Court be pleased to reinstate the above suit to full hearing and revisit the Orders issued on 28th June 2017 by Honourable Justice Mutungi that the parties were to move to Court only after succession.

5. That one of the reasons is that the 2nd house, the 1st Respondent had refused to sign the Succession documents and hence causing the delay.

6. That the Applicants be compensated for the demolished residential houses by the 2nd Respondent of the Rapogi Post Office.

7. That costs of this application be provided.”

4. In support of their Application, is the 1st applicant's affidavit sworn on 19th July 2019 and another one sworn on 23rd July 2019. She deposed that she is the eldest daughter of Henry Odembo (Deceased owner of the suit properties) and a sibling to the 2nd Applicant, Francis Odembo (indisposed). It was her deposition that their inability to defend the suit was occasioned by absence of their counsel, Mr. Brian Mboya who could not be reached through telephone calls. That they later came to learn that the counsel was bereaved hence his absence in Court on the day this matter was dismissed for want of prosecution without service or notice of the same. That their suit was prematurely and irregularly dismissed in spite of court Orders made on 4th November 2015 to preserve the suit properties pending conclusion of **Succession of Case 105/2018**.

5. She deposed further that the 2nd Defendant who is intermeddling with the suit properties is not a family member and has no capacity to deal with the suit properties in any way whatsoever. She urged the Court to reinstate the suit and accord them a second chance in the matter. That it was the duty of the Court to ensure that all the parties are served in a case affecting them.

6. It was their case further that they will suffer irreparable loss if the Court does not uphold its duty of protecting them from land grabbers who to take advantage of situations like this to make them destitute. That no prejudice would be suffered by the Respondents in the event of a reinstatement. That in any event, it is in the interests of justice to reinstate the suit.

The 1st & 2nd Respondents' Case

7. The 1st Respondent associated herself fully with the 2nd Respondent's deposition by her replying affidavit sworn on 9th September 2019 and filed in court on 24th September 2019.

8. The 2nd Respondent filed a 21- paragraphed replying affidavit sworn on 6th August 2019. He deposed that the suit was duly dismissed on 19th December 2018 under the provisions of **Order 17 Rule 2 (1)** of the Civil Procedure Rules 2010 after the Court was satisfied that the Applicants were duly served. That therefore, the allegation by the Applicants that the Court acted unfairly and irregularly is to cast doubt on the integrity of the Court without any evidence to prove impropriety or bias.

9. He further deposed that the Applicant has not brought any piece of evidence to challenge the fact that she was not served thereby making the proof of service on record unchallenged. He averred therefore that due process leading up to the dismissal was adhered to.

10. He stated that in view of the dismissal, his title to the property stood unchallenged and was therefore free to exercise his rights as a sole proprietor. He accused the Applicant of indolence in prosecuting the suit. He claimed to have acquired the suit properties as a bonafide purchaser for value without notice and that the applicants' contention on compensation does not arise. He prayed that the Application be dismissed for being vexatious, a sham and bad in law.

The Applicants' Further Response

11. On 5th September 2019, the Applicant filed a Further Replying affidavit sworn on 30th August 2019. In rebutting service of Notice of Dismissal, she questioned the manner in which it was effected. She deposed that whether it was done by way of postal service, registered post, ordinary postage or through media, service never reached them.

12. She further deposed that at no point had the Court set aside the earlier Orders of the court. While praying that the suit be reinstated, she reiterated that their advocate, Brian Mboya, did not attend Court and that he was unavailable through his mobile phone.

The Applicants' Written Submissions

13. The Applicants filed their written submissions dated 19th September 2019 on 19th September 2019. It was their submission that they learnt of the dismissal when 1st applicant was informed of the demolitions of the suit properties.

14. With respect to Notice to Show Cause, she argued that she did not receive service as required under the law. That as a consequence,

land grabbers are now enjoying her father's property. She prayed that the suit be reinstated as the dismissal date was taken ex-parte. She further submitted that it was upon the process server to avail or swear an affidavit stating the manner of service of the Notice.

15. In the end, she reiterated that Courts have a duty to give parties to a suit reasonable opportunity to present their case. She urged the Court to use its discretion to reinstate the suit and set aside ex-parte dismissal orders. To that end, she relied on Nyeri **HCC NO. 101/2011, Wachira Karani -vs- Bildad Wachira** and Nairobi **HCC NO. 683/2009 Moses Mwangi -vs- Lutheran Church of Kenya Registered Trustees**.

Issues for Determination

16. The entire application hinges on the determination of two pertinent issues; namely;

i. Whether the Notice to Show Cause was served upon the Applicants.

ii. Whether the Applicants have established a sufficient cause to warrant a reinstatement.

Analysis and Determination

17. I note all the provisions of the law under which the instant application is initiated. However, dismissal of suit for want of prosecutions is governed by **Order 17 Rule 2(1) of Civil Procedure Rules, 2010** which provides:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.” (emphasis added)

18. In applying the said legal provisions, the Court has the discretion, which must be exercised judiciously, on whether or not to dismiss a matter. In **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR** it was stated;

“11. discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay”

19. The Court in **Nilesh Shah case (ibid)** referred to the decision in **Ivita vs. Kyumbu [1984] KLR 441** where the principles for reinstatement of suit were set out thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

20. On the importance of the giving notice to parties, it was held in **Eunice Soko Mlagui v Suresh Parmar & 3 others [2018] eKLR**, it was held that;

“The rules of natural justice require that before an order adverse to any party is made by a court, that party ought to be heard and be allowed to make representations.”

It is my view that even if the orders sought are granted the defendants will not be unduly prejudiced as they will be accorded an opportunity to defend the suit should they so wish.

21. I have carefully gone through the instant matter and I have ascertained that the following documents requisite for dismissal of a suit are on record; **The Notice to Show Cause (NTSC) dated 6th November 2018, issued by Court under Order 17 Rule 2(1), the Affidavit of service dated 17th December 2018 and The Decree dismissing the suit.** I am satisfied on their authenticity.

22. Nonetheless, the Affidavit of Service, is want of some important information and supporting annexures that go into demonstrating that indeed service was effected. In paragraph 3, the deponent, Alice Ntabo, while swearing to the fact that the Notice to Show Cause was dispatched and accordingly posted, deposed as follows;

“5. THAT I do confirm that (sic) the same were posted on 1/12/2018 as per the postage stamp/receiving stamp issued by the postal corporation.”

23. In the record, there is no postage stamp/receiving stamp issued by the postal corporation to corroborate the deposition that it was received

by the Corporation. In her own words, the deponent says, ***“as per the postage stamp/receiving stamp issued by the corporation”*** the NTSC was served. The Applicant challenged Service of the NTSC. In their response, the 1st and 2nd Respondents simply state that the Applicants were duly served. further in paragraph 9, the 2nd respondent deposed as follows;

“9. THAT the Applicant has not provided any piece of evidence to challenge the fact of service but merely alleges that she was not served.”

24. Two things emerge from the above scenario. First, it is an extremely arduous task to expect a litigant to prove the negative. In this scenario, to expect the Applicant to prove that she did not get service is to overstretch the burden of proof as envisaged under **section 107 of the Evidence Act (Cap 80 Laws of Kenya)**.

25. Therefore, this one of those instances where the burden of proof shifted to the Respondents. They had the option of calling the Court Bailiff as a witness to give evidence and produce receipts stamped by the Corporation to prove that indeed posting was duly done; see also **Order 5 Rule 16 of the Civil Procedure Rules, 2010**.

26. Accordingly, I find and hereby hold that the Applicant was not duly served. In the premises, the dismissal of the suit was unprocedural for want of proper service and the requirements of the doctrine of natural justice as recognised in **Re Hebtulla Properties Limited (1976-80) 1 KLR 1195 at 1209**. To that end, I find that the Applicants have established a sufficient cause to allow a reinstatement of the suit.

27. One important question that I must address is the nature of prejudice if at all, that will be suffered by the Respondents in the event of a reinstatement. In doing so, it is not lost on this Court that a Defendant or Respondent must satisfy that he will be dealt a huge injustice due to the delay. He has the obligation demonstrate that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.

28. In the instant case, the Respondents have not raised any tangible prejudice that a reinstatement will cause. The 2nd Respondents only mentions in paragraph 13, 14 and 15 of his replying affidavit that his proprietary interests in the suit property was unchallenged. That he is a bonafide purchaser and he has not committed any breach by developing the suit properties. Notably, he does not indicate the nature of prejudice or injustice that will be visited upon him as a result of a reinstatement. As such, I do find and hereby hold that the totality of the circumstances of the case call for a reinstatement. It is in the interests of justice that the parties be heard. The injustice likely to be caused to the Applicant by a dismissal will be greater than the harm that will be suffered by the Respondents as a result of the reinstatement.

29. In the end, I hereby allow the application dated 23rd July 2019 in terms of only orders 2 and 4 sought therein.

30. As regards order number 3 sought in the application, in the spirit of **section 13 (7) (a) of the Environment and Land Court 2015 (2011)** and the decision in **Ogada –vs- Mollin (2009) KLR 620** to which I subscribe, I restate the conservatory orders over the suit properties granted on 4th November 2015.

31. Order number 5 is not for grant while order number 6 for compensation as sought in the application is not tenable. I do proceed to disallow order number 6 as it would at this stage, be premature and tantamount to determining order (c) for general damages sought in the plaint dated 28th August 2014.

32. Costs of the application be in the cause.

33. It is hereby so ordered.

DELIVERED, SIGNED and Dated in open court at Migori this 10th Day of DECEMBER 2019.

G.M.A ONG’ONDO

JUDGE

In the presence of:-

1ST plaintiff/applicant – present in person.

Mr. Oywer learned counsel holding brief for Kisera for 1st defendant.

2nd plaintiff –Absent

2nd to 7th defendants/respondents – Absent

Tom Maurice – Court Assistant