



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 8 OF 2012

KUTA KIRINGI LUNGANZI

DERI KIRINGI LUNGANZI.....PLAINTIFFS

VERSUS

PANDE MKAUMA PANDE

KANTI JETTA RAMJI.....DEFENDANTS

RULING

1. By this Notice of Motion dated 23rd October 2018 brought inter alia under Order 12 Rule 7 and Order 17 Rule 4 of the Civil Procedure Rules the two Plaintiffs Kuta Kiringi Lunganzi and Der Kiringi Lunganzi pray for an order that this Honourable Court be pleased to set aside the orders issued herein on 26th September 2018 dismissing the suit and to instead reinstate the same for hearing and determination.

2. The application which is supported by three Affidavits sworn by the 1st Plaintiff and two others is based on the grounds:-

i) That the suit was dismissed for want of prosecution on 26th September 2018;

ii) That the Plaintiff's Advocate had instructed a colleague to attend Court and apply for an adjournment as the 1st Defendant was said to be deceased and there was need for substitution;

iii) That the application for adjournment was dismissed and the entire suit was subsequently thrown out for want of prosecution yet the 1st Plaintiff and his witness were in Court and were ready to be heard.

iv) That the dispute relates to family land, is emotive and needs to be determined on merit; and

v) That no prejudice shall be suffered by any party if the case is reinstated since all of them shall have a chance to cross-examine all the witnesses.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 10th December 2018 by the Administrator of the Estate of the 1st Respondent one Athman Juma Makarani, he avers that he was in Court when this matter came up for hearing on 31st May 2018 when the Court was informed that the 1st Defendant had died in 2014 and the suit against her had abated. The matter was then stood over generally to allow the Plaintiffs to decide on the way forward.

4. The 1st Respondent denies that the Plaintiff and/or their witnesses were in Court as alleged or at all. He avers that after the application for adjournment was denied, the names of the Plaintiffs were called outside the Court corridors but there was no response.

5. The 1st Respondent avers that their family has been greatly prejudiced by the injunction orders granted herein in favour of the Plaintiffs on 25th June 2013 and urge the Court to dismiss the suit herein.

6. On his part, the 2nd Defendant Kanti Jetta Ramji has filed Grounds of Opposition dated 10th December 2018 opposing the Application on the grounds:-

1) That the application is incurably defective, vexatious, bad in law and therefore an abuse of the Court's process as it is brought under the wrong provisions of the law.

2) That the Applicants have not demonstrated they deserve the orders sought.

3) That the Applicants are guilty of indolence upon which equity frowns.

4) That the Application offends the provisions of Section 1A, 1B and 3A of the Civil Procedure Act; and

5) That the Application lacks merit and should be dismissed with costs.

7. I have considered the Application and the responses thereto. I have equally perused and considered the submissions and authorities filed herein by the Learned Advocates for the Parties.

8. The Court's power in considering an application to set aside an interlocutory Judgment or order is discretionary. As was held in **Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75:-**

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as maybe just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

9. However as was stated by the Court of Appeal in **Shah –vs- Mbogo (1967) EA 166:-**

“...this discretion ...is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. In the matter before me the Plaintiffs in the three Affidavits filed in support of this application assert that their Advocate was not in Court as he had instructed another Advocate to attend Court and apply for an adjournment on account that the 1st Defendant was deceased and there was need to substitute the said 1st Defendant before the matter could proceed to hearing.

11. According to the Plaintiffs, the 1st Plaintiff, a witness who happens to be their uncle together with a Law Student from their Advocates Law firm were all present in Court on 26th September 2018 but they never heard their matter being called out. When the Court took a break at around 10.30 a.m., the 1st Plaintiff and his uncle having not seen their Advocate left for home and it was only later on in the evening that they learnt that the Advocate had sent someone else to represent them.

12. The Court record herein however tells a different story. From a perusal of the record, this matter was listed on 26th September 2018 for hearing at 9.00 a.m. When the matter was called out, Mr. Matheka Advocate who was holding brief for the Plaintiffs Advocates informed the Court that he was not ready to proceed as the 1st Defendant was deceased.

13. Given that the issue of the death of the 1st Defendant had been raised previously on 31st May 2018 when the suit came up for hearing, this Court declined the application and scheduled the matter for hearing at 11.30 a.m. At the appointed time, Mr. Matheka Advocate addressed the court and stated that he had no instructions to proceed and that he needed time to withdraw from acting.

14. The record further shows that at this juncture, the names of the Plaintiffs were called outside the Court and it was upon confirmation of their absence that the Court proceeded to dismiss the suit for want of prosecution. The Plaintiffs were therefore not present in court on the date fixed for the hearing of the suit as they allege otherwise they would not have failed with the representative from their Advocates Law Firm to notice that another Advocate was in Court holding brief.

15. As it were, a perusal of the record right from the inception of this suit in the year 2012 does not disclose any much intention on the part of the Plaintiffs to proceed with this suit. When they filed the suit on 31st January 2012, they contemporaneously filed an application dated the same day seeking temporary orders of injunction. On 20th June 2013, that application was allowed.

16. Thereafter no action was taken to prosecute the matter for some three (3) years. When the matter subsequently came up for hearing on 4th May 2016, Ms Mutugi, Learned Counsel for the Plaintiffs was said to be held up in Mombasa in another High Court Case. The Court then granted the last adjournment to the Plaintiffs and fixed the matter for hearing on 19th June 2016.

17. On the said date however it turned out that the hearing notice had been served by the Plaintiffs' Advocates upon an Advocate who was no longer representing the 1st Defendant in the matter and the hearing could not proceed once more with the matter being stood over generally.

18. Subsequently the matter was fixed for hearing on 31st May 2018. On that date, Mr. Mukomba Advocate for the Plaintiffs told the Court that they had again, inadvertently served a Law Firm which had ceased to be on record for the 1st Defendant. The 1st Defendants current Advocates Ms Kanyi J & Company had been on record from 5th July 2017 but they had not been served with a hearing notice.

19. It is instructive that on the said date, Counsel for the Plaintiffs also stated on record that they were aware the 1st Defendant had died. In the circumstances, this court adjourned the matter to 26th September 2018 giving the Plaintiffs time to consider how they would proceed in light of the knowledge that the 1st Defendant was deceased. It was therefore strange that the Plaintiffs were using the reason of death of the 1st Defendant to seek another adjournment when the matter came up for hearing.

20. Arising from the foregoing, I am persuaded that the Plaintiffs were hell bent to subvert the timeous disposal of this case. Their conduct as enumerated above was that of persons who had no will whatsoever to prosecute the suit.

21. Accordingly, I did not think that they deserve the exercise of this Court's discretion in their favour. The application dated 23rd October 2018 is bereft of merit and is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 5th day of December, 2019.

J.O. OLOLA

JUDGE