



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.163 OF 2014

LOIS WAIRIMU MAGUA..... PLAINTIFF

VERSUS

HENRY KETER CHEPSENGENY &

7 OTHERS DEFENDANTS

RULING

(Applicant having been given time to file documents but not doing so within time and not paying court adjournment fees or costs as ordered; pleadings struck out pursuant to the directions relating to the Environment and Land Court; application to reinstate the struck out pleadings; duty of parties to comply with pre-trial directions paramount; court having power to order sanctions for failure to comply with pre-trial directions; pleadings properly struck out for failure to comply with pre-trial directions; nevertheless application to reinstate allowed but subject to payment of costs)

1. The application before me is that dated 23 November 2017 filed by the 5th defendant. The application seeks to set aside my orders of 22 November 2017 vide which I struck out the 5th defendant's statement of defence and list of documents and witness statements, for failure to comply with various pre-trial orders and directions which I issued on 6 November 2017.

2. By way of a background, the original plaint was filed on 10 June 2014. The plaintiff's case is that through an agreement dated 16 September 2006, she purchased from the 1st defendant, the land parcel Nakuru Municipality Block 20/11 (herein after referred to as "the suit land") at a consideration of Kshs. 2,000,000/= and thereafter the said property was transferred to her and she became registered as proprietor of the leasehold title comprised therein on 23 October 2008. Her attempts to settle into the property were however thwarted by the 2nd defendant who apparently held a parallel title. The 2nd defendant later transferred its title to the 5th defendant and the 5th defendant took out a loan from the 6th defendant with the suit property as security. It is thus the case of the plaintiff that the parallel title now held by the 5th defendant is fraudulent and she has sought its cancellation.

3. Together with the plaint, the plaintiff had filed an application for injunction of which I delivered a ruling on 11 June 2015. Thereafter, I gave directions for parties to comply with Order 11, and file their respective pleadings, list of documents and list of witnesses. The matter has thereafter been mentioned on various occasions with time lines being given to parties to comply with pre-trial directions.

4. On 4 October 2017, Mr. Ochang', learned counsel for the 5th and 8th defendants, asked for 21 days to file his clients' documents, which request I did grant and directed that the matter be mentioned on 6

November 2011 to follow up on compliance with these directions. On that day, Mr. Ochang', mentioned that he has filed the defences of the 5th and 8th defendants but needed 7 more days to file the witness statement of the 5th defendant. Counsel for the 2nd, and 6th defendants also sought more time to complete the filing of their pre-trial documents. I thought that ample time had been given to the defendants and I was not persuaded that there was any good reason for not complying with the court's pre-trial directions within the time given. I thus imposed upon the 2nd, 5th and 6th defendants a penalty fine of Kshs. 2,000/=, court adjournment fees of Kshs. 1,000/=, and directed them to pay to the plaintiff, costs of Kshs. 3,000/= before the next mention date which was 22 November 2017.

5. On 22 November 2017, Mr. Ochang' for the 5th and 8th defendants did not appear in court. It emerged that the 5th defendant had not paid any of the fines and penalties imposed upon it on 22 November 2017 and no reason whatsoever was given as to why the 5th defendant had not made good the pre-trial directions of 22 November 2017. I did state that it is incumbent upon all parties to comply with court orders and I did not see what business a litigant has in court if such litigant has no regard to court orders. For that non-compliance, I proceeded to strike out the pleadings and all documents filed by the 5th defendant.

6. In doing so, I followed the provisions of paragraph No. 28 of Gazette No. 5178 being the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings relating to the Environment and The Use and Occupation of, and Title to Land and Proceedings In other Courts. Paragraph 28 of the said directions inter alia provides as follows :-

28. In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference :-

(a) The issuance of appropriate Orders and directions to ensure parties comply and take pre-trial conferences seriously as they constitute a vital stage in the overall case management and efficient administration of justice.

(b) The issuance of an Order striking out pleadings and imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines.

(c) ... (d) ... (e) ... (f) ... (g) ... (h) ... (i) ... (j) ... (k) ...

(l) The Judge shall have the discretion to give any further orders and/or directions as the ends of justice may require.

7. It will be seen from the above, especially paragraph 28 (b), that the Court has power to "strike out pleadings or impose costs or similar sanctions" where there has been non-compliance with pre-trial directions or where there has been violation of timelines. It is incumbent upon every litigant to strictly follow any directions and any timelines that may have been given by a court during pre-trials. It has now become common place for litigants to simply ask for more time hoping that the court will continuously accede to such requests. On my part, I think it is time that the courts put their foot down and stamped their authority on tardy and recalcitrant parties, who appear bent on ensuring that matters in court are delayed. It is time that courts imposed heavy fines and burdened parties with costs, so that an indolent party does not get away with violations of court directions. In extreme cases, a court should not hesitate to strike out pleadings because if a litigant cannot adhere and follow court directions, I really do not see what business such person has in court. It was following the provisions of paragraph 28 (b), which inter alia empowers me to strike out pleadings where there have been violations of court orders and directions, that I proceeded to strike out the pleadings of the 5th defendant.

8. In this application, the 5th defendant has begged me to revise my orders of 22 November 2017, and excuse and pardon its omissions. It is explained that what happened was a mistake of counsel. In the supporting affidavit sworn by Mr. Ochang' John Ajigo, learned counsel for the 5th defendant, he has deposed inter alia that he omitted to diarize the mention date of 22 November 2017. He has stated that his client did send him through M-Pesa, sufficient money to pay the fines and costs imposed, but he

inadvertently delayed in remitting the same.

9. Frankly, I am not too persuaded by the explanations given by Mr. Ochang', and to his credit, he himself has conceded in his affidavit that the reasons he may detail, "might fall short of the test of reasonability". They actually do. Counsel was of course present when all these orders and directions were given and he had a duty to inform his client and ensure there compliance. Indeed, in her reply, the plaintiff has pointed out as much.

10. Despite the fact that I do not hold highly the explanations tendered, in my discretion, I will allow the application. I will reinstate the defence, list of documents and any other document of the 5th defendant that I may have struck out. The 5th defendant must however fully comply with the order on payment of costs and fines and must file all its documents within 14 days of today. The 5th defendant will also pay costs of this application to the plaintiff, which again in my discretion, I assess at Kshs. 5,000/=. These costs must be paid within 14 days of today. If there is going to be any non-compliance with these orders, then the orders striking out the pleadings and documents of the 5th defendant as made on 22 November 2017, will stand.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ochang' Ajigo for the 5th defendant/applicant.

Mr. Caleb Langat holding brief for Mr. Kipkoech for the plaintiff.

Mr. Towett for the 6th defendant.

No appearance for the 1st, 2nd, 3rd & 4th defendants.

Court Assistant :Nelima Janepher.