



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 203 OF 2014

WILFRED OCHWEDA OLUOCH.....1ST PLAINTIFF

ZAINABU OLUOCH.....2ND PLAINTIFF

VERSUS

VINCENT MWALE OBANDA.....1ST DEFENDANT

GODFREY OCHIENG JUMA.....2ND DEFENDANT

BENEDICT SIDAYI OCHIENG.....3RD DEFENDANT

STEPHEN OCHIENG OTIENO.....4TH DEFENDANT

NATIONAL BANK OF KENYA LTD.....5TH DEFENDANT

THE LAND REGISTRAR BUSIA (K).....6TH DEFENDANT

R U L I N G

1. The application under consideration is a Notice of Motion dated 8/3/2017 and filed here on 9/7/2017. It is brought under orders 11 and 12 rule 7 of Civil Procedure Rules, 2010, Section 3A of Civil Procedure Act (cap 21) and all enabling provisions of law. The Plaintiffs/Applicants – **WILFRED OCHWEDA OLUOCH and ZAINABU OLUOCH** (simply “Applicants” hereafter) – are essentially contesting the dismissal of their suit that took place on 8/12/2016. The suit is against the Defendants/Respondents – **VINCENT MWALE OBANDA (1st Defendant), GODFREY OCHIENG JUMA (2nd Defendant), BENEDETTE SIDAYI OCHIENG’ (3rd Defendant), STEPHEN OCHIENG OTIENO (4th Defendant), NATIONAL BANK OF KENYA (5th Defendant) and THE LAND REGISTRAR (6th Defendant** – who are all accused of illegal and/or fraudulent dealings relating to **land parcel No. MARACHI/BUMALA/1210** (“disputed land” hereafter).

2. To be precise, the prayers sought in the application are as follows:

Prayer 1: The order dismissing the Plaintiffs’ suit on 8/12/2016 be set aside and the Plaintiffs suit be reinstated for hearing and final disposal.

Prayer 2: Costs of this motion be granted.

3. In the grounds constituting the premise of the application, it was stated, *inter alia*, that the Applicants counsel was not aware of the hearing date; that the suit was not ready for hearing as pre-trial requirements had not yet been complied with; that the court was misled as to the true status of the case; and that the Applicants were greatly prejudiced by the dismissal.

4. The supporting affidavit that accompanied the application amplified the grounds and provided further information. A reading of the affidavit shows that the Respondents had not yet complied with pre-trial conditions despite a court directive to do so. It shows further that at or around the time of dismissal, the Applicants counsel was engaged in the hearing of another case in a different court. Further, it emerged that the Applicants counsel was not aware of the hearing date, his clerk having not informed him of it and neither having put the date in the counsel’s dairy.

5. The Respondents responded by filing grounds of opposition generally. On record are grounds of opposition from 2nd, 3rd, 4th and 5th Respondents. According to responses filed, the application is viewed as frivolous and vexatious. The Applicants were said to have been duly served while failing to diarize the matter was said to be an omission amounting to negligence.
6. The application was canvassed by way of written submissions. The Applicants submissions were filed on 30/10/2017. The submissions contain a rendition of facts capturing, in essence, what is contained in the application. The latter part of the submissions contains an exposition of the applicable law. There was a highlight of the statute law, with Sections 3, and 3A of Civil Procedure Act (cap 21) and Orders 11 and 12 of Civil Procedure Rule, 2010, taking prominence.
7. Reference was also made to judicial positions espoused by courts in various pronouncements. In this regard, the cases of **UNITED INSURANCE CO. LTD Vs KERANO MARWA & Another: HCC 409 of 2009, LLR 5657 (HCR) Kisumu** and **TRUST BANK LTD Vs PORTWAY STORES & Other (1993) LTD & Others: HCC No. 413 of 1997 (2001) EA 256** were cited. The aim here was to emphasize the wide discretionary power of the courts to intervene and the need not to visit on the Plaintiffs the mistakes of their Counsel. The same points were further emphasized by citing the decided cases of **ALLOYS ONGAKI Vs JUSTUS WAMBURUI & Another: HCC No. 84 of 1999, BUSIA** and **PATEL Vs E.A. CARGO HANDLING SERVICES LTD (1974) EA 75**. This court was ultimately urged to allow the application.
8. The 2nd, 3rd and 4th Respondents submissions were filed on 12/3/2018. The 5th Respondents submissions had been filed earlier on 9/11/2017. I do not have the 1st Respondent's submissions as I write this ruling, and the 6th Respondent did not participate in the application at all.
9. The 2nd, 3rd and 4th Respondents submitted, *inter alia*, that the Applicant has not given satisfactory explanation for failing to appear on the hearing date. The Applicant was also faulted for first denying service and then later admitting it but excusing non-attendance on the basis that the hearing date was never diarized. According to the Respondents this amounts to falsehood and was meant to mislead the court.
10. The Applicants were said to have lost interest in the case and this prompted the Respondents to take a hearing date. Then on the hearing date, the Applicants, though served, failed to appear. And this application itself was said to have been filed belatedly. The suit, it was submitted, was dismissed in December 2016 while the application was filed about four(4) months late, that is March 2017. There was said to be a delay of about four (4) months. The court was asked to dismiss the application.
11. The 5th Respondent also submitted that the application should be dismissed with costs. It was pointed out that failure to attend court for hearing constituted a good ground for dismissing the case. Order 12 Rule 3 of Civil Procedure Rules, 2010, was said to mandate such dismissal while the case of **FREDRICK NTONGAI M'Erimba & Another Vs M.T. Asanyo & Another (2008) EKLr** was cited as an instance where such dismissal took place.
12. Like the other Respondents, the 5th Respondent also accused the Applicant of filing the application belatedly. It was alleged that there was negligence on the Applicant's part in failing to diarize the hearing date upon service and there was delay in responding to the dismissal herein as this application was filed about three (3) months later.
13. I have considered the application, the responses filed, rival submissions, and the pleadings on record generally. It seems to me that when the Respondents took the hearing date, the suit was not ready for hearing. As alleged by the Applicants, both sides had to file a list of agreed issues. The applicant had done so. The Respondents had not. Further, the Respondents filed their defences and counter-claim (for 2nd, 3rd, and 4th Defendants, that is). They also filed a list of documents. But neither their own statements nor their witness statements are in the court file. What this in essence means is that had the court insisted on proceeding with the defence case or counter-claim after dismissing the Applicants case, the hearing would not have taken place. The Applicants therefore have a point when they say that the matter was not ready for hearing.
14. And given this scenario or position, it is easy to question the logic of taking a hearing date by the Respondents knowing well that they had not yet complied with some pre-trial requirements.
15. To me also, the explanation for non-appearance given by the Applicants counsel seems reasonable. The hearing date was taken in his absence. It was then served on his clerk who failed to diarize it. It stands to reason then that the counsel could not know of the hearing date. Failure to attend hearing therefore does not seem deliberate or due to arrogance on his part. He seems to have been genuinely unaware of the hearing date. True, there appears to be some ambivalence or contradiction on the part of the Applicants counsel in first denying service and then admitting it. That in my view could form a basis for penalizing him by way of costs but cannot be a basis for refusing to reinstate the Applicant's case. Such refusal would punish the Applicants yet they were not part of what happened.
16. The law generally is as explained by the Applicant's counsel. Courts have largely been inclined to set aside dismissals where Plaintiffs come later and show good cause for setting aside. The law is clear. The power to set aside is discretionary. The discretion itself is unlimited provided only that it is judiciously exercised. And to judiciously exercise it, the court needs to be guided by good evidence and sound legal principles.
17. The approach of the court should be liberal, not narrowly grammatical or unduly pedantic. In **Intermatt Manufacturers Ltd Vs Akiba Bank Ltd [2007] eKLR**, Apaloo JA (as he then was) expressed himself thus:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think that 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 cost. The court as often said exists for the purposes of deciding the rights of the parties and not for the purpose of imposing

discipline.”

18. I have considered the explanation given and the legal position as put forward by the Applicants and I am in general agreement with them. I may venture to add that even an entirely regular or proper dismissal can be set aside if the Plaintiff persuades the court that his case deserves full consideration of its merits and the court, upon looking at the pleadings filed, becomes so persuaded. The only qualification to this position is that the Plaintiff should compensate the other side by way of costs and should also demonstrate an eagerness to proceed with his case without further delay. I think the court on its part should make it clear to the Plaintiff that another justified dismissal because of the Plaintiffs dilatory behavior would be irreversible.

19. This is precisely the position I will take in this matter. I am persuaded that the Applicant’s case deserves to see the light of the day. This is much more so because it is necessary to consider it vis-à-vis the defences and the counter-claim filed by the defence. The Applicants are hereby warned against indolence. They should act with all due dispatch to ensure that the matter proceeds to hearing.

20. I therefore allow the application herein but in the circumstances of this case, costs will be in the cause.

Dated, signed and delivered at Busia this 24th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

4th Defendant:

5th Defendant:

6th Defendant:

Counsel of Plaintiffs.....

Counsel of Defendants.....