REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 2 OF 2013

CHARO SHUHULI RANDU.....PLAINTIFF/APPLICANT

VERSUS

KARISA NZAI.....1ST DEFENDANT/RESPONDENT

PILI MBWANA.....2ND DEFENDANT/RESPONDENT

RULING

1. Charo Shuhuli Randu filed this suit on 2nd January 2013 praying for a permanent injunction to issue restraining the Defendant from trespassing, entering, remaining in, developing, fencing, constructing, leasing, alienating and/or dealing with a portion of unsurvyed parcel of land measuring 100 feet by 160 feet curved from land Portion No. 245 Malindi.

2. By an application dated and filed the same day the suit was filed, the Plaintiff also sought under Certificate of Urgency temporary Orders of injunction restraining the Defendants from dealing with the aforesaid parcel of land in the manner herein described pending the hearing and determination of the suit. That application was placed before Honourable Justice Muya on 3rd January 2013 and the Learned Judge granted the Orders prayed for pending inter-partes hearing on 17th January 2013.

3. On the date fixed for inter-partes hearing, Mr. Otara Advocate acting for the Plaintiff appeared before the Honourable Justice E.M. Muriithi and sought the extension of the orders after informing the Court that he had been served with a Notice of Appointment of Advocates by Messrs Michira Messah & Company Advocates and that they had agreed with the said Advocates to fix the matter for hearing on another date. The Learned Judge then extended the interim Orders and then fixed the matter for mention on 31st January 2013.

4. As it were, on the said 31st January 2013, the file was placed before Lady Justice Maureen Odero who, in the absence of both parties, stood over the matter generally. Nothing happened thereafter in the file until two years later on 21st May 2015 when Messrs Kilonzo & Aziz Advocates for the 2nd Defendant appeared in the registry and fixed the matter for pre-trial directions on 23rd June 2015.

5. It is however apparent from the record that the file was not taken before any Court on the 23rd June 2015. Subsequently on 21st July 2016, the same Advocates for the 2nd Defendant appeared at the Court Registry and fixed the matter for pre-trial directions on 10th October 2016. On the said date, the matter was placed before the Deputy Registrar and Mr. Otara Advocate appeared for the Plaintiff while Mr. Mburu Advocate appeared for the Defendant. From the records, Counsel for the Plaintiff addressed the Court and informed the Court that both parties had complied with the requirements of Order 11 of the Civil Procedure Rules but there were some issues which they needed to put in place before the matter could be fixed for hearing. Accordingly the Court fixed the matter for mention on 14th November 2016.

6. As things turned out, the matter was not taken to Court on 14th November 2016. Instead, by a Notice to Show Cause dated 21st March 2017, the parties herein were required to appear in Court on 13th July and Show Cause why the suit should not be dismissed for want of prosecution. On the appointed day, there was no appearance for the Plaintiff. Mr. Kilonzo Advocate however appeared on behalf of the 2nd Defendant and urged the Court to dismiss the suit for want of prosecution. The suit was accordingly dismissed pursuant to the Provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010.

7. Subsequently and by the present application before me and dated 31st October 2017, the Plaintiff prays for orders of temporary injunction to issue against the Defendants and that the order of this Court made on 13th July 2017 dismissing the suit be reviewed and/or set aside. The said application is supported by the Plaintiff's Affidavit sworn the same day which is premised on the grounds:-

i) That the applicant craves an opportunity to be heard before the final orders are made regarding his right to the suit property;

ii) That the suit concerns ancestral rights over the suit property and its dismissal was due to failure on the part of his advocate and not the applicant himself;

iii) That the applicant has not preferred an appeal against the order of dismissal;

iv) That the application has been brought at the earliest time possible and without undue delay; and

v) That the 2nd Respondent has restarted constructing on the suit property.

8. By Grounds of Opposition filed herein on 5th December 2017, the 2nd Defendant/Respondent is opposed to the grant of the Orders sought in the application on the grounds inter alia:-

1. That the Application is a non-starter, bad in law and an abuse of the Court Process.

2. That the Application is defective ab initio as it was filed by an Advocate who was (not) properly on record. Pursuant to Rule 9 of the Civil Procedure Rules, the firm of Omagwa Angima & Company Advocates ought to have sought leave of the Honourable Court before replacing the firm of Richard Otara & Company Advocates who were then acting for the Applicant as there is a final Judgment and Order of the Court.

3. That the order of injunction sought by the Applicant is not attainable as the Applicant herein has not demonstrated that irreparable loss of damage is likely to be suffered in the event this Order is not granted. There is no suit upon which the Orders sought can be granted.

4. That this application is incompetent as to the extent it is seeking to reinstate a suit which was dismissed for want of prosecution by this Court on 13th July 2017. The Applicant has failed to demonstrate with sufficient evidence that the suit was improperly dismissed or that this Court did not exercise its discretion properly in dismissing the suit; and

5. That this Application is made after an inordinate, unexplained and inexcusable delay of about one year since the same was dismissed. Equity aids the vigilant and not the indolent. It follows that this Application must fail.

9. I have considered the Application and the Grounds filed in Opposition thereto. I have equally considered the submissions filed and placed before me by the Learned Advocates for the parties.

10. I think the main issue before me is whether in the circumstances of this case this Court ought to exercise its discretion in favour of the Applicant and set aside the Orders made herein on 13th July 2017. ***In Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75,*** the Court stated that:-

"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 may be 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."

11. It was however stated earlier in ***Shah –vs- Mbogo(1967) EA 166*** that:-

"This discretion to set aside an ex –parte Judgment 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."

12. As I have noted hereinabove, the suit was commenced by the Plaintiff on 2nd January 2013. Thereafter and after obtaining interim Orders of injunction, nothing substantial has taken place in the file since March 2013. The Plaintiff has largely heaped blame upon his former Advocate Messrs Richard O & Company Advocates for the failure to take any steps to progress this matter for hearing.

13. However, as Kimaru J observed while dealing with a similar matter in ***Savings & Loans Ltd –vs- Susan Wanjiru Muritu (Nairobi) (Milimani) HCCC No. 397 of 2002:-***

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.

The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel for the litigant on account of such advocate's failure to attend the Court. It is the duty of the litigant to consistently check with the advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty justice for the Court to exercise its discretion in favour of such a litigant."

14. Similarly in the matter before me, there was absolutely no indication of any action on the part of the Plaintiff to follow up and prosecute

his case after the suit was filed in the year 2013. Indeed, it is apparent from the material placed before me that he was only woken into filing the present application some three months after the dismissal when he realised that the 2nd Defendant had resumed construction on the parcel of land to which he obtained temporary injunction Orders in the year 2013.

15. As Gikonyo J observed in ***Fran Investment Ltd –vs- G4S Security Services Ltd (2015) eKLR:-***

> ***"It is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed expeditiously, which is founded upon the old adage and now an express constitutional principle under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff."***

16. As it were, the Plaintiff does not deny that his previous Advocate on record was served with the Notice to Show Cause as issued by this Court on 21st March 2017. When the matter came up on 13th July 2017, neither the Plaintiff nor his appointed Advocate was in Court and no cause was therefore shown to the Court's satisfaction as to why the suit should have been spared dismissal for want of prosecution.

17. That being the case I need not to delve into the other issues raised by the Respondent as to the unsuitability of the Application. In the result, I find no merit in the application dated, 31st October 2017. The same is accordingly dismissed with costs to the 2nd Defendant.

Dated, signed and delivered at Malindi this 31st day of October, 2018.

J.O. OLOLA

JUDGE