



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 33 OF 2014

RICHARD MARK BINNS

FELICITY ANN BINNS.....PLAINTIFFS

VERSUS

SIMEON KAZUNGU BAYA

RALPH KALAMA

THE CHIEF LAND REGISTRAR

FOUR ISLANDS BAY LIMITED.....DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion Application dated 23rd August 2017 and filed herein on 24th August 2017. By the said Application the Plaintiffs pray for orders:-

- 1. That the Orders of Honourable Justice O. Angote made on the 1st of July, 2016 dismissing the suit filed herein be reviewed, varied and/or set aside.***
- 2. That the suit filed herein on 3rd March 2014 together with all other consequential orders be reinstated.***
- 3. That the costs of this application be provided for.***

2. The said Application is supported by two affidavits sworn by Richard Mark Binns, the 1st plaintiff herein and is premised on a number of grounds listed on the body thereof as follows:-

- i) That the parties to this suit and the Plaintiff in particular, were not properly afforded a chance to be heard before the said order was made;***
- ii) That neither the Plaintiff nor its(sic) Advocates on record received the Notice to show cause why(the) suit should (not) be dismissed as envisaged under Order 17 Rule 2. The said Notice has not been received to-date;***
- iii) That the Order of dismissal made on 1/7/16 was made through no fault or wrong doing on the part of the Applicant/Plaintiff but the fault of the Advocates instructed by the Plaintiff who were on record;***
- iv) That the Applicant is keen on prosecuting their suit as they fell aggrieved by the action of the Respondents;***
- v) That no appeal has been preferred against the order of 1st July 2016;***
- vi) That the delay occasioned herein is not so inordinate or so great as to be considered inexcusable;***
- vii) That in the interest of justice, the said Order ought to be reviewed and the suit and the consequential Orders therein be reinstated for hearing and determination;***

viii) That the dispute giving rise to the suit was precipitated by the 3rd Respondent who in collusion with the Respondents had the suit property registered in the name of the Plaintiff to be transferred to the 4th Defendant seeking compensation in the said suit; and

ix) That if the suit is not reinstated the Plaintiff will suffer a lot of loss and damage as they will have been deprived of their lawfully acquired property without compensation as enshrined in the Constitution.

3. In a Replying Affidavit sworn by its director Isaac Rodrot and filed herein on 6th October 2017, Four Islands Bay Limited (the 4th Defendant) terms the Plaintiff's application as baseless, vexatious and a total of abuse of the Court Process. The 4th Defendant avers that after the Plaintiff filed this suit on 3rd March 2014, they moved the Court under a Certificate of urgency and obtained injunction orders against the Respondents on 4th July 2014. Thereafter the Plaintiffs did not take any steps to prosecute the suit leading to the issuance of the Notice to Show Cause.

4. The 4th Defendant avers that the conduct of the Plaintiffs towards this matter clearly manifests lack of interest in the matter and is undeserving of the Court's discretion to set aside. It is the 4th Defendant's case that the application to reinstate the suit is made after an inordinate, unexplained and inexcusable 14 months delay after the suit was dismissed. They therefore urge the Court to dismiss the application on the basis that the same lacks merit.

5. In addition to the Replying Affidavit, the 4th Defendant also filed Grounds of Opposition to the Application on 6th October 2017. The other Defendants did not file any response to the Application.

6. I have considered the Application and the response thereto. I have equally considered the Written Submissions filed herein by the Learned Advocates Ms Chepkwony for the Plaintiffs/Applicants and Mr. Kilonzo for the 4th Defendant/Respondent.

7. Order 17 Rule 2(1) of the Civil Procedure Rules grants the Court power to dismiss a suit in which no step has been taken for one year. The Order requires the Court to give notice to the party concerned to show cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the Court, the Court may dismiss the suit.

8. The suit before me was filed on 3rd March 2014. The Plaintiffs are seeking various sums of money from the Defendants herein jointly and severally. They also pray for a declaration that they are the rightful proprietors of the suit property, a parcel of land known as Kilifi/Jimba/1146 as well as a permanent injunction restraining the 4th Defendant in particular from claiming ownership, developing, dealing in or in any way interfering with the suit property said to be measuring 3.7 hectares.

9. On the 4th of March 2014, the Plaintiffs were granted leave to serve the 4th Defendant by way of Substituted Service by way of an advertisement. The 4th Defendant was required to enter appearance within 21 days from the date of the advertisement. A copy of the Advertisement carried out apparently in the Standard Newspaper is attached to an Affidavit of Service filed by the Plaintiffs in Court on 14th April 2014. It is not however clear from the newspaper extract on which date the advertisement was carried out in the said newspaper.

10. Be that as it may the Plaint was amended on 1st October 2014. On 31st October 2014 Messrs Kilonzo & Aziz Advocates filed a Notice of Appointment of Advocates after which the matter appears to have gone quiet.

11. By a Notice to Show Cause dated 2nd June 2016, the Deputy Registrar of this Court gave notice to the Advocates appearing for the parties herein to appear before the Court on 1st July 2016 to show cause why this suit should not be dismissed since no application had been made or any step taken by either party with a view to proceeding with the suit. On the appointed date, none of the parties appeared before the Honourable Justice Angote and the Learned Judge proceeded to dismiss the suit for want of prosecution.

12. In the Application before me, the Plaintiffs plead for the reinstatement of the suit and blame their Advocates then on record-Messrs Kandie Mtai Mudezi & Company Advocates for failing to take steps to fix the matter for hearing. In addition, the Plaintiffs who are husband and wife state that they were forced to travel in and out of the Country for various periods between 25th April 2014 and 3rd August 2017 to seek essential treatment. It is their case that during the time, they entrusted the case to their Advocates who constantly assured them that their case was proceeding well. It is only much later when they visited the Court Registry after their Advocate became evasive that they discovered that their case had been dismissed in the absence of the Advocates.

13. On their part, the 4th Defendant contends that the Plaintiff had granted implied and general authority to their Advocates to compromise and/or settle the suit and the Plaintiffs are estopped from denying that the said Advocates were their agents. It is the 4th Defendant's position that having appointed the said Advocates, the Plaintiff cannot be heard apportioning blame to them and that the only remedy available to the Plaintiffs is to seek damages from the said Advocates. The 4th Defendant further accuses the Plaintiffs of being guilty of laches and only bringing this application as an afterthought some 14 months after the suit was dismissed.

14. I have applied my mind to the circumstances of this case and considered whether there is a basis for this Court to exercise its discretionary power to set aside the orders of 1st July 2016 and reinstate the suit. The guiding principle in the exercise of the Court's discretion was laid out in **Mbogo & Another -vs- Shah (1968) EA 93**. Such discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. As it were, such discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

15. I note from the record that this suit was barely two and a half years old when it was dismissed for want of prosecution. As at the time,

only one of the four defendants had entered appearance and none of them had filed a defence to the Plaintiff's suit. While it is true that as at the time it was dismissed no action or step had been taken to prosecute the same, it is apparent from the communication annexed to the Plaintiffs affidavits in support of the application that the Plaintiffs were constantly in touch with their advocates and were enthusiastic to have the matter proceed. The said Advocates failed to attend Court when required to show cause and subsequently failed to properly explain what had befallen the suit to their clients.

16. As Chief Justice Madan stated in *Belinda Murai & Others –vs- Amos Wainaina :-*

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule....”

17. Apaloo JA adopted a similar approach in *Philiph Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103*, where he stated 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 having his case heard on merit. I think 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 costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

18. Arising from the foregoing, I am satisfied that the Plaintiffs Application dated 23rd August 2017 has merit. Accordingly, I hereby set aside the orders of this Court granted on 1st July 2016 and reinstate the suit for hearing. The Plaintiffs are hereby directed to forthwith set down the suit for hearing with dispatch.

19. The costs of the application shall be in the cause.

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

J.O. OLOLA

JUDGE