



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO.273 OF 2017

PAUL MAINA KIRUNGUI - 1ST PLAINTIFF

GRACE WANGUI KIRUNGUI - 2ND PLAINTIFF

VS

MERCY MUTHONI (sued in her

Capacity as the Administrator of the

estate of JORAM KIRIGI GACUNA) - 1ST DEFENDANT

LAND REGISTRAR, MURANG'A - 2ND DEFENDANT

RULING

1. This Ruling relates to an application filed on 3/4/18 arising from a dismissal order of this suit for want of prosecution. The Applicant is seeking for reinstatement of suit.

2. It is supported by the grounds thereto as well as the Supporting affidavit of Stephen Walter Kaai, learned Counsel for the Plaintiffs filed on 4/4/18. In it, the Counsel states that he was appointed by the Plaintiffs on 15/3/18. That a notice of change of Advocate was prepared and given to his secretary to type but the said secretary was involved in an accident on 16/5/18 thus failing to so type the said Notice of change of Advocates in time for filing in Court. The Advocate deposed that he appeared in Court on 19/3/18 and requested to be allowed to regularize the appointment but the Court declined telling him that he was not on record. He claims that the suit was coming up for mention on that day. That although the Advocate was not on record the Plaintiffs were in Court and were not called before the suit was dismissed. That the suit did not fall under the Order 17 rule 2 or Order 12 rule 7. That the matter relates to a prime piece of land and the dismissal of the suit without hearing on merit will put them to untold loss. That the mistake of the Advocate should not be revisited on the Plaintiffs. That failure to file notice of change of Advocates was beyond his control.

3. The application is opposed by the 1st Respondent in her replying affidavit dated 29/6/18. In it she deposed that the affidavit carries concoctions of events and explanations for the following reasons; no evidence was adduced to prove that indeed an accident occurred on the material day involving the secretary of the Plaintiff's Advocate; It would be unlikely that a senior Advocate would travel from Nairobi to Murang'a to appear before the Environment and Land Court without a basic document like a notice of appointment is filed; the Plaintiff's Advocate had 2 clear days to prepare a notice of change but did not; It is untrue that the Plaintiffs were in Court as the 2nd Plaintiff is long deceased and therefore could not have been in Court on the 19/3/18. That it was apparent that the Plaintiffs have lost interest in the suit.

4. Parties filed written submissions which I have reviewed. The Plaintiff Counsel reiterated the grounds stated in the supporting affidavit and added that the 2nd Plaintiff is well and alive contrary to the 1st Respondent's allegations that she is long dead. Relying on the case of **Protein & Fruits Processor Ltd vs. Credit Ltd & Brothers (2 KLR) 2004** he stated that no prejudice shall be visited to the 1st Defendant if the case is reinstated. The suit land is prime and the Plaintiffs stand to lose if the matter is not adjudicated on its merits.

5. The 1st Defendant submitted and reiterated the contents of her replying affidavit except she withdrew the contention that the 2nd Plaintiff is deceased. In addition she submitted that the Applicants have attended Court twice since 2016. She urged the Court to dismiss the application.

6. Having analysed the affidavit with the submissions I shall now consider the matter.

7. This suit was filed on 30/8/13 at Nyeri Environment and Land Court under ELC Case No. 176 of 2013. In the suit the Plaintiffs sought the following orders;

- a. An order for permanent injunction restraining the 1st Defendant from any dealings in LR. No. 19/KIAWAMBOGO/1862.
- b. An order for permanent mandatory injunction directing the 2nd Defendant to cancel the registration of the 1st Defendant's husband Joram Kirigi Gacuna as the proprietor to LR. No. 19/KIAWAMBOGO/1862.
- c. Costs of this suit.
- d. Any further relief deemed fit by this Honourable Court.

8. On the 15/10/13 the 1st Defendant filed a defence in which she denied the Plaintiffs claim. Alongside, the Defendants also filed her list of witness statements, witness statements and list of documents on even date. It is on record that the Plaintiff had equally filed the list of witnesses, witness statements and list of documents they wished to rely on in the case.

9. The Plaintiffs were represented by the law firm of J M Kagwi & Co. Advocates.

10. At the establishment of the Environment and Land Court at Murang'a the suit was transferred to this Court in early 2017. On the 13/3/17 the parties were issued with mention notice to appear before the Judge on 20/4/18 for directions in the case. When the matter came before the Judge on 20/4/17 noting that the notice had not been served the judge ordered the mention notice to be reissued.

11. On the 8/5/17 the parties were absent and the Court ordered that new dates be taken in the registry. On 31/1/18 it is on record that both Advocates were served with mention notices dated 20/4/17 to appear before the Judge on 8/5/17 for mention but they chose to stay away from Court.

12. On 20/12/17 another mention notice was issued to the parties to appear for mention on 31/1/18. The Plaintiffs Advocates Messrs J M Kagwi & Co. Advocates acknowledged receipt of the mention notice and stamped and signed by one, Elizabeth, on 23/1/18. However, on the date of the mention it is only the 1st Plaintiff who was present in Court and the Advocate was absent. The Defendants were also absent. The Court ordered that a Notice to show cause be issued.

13. Notice to show cause pursuant to Order 17 rule 2 of Civil Procedure Rules was issued on 2/2/18 directing parties to appear before the Court on 19/3/18 to show cause why the suit should not be dismissed. This Notice to show cause was acknowledged and stamped by Elizabeth on 22/2/18 on behalf of the Law firm of J M Kagwi who acted for the Plaintiffs. A return of service was filed on 26/2/18 to that effect.

14. Come the 19/3/18 the parties were absent in Court and the Honourable Court proceeded to dismiss the case for non-attendance/want of prosecution pursuant to order 17 rule 2. It is noted that this suit was filed on 3/8/13 and despite evidence on record that the both parties had complied under Order 3 rule 2 and 7 rule 5, no attempts by the Plaintiffs were made to fix the matter for hearing. It is on record that the matter was first mentioned before the Environment and Land Court Judge on 13/4/15 when only the 1st Plaintiff was present. The Advocate and the Defendants were absent. The matter was taken out of the cause list. The next time there was an appearance in the suit was on 31/1/18 when only the 1st Plaintiff was present but his Advocate was absent.

15. Under Para 12 of the Supporting affidavit the Plaintiffs Advocate admitted that he tried to address the Court on 19/3/18 though he had not filed a notice of change of Advocates. There is no evidence on record of such appearance least of all the content of his address. In any event the said Counsel had not filed Notice of his appointment and therefore had no audience with the Court.

16. There is no evidence tendered by the said Counsel to support his averments that the secretary had been involved in a road accident and was finally hospitalized thus failing to prepare the notice of appointment. In any event as at 19/3/18 the Plaintiffs were still being represented by the law firm of J M Kagwi who had Notice of the Notice to show cause but did not appear in Court nor the Plaintiffs or the date for hearing of Notice to show cause. There was no evidence or indication that the Plaintiff had changed their Advocates.

17. It is on record that the Applicants Advocates only filed their notice of appointment dated 3/4/18 on 4/4/18 after the matter had been dismissed on the 19/3/18. If the Applicant's Counsel was keen to come on record, he would have filed his notice on the same day. The letter dated 8/3/18 filed by the Applicant seeking to withdraw instruction from his previous advocates was only filed on 4/4/18 after the case had been dismissed on 19/3/18. The Advocate for the Applicant has enclosed a cause list for 19/3/17 that showed that the matter came up for mention. He contends that the matter was dismissed at the mention stage. This, to say the least is misleading the Court. I say so because according to the proceedings on record Notice to show cause was issued on 2/2/18 and duly served on the advocates of the Applicant. It was duly acknowledged. Come the 19/3/18 the parties were absent and that is the date the Court dismissed the suit for want of prosecution and or non-attendance. The Court finds that no plausible reasons have been given by the Advocate in response to the Notice to show cause. The said Advocate has not even alluded to the same in this application.

18. Section 1A of Civil Procedure Rules provides as follows;

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to

the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

19. From Para 18 above, a party in a Civil proceeding or an Advocate is under a duty to assist the Court achieve its overriding objectives and to participate in the process of the Court including complying with the orders of the Court. In this case the Plaintiffs have not been apt to the above section in pursuing expeditious disposal of their case.

20. It is clear from the record above that the Plaintiffs have not demonstrated any interest to prosecute this matter. They have been indolent and the Court being a Court of equity cannot exercise discretion in favour of an indolent party. It is declined.

21. This application is devoid of merit. It is dismissed with costs to the 1st Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A this 31ST DAY OF OCTOBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Njau HB for Kaai for the Plaintiffs/Applicants

Respondents/Defendants – Absent

Irene and Njeri, Court Assistants