

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCMISC. SUIT NO. 30 OF 2016

1. SIMON THUO MUHIA

2. MARY NJOKI THUO.....PLAINTIFFS

VERSUS

DELLIAN LANGATA LIMITED.....DEFENDANT

RULING

This suit (formerly Nairobi High Court Misc. Suit No. 184 of 1991) was brought by way of Originating Summons on 19th March 1991 seeking among others, an order to extend the caveats which the plaintiffs had registered against the titles of land parcel numbers LR. No. 3591/22 and LR.3591/23(hereinafter referred to as “the suit properties”). In his affidavit sworn on 18th March 1991 in support of the application, the 1st plaintiff contended that the plaintiffs had entered into a valid agreement for sale dated 5th February 1988 with the defendant in respect of the suit properties and had had fulfilled their obligations under the said agreement. The plaintiffs contended that they were entitled to specific performance of the said agreement and that if the caveats which they had registered against the titles of the suit properties to protect their interest therein were removed, the said properties stood the risk of being alienated by the defendant a move that would defeat the plaintiffs’ interest in the said properties. It is on the basis of the foregoing that the plaintiffs sought the extension of the said caveats.

A few weeks after the filing of this suit, the plaintiff filed another suit namely, Nairobi HCCC No. 1561 of 1991(now Nairobi ELC No. 293 of 2016) by way of a plaint against the defendant and another party seeking among others, specific performance of the said agreement for sale. This suit,Nairobi HCCC No. 1561 of 1991 (hereinafter referred to only as “ELC NO. 293 of 2016”) was filed on 2nd April 1991. On 30th July 1991, the present suit (formerly Nairobi HC.Misc. Suit No.184 of 1991) was consolidated with ELC No. 293 of 2016. For reasons which are not clear from the record, the two files were kept separate.The hearing of ELC No. 293 of 2016 commenced before Muchelule J. who took the evidence of several witness before he was transferred leaving the matter part heard. On 13th June 2012, the advocates for the parties in ELC No. 293 of 2016 appeared before Ougo J. and recorded a consent to the effect that the matter which was by them part heard be removed from the hearing list of the day and that the court registry do provide certified copies of the proceedings to enable the court give directions on the way forward.

From the record, no further action seems to have been taken in ELC No. 293 of 2016 until 16th March 2016 when the same was transferred from the Civil Division of the High Court to this court. In the meantime, this suit which was consolidated with ELC No. 293 of 2016 and which appears not to have been put together with ELC No. 293 of 2016 which was part heard and was awaiting the typing of proceedings was dismissed by the court on its own motion for want of prosecution on 23rd February 2015 after the parties were served with a notice to show cause and the plaintiff failed to appear in court.

What I now have before me is the plaintiff’s application by way of Notice of Motion dated 26thFebruary 2015 seeking to set aside the said order of dismissal. The application has been brought on the grounds that this suit was consolidated with ELC No. 293 of 2016 which is part heard before Muchelule J. and which is waiting the typing of proceedings before directions regarding further hearing can be given. The plaintiff has contended that his advocate’s failure to attend court on 23rd February 2015 to show cause

why the suit should not be dismissed was due to inadvertence on the part of the said advocate who was also engaged in another matter before the Court of Appeal on the material day.

The Plaintiff's application was opposed by the defendant through a replying affidavit sworn by Phyllis Christabel WamburaMaranga on 30th November 2015. The defendant contended that the plaintiff's application lacks merit and should be dismissed. The defendant contended that the revival of this suit would cause prejudice to the defendant. The defendant has contended that the plaintiff was guilty of inordinate delay in the prosecution of this suit and as such the court was justified in dismissing the suit. The application was argued by way of written submissions. The plaintiffs filed their submissions on 16th June 2016 while the defendant filed its submissions on 27th June 2016.

I have considered the plaintiffs' application together with the affidavit and further affidavit filed in support hereof. I have also considered the replying affidavit that was filed by the defendant in opposition to the application and the parties' respective submissions. The order that is sought to be set aside was made in the absence of the plaintiffs. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. Section 3A of the Civil Procedure Rules also gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. The powers donated to the court under section 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil procedure Rules aforesaid are discretionary. Like any other discretionary power, the same must be exercised judiciously and not capriciously with the sole aim of ensuring that justice is done to the parties.

On the material before me, I am satisfied that the plaintiffs have laid a proper basis for the exercise of this courts discretion in their favour. The plaintiffs have given a reasonable explanation as to why they failed to appear in court on 23rd February 2015 to show cause why this suit should not be dismissed. The plaintiffs have also satisfied this court that this suit should not have been dismissed in the first place. The plaintiffs have given convincing reasons why there has been a delay in the prosecution of this suit. As I have stated earlier in this ruling, this suit was consolidated with ELC No. 293 of 2016. ELC No. 293 of 2016 is part heard. The last order which was made in that matter was that the proceedings be typed so that the court can give directions on further hearing of the matter. This suit having been consolidated with ELC No.293 of 2016, there is no way the plaintiffs could have fixed the same for hearing singly. I have considered the grounds that have been put forward by the defendant in opposition to the application. In my view, the same do not answer the application. The defendant has not denied that this suit was consolidated with ELC No.293 of 2016. The defendant has also not denied in its replying affidavit in opposition to the application that ELC No. 293 of 2016 is part heard and is awaiting further directions by the court. The defendant who has contended that the plaintiffs are guilty of inordinate delay has not explained how the plaintiffs could have listed this suit for hearing before directions are given in ELC No.293 of 2016 which was consolidated with this suit. I am of the view that if the attention of the court would have been drawn to the fact that this suit was consolidated with ELC No. 293 of 2016 and that ELC No. 293 of 2016 is part heard, this suit could not have been dismissed. I am of the opinion that once a case has been consolidated with another, it cannot be severed for dismissal and the other is left pending.

For the foregoing reasons, I am satisfied that the Plaintiff's application dated 26th February 2015 is well founded. The same is allowed in terms of prayers 2 and 3 thereof. Since the proceedings in ELC No. 293 of 2016 have now been typed, the plaintiff should set down ELC No. 293 of 2016 and this suit for mention for directions within 60 days from the date hereof failure to which the two suits shall stand dismissed with costs. The costs of the application herein shall be in the cause.

Delivered and Signed at Nairobi, this 24th day of January, 2017

S. OKONG'O

JUDGE

In presence of

Mr. Mumbiri for the Plaintiffs

Mr. Otenyo for the Defendant

Kajuju Court Assistant