



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC NO. 471 OF 2014
(FORMERLY NYERI CIVIL CASE NO. 75 OF 2011)
JECINTA NYAGUTHII NDUNG'U.....PLAINTIFF/APPLICANT
-VERSUS-
GEORGE WAMBUGU MUCHERU..... DEFENDANT/RESPONDENT
RULING

1. This ruling is in respect of the Notice of Motion **dated 17th November, 2015**, in which the plaintiff seeks that the orders of this court made on **23rd September, 2015** dismissing the suit for want of prosecution be set aside.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit sworn by the applicant on **17th November, 2015**. She depones that she had tried to enquire on the progress of her matter from her former advocate (Mr. J. Macharia) and learnt that he has since retired to his rural home and his offices have been converted to an insurance brokerage firm. She depones that she only learnt that the suit had been dismissed after engaging new advocates who perused the court file and found the aforesaid position. It is her contention that the delay in prosecuting the matter is attributable to her former advocates and their mistakes should not be visited on her as client. She is still desirous of prosecuting the matter and avers that no prejudice will be suffered by the defendant if her application is allowed since the defendant has never entered appearance.

3. In opposing the application, the respondent, **George Wambugu Mucheru** swore a replying affidavit on **10th November, 2016** in which he depones that he has never been served with summons to enter appearance to enable him file his defence. It is his contention that he only learnt of the existence of the suit against him by applying to the court vide several letters (dated 19th January, 2016 and 11th December, 2016 respectively) asking for this instant application. He avers that the plaintiff is not entitled to the orders sought as the notice to show cause was addressed to her personally therefore she cannot claim to have had no knowledge of the matter.

4. The application came up for hearing on 22nd November, 2016 with **Ms Wanjira** holding brief for Mr. Ndungu for the applicant. The respondent was absent but his son, **Hillary Mwaniki Wambugu** informed the court that his father was in Nairobi and could not make it to court.

5. This being an application for setting aside an order dismissing a suit, the provisions of **Order 12 Rule 7** of the **Civil Procedure Rules 2010** apply. The law provides as follows:-

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”

6. Setting aside orders is a discretionary matter for the court as was held in several cases, most notably in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** where the Court of Appeal held thus:

“The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC. This discretion 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116, 123 BC Harris J.”

7. In the instant motion, it is the applicant's contention that her former advocate did not communicate to her about the notice to show cause. A look at the notice to show cause dated 15th July, 2015 shows that the notice was addressed personally to the plaintiff.

8. In his objection, the defendant raises a very serious issue: that he has never been served with any pleadings by the plaintiff and in fact he has had to write to court on several occasions to find out about the case.

9. There is no affidavit of service in the court record to prove that the defendant was served or a copy of summons to enter appearance duly signed by the defendant that he received the same. There is also no proof of service showing that the defendant was served with the instant motion.

10. What is the effect of not serving the defendant with summons to enter appearance? **Onyancha J** in **Karandeep Singh Dhillon & Another v Nteppes Enterprise Limited & Another [2010] eKLR** observed as follows:

“.....failure to have summons issued and served is as bad, if not worse, as failure to extend the same. A plaint filed in court on its own, carries no power to summon a Defendant to Court. The plaint will lie there impotently. It will alone have no power to bring the parties before the court for its adjudication.”

11. In effect, there was no suit against the defendant because he had not yet been summoned to appear. This view is shared by **Mutungi J** in the case of **Grace Wairimu Mungi v Catherine Njambi Muya**, Nairobi Civil Suit No.584 of 2011 thus;

“The provisions of Order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view serve of summons on a defendant is a vital step in initiation of litigation against a Defendant and until a summons is properly served on a Defendant there is no valid invitation to the Defendant to defend the suit.”

13. I adopt the decision in the case of **Waweru Maina Mugiria vs Thuku** (Supra) and decline to exercise the court's discretion in favour of the plaintiff for the reasons that not only was the plaintiff served with the notice to show cause, but more importantly the plaintiff after instituting this suit failed to serve the defendant with summons to enter appearance and the instant motion. I also find that there has been inordinate delay by one plaintiff agent in bringing this application. While it is trite law that the mistakes of the advocate should not be visited upon the client, the Supreme court in the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR**, held that this does not excuse the plaintiff's delay in taking up the matter.

14. For the above reasons, I dismiss the plaintiff's application dated **17th November, 2015** with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nyeri this 19th day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Peter Muthoni h/b for Mr. Ekin for the plaintiff

Mr. George Wambugu Mucheru - plaintiff

Court assistant - Esther