



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 63 OF 2015**

***(Formerly Nyeri Hccc No. 158 Of 1999)***

**PETER GATHUNGU ..... 1ST PLAINTIFF/RESPONDENT**

**MARTIN MUCUTHI ..... 2ND PLAINTIFF/APPLICANT**

**-VERSUS-**

**MOFFAT MWIHURI ..... DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of the amended notice of motion dated **5th October, 2015** which seeks:

- i. To set aside the orders of 9th May, 2011 dismissing the plaintiffs' suit for want of prosecution;**
- ii. Review of the orders of 9th May, 2011 and reinstatement of the suit;**
- iii. Declaration that there was an out of court settlement hence no further action is required;**
- iv. Stay of execution of the order made on 9/5/2011;**
- v. Costs of the application be in cause.**

2. The application is premised on the grounds on the face of the application and the affidavit sworn in support thereof as follows:

- a. That the applicant will suffer loss if the defendant/respondent proceeds with execution in respect of the taxed costs of the suit;
- b. That the orders sought to be reviewed or set aside were made owing to a mistake on the part of the applicant's counsel;
- c. That the applicant should not be punished on account of a mistake of his advocate;
- d. That by the time the orders were issued, the plaintiffs' had instructed their advocate to mark the matter as settled.
- e. That instead of marking the matter as settled, their advocate applied to cease acting for them;
- f. That the application pursuant to which the orders sought to be set aside or reviewed were served on the plaintiffs' firm of advocates which had at the time filed an application to cease acting for the plaintiffs;
- g. That the respondent's advocate while aware that the matter had been settled out of court, maliciously concealed that fact to the court when prosecuting the application for dismissal of the suit.
- h. That there is an error apparent on the face of the record;
- i. That he was out of the country when the orders sought to be reviewed or set aside were issued;

- j. That he had sent Mr. Wilson Waweru Nderitu to settle the matter out of court on his behalf;
- k. That parties through an intermediary one, Wilson Waweru Nderitu, made an agreement to settle the matter out of court but the implementation logistics took time before they were finalized;
- l. That pursuant to the said out of court settlement, the consideration that had passed between the plaintiffs and the defendant plus costs incurred in a bid to get the suit property transferred to the plaintiffs to wit Kshs. 120,000/= was refunded to the plaintiff.
- m. That following the payment of the consideration that had changed hands plus the costs the plaintiffs had incurred as a result of the transaction, the suit was compromised in that the plaintiffs' surrendered to the respondent all the documents in their possession. Pointing out that the respondent sold the subject matter of the suit to Nderitu, the applicant contends that it was dishonest for the respondent to accuse the 2nd plaintiff of failure to prosecute the suit which they had amicably settled out of court.
- n. Explaining that they instructed the advocate who took over the suit from their advocate Mwirigi, who has since passed on, to file the settlement in court, the applicant accuses his advocate for having filed an application to cease acting for them instead of filing the settlement.
- o. It is contended that the defendant/respondent was aware of the application by Gichure to cease acting for the 1st plaintiff and that the firm of Gichure which was served with the application for dismissal of the suit, did not inform him about the suit.
- p. That the bill of costs was served on the firm of Gichure & Co. Advocates yet it was not acting for him;
- q. The applicant accuses the respondent of having failed to personally serve him with the application for dismissal of the suit and contends that the respondent had the intention of denying him an opportunity to be heard before the application was heard and determined;
- r. The applicant further contends that he had not instructed the 1st plaintiff to instruct an advocate for him. Consequently, when he came back to Kenya, he withdrew the services of the advocate his co-plaintiff had instructed to act for him and filed the instant application.
- s. The applicant accuses his co-plaintiff respondent of having hatched a scheme to have the suit dismissed with costs to him.
- t. In view of the foregoing, it is the applicant's case, that he should not be condemned to pay the costs of the application and the suit.

3. The application is opposed on the grounds that it is a sham, misconceived, vexatious, a none starter, an abuse of the court process and the applicant has not complied with the orders issued on 22nd September, 2015.

4. When the application came up for hearing, the applicant relied on the grounds on the face of the application and the supporting affidavit. He maintained that their advocate had ceased acting for them and that the respondent's advocate was aware of that fact.

5. Arguing that they should not be held responsible for the actions of their advocate, the applicant maintained that the impugned orders were issued when he was outside the country.

6. He further maintained that the respondent's counsel misled the court when the application for dismissal of the suit came up for hearing by failing to reveal to the court that the matter had been settled out of court.

7. On behalf of the respondent, advocate for the respondent, Ms Maina, submitted that the matter had come to an end. Arguing that **Sections 1A, 1B and 3A** of the Civil Procedure Act demands the speedy disposal of suits, she explained that the suit had not been set down for hearing and had stayed for five years without being prosecuted.

8. In a rejoinder, the applicant conceded that litigation must come to an end but maintained that the court issued the orders against them because it was misled.

#### **Analysis and determination**

9. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought. In determining this question, I begin by pointing out that the defendant/respondent has not denied or controverted or even attempted to controvert the allegations by the applicant concerning the circumstances surrounding the issuance of the order sought to be set aside. The averment to the effect that by the time the respondent moved the court for dismissal of the suit, the suit had been compromised and the contention that the applicant was not served with the application for dismissal of the suit, all of which have not been controverted brings into question, the circumstances under which the order was issued. An issue also arises as to whether the respondent who had agreed to have the suit against him settled out of court and refunded the consideration which had passed between him and the plaintiffs, could sustain an order of costs in the circumstances.

10. Notwithstanding the fact that the application for dismissal of the suit was undefended, the defendant/respondent and his advocate were under a legal obligation to assist the court to arrive at a just determination of the issue before it. In this regard see **Section 1A (3)** of the Civil Procedure Act, which provides as follows:

**“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...”**

11. The overriding objective of the Act (Civil Procedure Act) and the Rules made there under, is stated under **Section 1 A (1)** of the Act to be facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

12. In the circumstances of this case, I entertain serious doubt whether the court would have issued the order for costs against the plaintiffs without affording them an opportunity to be heard on the issue. From the uncontroverted averments of the applicant, the respondent’s counsel knew that the matter had been settled out of court but failed to inform the court of that fact. He also failed to personally serve the plaintiffs yet he knew that their advocates had ceased acting for them.

13. From the uncontroverted averments of the applicant, I find that the applicant has made a case for setting aside the order for costs and a declaration that the suit was settled out of court hence no orders for costs ought to have issued. Consequently, I set aside the order for dismissal of the suit and substitute it with an order marking the suit as settled.

14. Parties shall bear their costs of the suit and the instant application.

15. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 12th day of June, 2017.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Ms Maina h/b Mr. Gori for the defendant

Pater Gathungu – 1st plaintiff

Martin Mucuthi – 2nd plaintiff

Court assistant - Esther