



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.92 OF 2009

BETH WAMBUI WAMBUGU.....PLAINTIFF/APPLICANT

-VERSUS-

PAUL MUREITHI NYAGA.....1ST DEFENDANT/RESPONDENT

EMBAKASI RANCHING CO. LTD.....2nd DEFENDANT/RESPONDENT

FRANCIS NJAU MUTHEA.....3rd DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated **4th September 2015**, brought under Order 17 Rule 2(1) and 2(2) of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A of Civil Procedure Act.

The Plaintiff/Applicant has sought for the following orders:-

i. Spent.

ii. That the Court set aside the order dated 11th March 2015, dismissing the suit herein and the same be reinstated for hearing on merit.

iii. Any other orders that commends itself to the court in the circumstances.

iv. Costs of this application.

The application is based on the grounds stated on the face of the application and on the *Supporting Affidavit* of **Beth Wambui Wambugu**, the Plaintiff/Applicant herein dated **4th September 2015**. The grounds in support are:-

a) Neither the Plaintiff nor her advocates were aware that this suit was set for hearing/mention on 11th March 2015.

b) Neither the Plaintiff nor her advocates were served with a notice informing them that the suit

was coming up for dismissal.

c) The Plaintiff had reasonable cause to demonstrate why the suit should not be dismissed for want of prosecution.

d) The Plaintiff will suffer irreparable loss and will be occasioned great injustice if this application is not granted.

The Plaintiff/Applicant's case is that the suit was filed in the year **2009**, with **Lumumba, Mumma and Kaluma Advocates** as the Law Firm on record for the Plaintiff/Applicant. That the Judge listening to the matter was elevated to the Court of Appeal and thereafter, the Court file could not be traced for the whole of the year **2013**. She stated that the Law Firm that was representing her in the matter disbanded and she appointed the Law Firm of **K'Bahati & Company Advocates** as her new Counsels. The new counsel wrote a letter of invitation to the other parties in the suit requesting that a date be fixed on the **29th January 2015**. She stated that taking a date at the registry was not possible as the court file was still missing. She averred that her advocates wrote to the Deputy Registrar expressing their frustrations. The Plaintiff/Applicant claimed that she then fell ill around **February 2015**, and returned to her home in Kirinyaga. She claimed that when she got better and returned around **September 2015**, she found that the 1st Defendant had entered into the suit premises. She informed her advocates who rushed to the registry but were informed that the case had been dismissed. She claims that they did not receive any feedback from their inquiries on the whereabouts of the Court file and that no **Notice** for dismissal had been sent to the Plaintiff/Applicant or her advocates. She averred that on perusal of the court file, it was indicated that service on the new advocates, **K'Bahati & Co. Advocates** failed since they had changed their office location. She confirmed this was true but that a notice was stuck at the door of the previous location and that the new location was also indicated in the letter dated **29th January 2015**, and therefore proper service was not effected. She claimed that the suit property is her only livelihood and that irreparable damage will be caused if the suit remains dismissed. She urged the court to allow her claim.

The application is opposed by the 1st Defendant/Respondent only. The 2nd and 3rd Defendants/Respondents even after being served with the hearing notice as is evident from the Affidavit of Service sworn on the **4th March 2016**, by **Joan Oburu, Court process Server**, did not enter appearance nor file a Replying Affidavit to the **Notice of Motion**. The application is therefore not opposed by the 2nd and 3rd Defendants/Respondents.

The 1st Defendant/Respondent, **Paul Mureithi Nyaga**, filed a **Replying Affidavit** on the **22nd March 2016**. He claimed that the Plaintiff/Applicant had slept on her rights for **5 years** and had not taken any action in the suit. He further claimed that the Plaintiff/Applicant had the intention of keeping the matter in court as long as possible to prevent the 1st Defendant/Respondent's development on the suit property. He added that this was detrimental to him and was causing him irreparable loss. He pointed out that if the Plaintiff's/Applicant's advocates were serious about the suit, they would have properly notified the court of their change of location. He disputed the claim that the suit property was a source of livelihood for the Plaintiff/Applicant as she had no property developed and no farming taking place thereon. He argued that by reinstating the suit, that would amount to an abuse of the court process and would cause the 1st Defendant irreparable damage.

The application was **canvassed** by way of **Written Submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

There is no doubt that the Plaintiff/Applicant filed this suit in the year **2009**. From the Court record, it is evident that the last action on the matter before the suit was dismissed was on **1st August 2011**. It is also evident that Notice under Order 17 Rule 2(1) of the Civil Procedure Rules was issued on **26th February 2015**. From the Notice, it is indicated that **K'Bahati Advocate** had moved and the security officer was not aware where they were located.

From the Court record, ***K'Bahati Advocate*** is the advocate for the Plaintiff/Applicant and the Notice shows that the address indicated was:- ***ACK Garden House, 3rd Floor, Wing B, First Ngong Avenue, Nairobi.*** Further, the said Notice does not indicate whether the other advocates for the Defendants were served with the Notice or not.

From the Court record, it is clear that on ***11th March 2015***, none of the advocates nor the parties were present. However, the suit was dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules for want of prosecution. Thereafter, the Plaintiff/Applicant filed this ***Notice of Motion on 4th September 2015***. The said application has been opposed by the 1st Defendant/Respondent.

Order 17 rule 2(1) provides that:-

“In any suit in which no application has been made or step taken by either party for one year, the court may give Notice in writing to the parties to show cause why the suit should not be dismissed and if the cause is not shown to its satisfaction, may dismiss the suit”.

As the Court stated earlier, the last action on the file was on ***1st August 2011***. It is for that reason that the Court issued the Notice to Show Cause under Order 17 Rule 2(1).

However, the Plaintiff/Applicant has alleged that there was no action on the file due to no fault of her own. That the file had gone missing. She attached various correspondences to support her allegation. She also alleged that her advocate nor herself, did not attend Court on ***11th March 2015***, because they were never served with the Notice to Show Cause. Indeed the Notice to Show Cause shows that the Plaintiff's/Applicant's advocate was never served with the Notice because he had allegedly moved office. From the Notice to Show Cause, the address of ***K'Bahati advocate*** for the Plaintiff/Applicant is indicated as ***ACK Garden, 3rd Floor, Wing B, Ngong Avenue.*** However, from the letter dated ***15th January 2015***, from the ***Law firm of K'Bahati & Co Advocates***, it was indicated that their physical address is ***'Rose Avenue Apartments, 2nd Floor, Block A, Rose Avenue Off Arwing Kodhek Road.***

It is therefore indeed correct that the Plaintiff's/Applicant's advocate was never served with the Notice to Show Cause and could not attend Court on ***11th March 2015***, when the matter came up for hearing. The Defendants/Respondents were also absent and it is not clear whether they had been served with Notice to Show Cause or not. Thereafter, the order herein was entered in absence of the parties.

Order 12 Rule 7 of the Civil Procedure Rules grants the Court discretion to set aside Judgement or dismissal order. It states as follows:-

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

Further, in the case of ***Shah V. Mbogo (1967)EA 116***, the Court of Appeal held that:-

“Applying the principles that the Courts discretion to set aside an ex parte Judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice”.

The Plaintiff/Applicant in her affidavit has explained the cause of the delay in fixing the matter for hearing. The said explanation could not be made on ***11th March 2015***, because her advocate was never served with the Notice to Show Cause as provided by Order 17 Rule 2(1) of the Civil Procedure Rules. As was held by the Court in the case of ***Ibrahim Athman Said ..Vs...Ibrahim Abdalla Abdullah (2014) eKLR***, before the Court could proceed to make an order under the provisions of Order 17 Rule 2(1), it needed to make an inquiry to its satisfaction that indeed the Notice issued was served on the parties. In this case herein, the Notice issued was never served on the parties.

Further in the case of **Associated Warehouse Co. Ltd & Others...Vs... Trust Bank Ltd HCCC No.1266 of 1999**, the Court held that:-

“Rule 2(1)1 of Order 16 (Repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown dismissal is not mandatory as the rule is permissive. In this case, the Plaintiffs were not given a chance to show cause why their suit should not be dismissed...”

Equally in this matter, the Plaintiff/Applicant ought to have been given a chance to explain why the suit should not be dismissed. Therefore, since it is evident that the Plaintiff’s/Applicant’s advocate and the Plaintiff/Applicant herself were never served with Notice to Show Cause, it is my view that the order of dismissal of the suit made on **11th March 2015**, cannot stand as the Plaintiff/Applicant did not appear to demonstrate why the suit should not be dismissed. The Plaintiff/applicant was not afforded that opportunity and this is a clear case where the Court has to use its discretion under Order 12 Rule 7 to set aside the dismissal order.

For the above reasons, the Court finds that the Plaintiff’s/Applicant’s **Notice of Motion** dated **4th September 2015**, is **merited**. The said application is **allowed entirely in terms of prayer No.2 with costs being in the cause**.

However, the Court has noted that this is an old matter filed in Court in the **year 2009**. The Plaintiff/Applicant is directed to set the matter down for hearing within the next **30days** from the date of this Ruling. For that reason, the parties should take a date for Pre-trial Conference forthwith before the Deputy Registrar of Environment and Land Court and thereafter fix the matter for hearing as directed above.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31st** day of **August 2017**.

L. GACHERU

JUDGE

31/8/2017

In the presence of

Mr. Kimathi holding brief for Mr. K’Bahati for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017