



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 7 OF 2008

NAOMI MICHELE LEVY.....PLAINTIFF/APPLICANT

=VERSUS=

GIUSEPPE BOLZONI.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before me are two Applications. The Plaintiff's Application is the one dated 9th July 2013 while the Defendant's Application is dated 19th November 2013. The Plaintiff's Application is seeking for the following orders:

(a) That order and /or judgment made and/or given in this matter on 2nd July 2013 dismissing the Plaintiff's claim and suit against the Defendant for non-attendance be set aside and the Plaintiff's suit be reinstated for hearing.

(b) The proceedings conducted and the evidence taken in this matter on 2nd July 2013 in the absence of the Plaintiff and her advocates be set aside and the Plaintiff's suit and the Defendant's counterclaim be heard de novo and afresh in the presence of both parties and their respective advocates.

(c) The costs of this application be provided for.

2. On the other hand, the Defendant's Application is seeking for the dismissal of the Plaintiff's Application for want of prosecution.

The Plaintiff's/Applicant's case:

3. The Plaintiff's Application is based on the grounds that when the suit came up for hearing on 2nd July 2013, the Plaintiff's advocate was absent because he had erroneously diarised the date for hearing as 3rd July 2013.

4. According to the Affidavit of the Plaintiff's Advocate, the erroneous impression that the suit was fixed for hearing on 3rd July 2013 was fortified by correspondence exchanged between them and the Defendant's Advocates wherein the Defendant's Advocates had stated on one occasion that the

- suit was fixed for hearing on 3rd July 2013.
5. It is the Plaintiff's advocate deposition that labouring under the false impression that the suit was fixed for hearing on 3rd July 2013, he instructed one of the advocates to travel from Nairobi to Malindi to attend court on 3rd July 2013 and to make an Application for an adjournment just to find that the suit had proceeded for hearing the previous day.
 6. The Plaintiff's Advocate finally deponed that the non-attendance of court on 2nd July 2013 was completely inadvertent and it was as a result of an honest and excusable error on their part; that the Plaintiff has been severely and seriously prejudiced by having her claim and suit against the Defendant dismissed without being heard and thus condemning the Plaintiff unheard.
 7. In response to the Defendant's Application to have the Plaintiff's Application dismissed for want of prosecution, the Plaintiff's Advocate has deponed that the parties have exchanged numerous e-mails and phone calls while negotiating the issue of costs as advised by the court.

The Defendant's case

8. According to the Defendant's deposition, the Plaintiff's Application is motivated by an intention to delay or otherwise obstruct due and expeditious disposal and determination of the suit.
9. The Defendant gave a chronology of events which shows the Plaintiff's concerted efforts to delay the suit and more specifically the fact that the Plaintiff has always changed her advocates as soon as she realises that the matter is likely to proceed for hearing.
10. It is the Defendant's deposition that the date of 2nd July 2013 was taken by consent of the advocates and that in any event, the Plaintiff's advocate has indicated that he would not have proceeded with the hearing of the main suit on 2nd July 2013.
11. The Defendant finally stated that the non-attendance by the Plaintiff or her advocate when the matter came up for hearing is a calculated move aimed at diverting the course of justice and should not be excused by the court.
12. The Defendant has asked this court, vide her Application dated 19th November 2013 to dismiss the Plaintiff's Application dated 9th July 2013 because the Plaintiff has not been keen in prosecuting it.
13. Counsel for the Plaintiff and the Defendant appeared before me on 11th February 2014 and made oral submissions which I have considered. I have also considered the authorities on record.

Analysis and Findings:

14. This matter has been pending since it was filed six years ago. The matter has come up for the hearing of Applications and the main suit on numerous occasions.
15. On 30th April 2013, the main suit was fixed for hearing on 2nd July 2013 by the firm of Githera and Associates for the Plaintiff and Mr. Sitonik for the Defendant. On 16th May 2013, the then Plaintiff's Advocate filed an Application under a certificate of urgency seeking for leave of the court to allow Wyco Valuers Limited to access the suit property for the purpose of conducting a valuation. This court certified the Application as urgent and slated it for hearing on 5th June 2013.
16. It would appear that the Application was never listed for hearing on 5th June 2013 until 2nd July 2013 when the main suit came up for hearing. On that day, neither the Plaintiff nor her advocate were in court and after submissions by the Defendant's counsel, I dismissed the Plaintiff's suit for non-attendance and proceeded to take the defendant's evidence on her counterclaim. I then slated this matter for Judgment on 20th August 2013 whereafter the current Applications were filed.
17. It would appear that the Plaintiff, for the seventh time, changed her advocates after this matter was fixed for hearing.
18. According to the Plaintiff's current advocate, their attempts to trace the court file with a view of perusing it after coming on record were not successful because the file could not be traced. They have annexed a letter dated 18th June 2013 addressed to the Deputy Registrar of this court expressing their frustrations on the unavailability of the file. The letter was received by the Registry on the same day. Due to the unavailability of the court file, the Plaintiff's current advocate were unable to ascertain the position of the matter.

19. It is not clear from the Affidavit the person who advised the Plaintiff and her advocates about the hearing date of 3rd July 2013 instead of 2nd July 2013.
20. In an e-mail to the Defendant's advocates dated 21st June 2013, the Defendant's advocate, while responding to the Plaintiff's advocate for adjournment of the matter, stated that they were not agreeable to the adjournment of the case, the Defendant's advocate concluded their letter by stating as follows:

***“We are preparing for the hearing on 3rd July 2013.*”**

21. On 1st July 2013 at 4:17 pm, the Defendant's advocate clarified in an e-mail that was sent to the Plaintiff's advocate as follows:

***“Our client will be insisting on proceeding on 2nd July 2013.*”**

22. The Plaintiff's Advocate has deponed that by the time they received the e-mail of 1st July 2013, and considering that they are based in Nairobi, they were not in a position to ascertain the actual date of hearing from the court file.
23. Mr. Sundeep Scarvia, the Plaintiff's Advocate, has deponed that he travelled from Nairobi to Malindi by air on 2nd July 2013 for the purpose of attending court on 3rd July 2013. He was however shocked to discover that the matter had proceeded ex-parte on 2nd July 2013. The advocate annexed on the affidavit the air ticket showing that he indeed travelled from Nairobi to Malindi on 2nd July 2013 at 13:25.
24. Looking at the circumstances of this case, I am satisfied that the non-attendance by the Plaintiff's advocates on 2nd July 2013 was not a deliberate move to delay this matter but was as a result of an honest and excusable error on their part. The mistake of diarising the date as 3rd July 2013 was compounded by the unavailability of the court file and the Defendant's advocate e-mail of 21st June 2013 in which they indicated to the Plaintiff's advocates that the matter shall proceed for hearing on 3rd July 2013. It does not matter that the Plaintiff's advocates intended to make an Application to adjourn the matter on 2nd July 2013. What matters is that the Plaintiff was entitled to representation on 2nd July 2013 were it not for the inadvertent mistake of her counsel.
25. The Defendant travelled from Italy to Malindi to testify in this matter. In the circumstances and considering that she incurred expenses when the matter came up for hearing on 2nd July 2013, I shall set aside the ex-parte proceedings and orders of 2nd July 2014 on condition that the Plaintiff pays to the Defendant the expenses that she incurred. The payable charges shall be the return air ticket for the attendance of court on 2nd July 2013 and accommodation charges for three nights. The said expenses shall be paid by the Plaintiff within fifteen (15) days from the date the Defendant's advocate supplies to the Plaintiff's Advocates evidence of the incurred charges. Any other costs or charges in respect to the hearing of 2nd July 2014 shall be in the cause.
26. The Plaintiff's Application dated 9th July 2013 is therefore allowed as stipulated in the preceding paragraph with no orders as to costs.
27. In view of my orders above, the Defendants Application dated 9th November 2013 is hereby rejected with no orders as to costs.

Dated and Delivered in Malindi this 6th Day of **March 2014**

O. A. Angote

Judge

