



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI

ELC CASE NO. 149 OF 2007

ESTHER NYAMBURA NGOTHO.....PLAINTIFF

VERSUS

HARBANS SINGH BIRDI.....1ST DEFENDANT

MANMOHAN KAUR BIRDI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....THIRD PARTY

RULING

The Application

The Plaintiff filed an application by way of a Notice of Motion dated 19th December 2013 seeking the setting aside of the orders made on 25th November 2011 dismissing the suit herein for want of prosecution. The grounds for the application are that the Plaintiff or his then Advocate were not served with the Notice to Show cause, and only learnt of the dismissal recently after being served with **Constitutional Petition 461 of 2013** by the Defendants touching on the subject matter herein. Further, that the Plaintiff has been pursuing the matter in dispute through the lands offices and the police, and has now recently obtained documents which will assist this Court greatly in making a finding thereof.

These grounds were explained in the supporting affidavit and further affidavit sworn by the Plaintiff on 19th December 2013 and 17th May 2014 respectively. The Plaintiff stated that she is the widow and executrix of the will of Evanson Ngotho Rubia, who was the registered proprietor of the suit property being Nairobi/Block 94/150, and that a grant of probate was issued to her on the 12th of March 2001. Further, that she instructed her Advocates to file this suit after she noticed that the Defendants were encroaching on the suit property. The Plaintiff gave a detailed account of the complaints she made in this respect and ensuing proceedings at the Criminal Investigations Department, the Chief Land Registrar and the Kenya Human Rights Commission.

The Plaintiff explained that after the relevant documents were supplied to Criminal Investigations Department and subjected to forensic document examination, the titles purportedly held by the Defendants and their alleged seller were found to be a forgery as the signatures on the titles were not those of a Land Registrar. She annexed a copy of the report prepared by the Forensic Examiner. However, that in the meantime she received the pleadings in **Constitutional Petition 461 of 2013** from the Defendants wherein it was averred *inter alia* that the suit herein was dismissed for want of prosecution.

Further, that after perusal of the court file her Advocate advised her that the notice to show cause had not been served on him, and that it was indicated thereon that his office could not be found. The Plaintiff averred that she should be given a chance to show cause why this suit should not be dismissed and/or in the alternative, should be given a chance to prosecute her suit to conclusion. She also averred that the doctrine of *res judicata* does not apply in the present matter as the suit has never been tried, heard or determined. Further, that she was not lethargic in prosecuting this matter as she was gathering evidence and documentary proof to make her case more viable.

The Response

The Defendants' response is contained in a replying affidavit sworn on 14th March 2014 by the 1st Defendant. The substance of the 1st Defendant's reply was that the court applied correct and lawful positions to dismiss the said suit for want of prosecution, and therefore the Plaintiff's application was *res judicata*.

The Defendants aver that the Plaintiff instituted this suit in the year 2007 but took no further actions to prosecute this matter effectively. Further, that in the year 2011, the Deputy Registrar issued notice under Order 17 Rule 2(1) & 2(1) and 4 of the Civil Procedure Rules to show cause why this case should not be dismissed for want of prosecution, which Notice was served on all parties including the Plaintiff. The Defendants state that the matter was heard on the 25th November 2011 in the presence of the counsels for the 1st and 2nd Defendants and the 3rd Party, and an order was issued dismissing this case for want of prosecution and costs awarded to the Respondents herein. The Defendants annexed and a copy of the Notice to Show cause and of the said order.

It is the Defendants' averment that it is now seven years since this suit was instituted and two years since the suit was dismissed for want of prosecution, and that the delay in appealing or reviewing the dismissal order has further inordinately delayed rendering the Plaintiff's application nugatory.

The Third Party also voice similar sentiments in its Grounds of Opposition dated 14th April 2014, wherein it was stated that the Plaintiff's application offends the well-established law the doctrine of latches, and that this the matter is now *res judicata* having been dismissed by this court on 25th November 2011

The Submissions

Parties were directed by the court to file and serve submissions on the Plaintiff's Notices of Motion. The Plaintiffs' counsel in submissions dated 9th June 2014 reiterated the facts of their case and submitted that it is trite law that a party should not be condemned unheard, and that the suit was dismissed prematurely before according the Plaintiff a chance to be heard as she was not served with the notice to show cause. The counsel cited various decisions in support of his position that in such circumstances the dismissal of a suit ought to be set aside.

The Plaintiff's counsel further submitted that the delay in prosecuting the suit was caused by the relevant Government agencies from whom the Plaintiff was seeking important evidence from. Lastly, that the Plaintiff should not suffer from the mistakes made by her counsel, and that the Defendants will suffer no prejudice if the suit is reinstated.

The Defendants' counsel filed submissions dated 13th June 2014, and relied on Order 17 Rule 2 of the Civil Procedure Rules to argue that the suit was overdue for dismissal, as it had remained unprosecuted for four years. Further, that under sections 4 and 109 of the Evidence Act it was up to the Plaintiff to prove that the Notice to Show cause was never served upon him as alleged. Lastly, that the Plaintiff filed the suit without sufficient evidence hence the reason she was looking for more evidence, and that she can still ventilate her rights in the constitutional petition filed by the Defendants.

The Third Party's counsel filed submissions dated 4th July 2014 wherein she argued that the Plaintiff's

application is barred by laches, as the Plaintiff had failed to prosecute her case for over four years, and since two years had lapsed since the dismissal of the suit without her bringing any action. The counsel cited the cases of **Governors Ballion Safaris Ltd vs Skyship Company Limited & County Council of Transmara (2013) e KLR**, **Duale Maryan Gurre vs Ainal Mohammed & Board of Trustees NSSE, (2014) e KLR** and **Anthony Kabiru Kario & 2 Others vs Ragati Tea Factory & 10 Others, HCCC No 876 of 2001** in this respect, and for the position that the excuse given that the Plaintiff's advocate was to blame for not having prosecuted the case was no defence.

The Issues and Determination

After consideration of the pleadings filed and the submissions made, I find that the main issue for determination is whether reasonable grounds have been shown for this Court to set aside the orders dismissing the suit herein for want of prosecution. The Plaintiff argues that the delay in prosecuting the suit was excusable and has put forward the reason that there was ongoing investigation and collection of evidence, which led to the prosecution of the suit herein being overlooked. Further, that she was also not served with the Notice to Show cause why the suit should be dismissed. The Defendants and Third Party on the other hand argue that the delay is inexcusable and the Plaintiff's application is *res judicata*.

I will first consider the argument put forward that the Plaintiff's application is *res judicata*. Section 7 of the Civil Procedure Act provides as follows with regard to the doctrine of *res judicata*:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The said doctrine is clearly not applicable to the facts of the Plaintiff's application, as no evidence was brought of a previous application to set aside the orders of dismissal of the suit herein having been heard and determined by any court. In addition, the issues in the suit herein have not been heard and determined on merit.

On the main issue as to whether the Plaintiff has shown any grounds to set aside the order dismissing the suit herein, this Court is minded of the applicable law on the dismissal of a suit for want of prosecution as set out in Order 17 Rule 2 of the Civil Procedure Rules, which provides as follows:

“2. (1) 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 cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

It is not disputed that the threshold of one year's delay in prosecuting the suit herein was met, and that it was amenable to dismissal. For the order of dismissal to be set aside, the Plaintiff has to demonstrate that the grounds set out Order 45 Rule 1 (b) of the Civil Procedure Rules apply in her application. These grounds which are as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,

- ii. mistake or error apparent on the face of the record,
- iii. any other sufficient reason,
- iv. the application must be made without unreasonable delay.

I note from the court record that indeed the Notice to Show Cause was not served on the Plaintiff and/or her Advocate. It is indicated on the said Notice issued on 16th November 2011 that Kabaki & Company Advocates, who were the then Advocates for the Plaintiff, could not be served because the physical address that was given was not proper. This Court notes that the said address of the Advocates is the one that appeared on the court record, and no affidavit of service was filed by the process server to give evidence of how he came to the conclusion that this was not the proper address.

In addition the Plaintiff has brought evidence of the efforts she has been making to unearth more information on the dispute herein, including copies of the complaints she has made to various authorities and reports arising therefrom, which is in my opinion a reasonable excuse for the delay in prosecuting the case herein. I particularly note the observations in this respect in the report by the District Land Registrar dated 16th October 2009 which was attached to the Plaintiff's supporting affidavit as Annexure "ENN3", in which it is recorded that there are entries that do not appear genuine on the register of the suit property. It is noteworthy that the Defendants' Advocate did participate in the said investigations by the District Land Registrar. I also have taken notice of the Annexure "ENN 8" to the Plaintiff's supporting affidavit which is a report by a forensic document examiner from the Kenya Police, and raises the possibility of forgery as regards one of the two existing titles to the suit property.

There is now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of the Constitution and not to pay undue regard to procedural technicalities, and in light of the above reasons I find that there is sufficient ground to set aside the orders of dismissal of this suit given on made on 25th November 2011. In determining the issue whether the suit herein should be reinstated, I am also guided by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay in prosecuting a suit, the court must also be satisfied that justice will still be done to the parties despite the delay.

The Defendants and Third Party have not demonstrated any prejudice they will suffer in having the suit herein reinstated, and on the contrary it is in the interests of justice that the issue of which of the two titles in existence with respect to the suit property is the valid title be determined. In addition, the Defendants have filed a petition seeking a determination of their rights in this respect, and it is prudent that all issues arising from the dispute between the parties herein be determined on merit and with finality.

The Plaintiff's Notice of Motion dated 19th December 2013 is therefore accordingly allowed and the orders dismissing the suit herein for want of prosecution made on 25th November 2011 are hereby set aside. The suit herein is accordingly reinstated and shall proceed to full hearing. Lastly, since it is conceded that there was a delay in prosecuting the suit herein, the Plaintiff shall bear the costs of the Notice of Motion dated 19th December 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____7th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE