



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
HCCC NO. 47 OF 2011
(Formally Mombasa HCCC No.110 of 2011)

FADHILI ABDALLA.....PLAINTIFF/APPLICANT

=VERSUS=

BASHELALAI SHEKALE SHELALI.....1ST DEFENDANT/RESPONDENT

CINQUE AMIC LIMITED.....2ND DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 6th May 2013 seeking for the following orders:
 - a. **That the order dismissing the suit on 7th February be and is hereby set aside and the suit herein be reinstated and be heard expeditiously.**
 - b. **That the costs be in the cause.**
2. The Application is premised on the grounds that the Plaintiff's Advocate and the Plaintiff was not informed of the hearing date by his clerk; that the Plaintiff is zealous in having his day in court because the matter canvassed in the suit are weighty land issues which need to be canvassed at the full hearing and that the mistake of counsel should not be visited on the Plaintiff.
3. The Application is opposed by the 2nd Defendant.

Plaintiff's/Applicant's case:

4. The Plaintiff filed his Supporting Affidavit alongside the Application in which he deponed that his

- advocate was not informed of the matter when it came up for hearing; that the advocate was all along not informed that the matter had been fixed for hearing or mention by his former clerk and that he is serious in pursuing his quest for justice.
5. The Plaintiff further deponed that the non-appearance by his advocate in court was by reason of lack of communication by the said former clerk, one Morris Ngonyo and as a result, he was not informed of the hearing date.
 6. The Plaintiff finally deponed that the matter was not ready for hearing because the Application dated 28th April 2011 was still pending and it ought to have been heard and determined before the main suit could be set down; that the parties had not listed the matter for pre-trial directions and that the hearing notice allegedly served on the former clerk was erroneously served on him as he was not in employment in the Plaintiff's firm and that the said clerk did not have instructions to accept any document on behalf of the firm.

The 2nd Defendant's/Respondent's case

7. The 2nd Defendant's director filed her Replying Affidavit on 20th August 2013 and deponed that since the 11th November 2011 to the 8th December 2011 when the Plaintiff's advocate informed the court of possible negotiations to settle the matter out of court, she never heard from the Plaintiff; that on 8th December 2011, she attended court for mention but the other parties were absent and the court directed her to take a hearing date in the registry.
8. On 14th December 2011, the 2nd Defendant invited the Plaintiff's advocate for fixing of a hearing date which invitation they never responded to; that the Plaintiff fixed the matter for hearing on 5th June 2012 on which date they did not turn up and the court slated the matter for mention on 25th June 2012 for the purpose of fixing the same for hearing.
9. The 2nd Defendant served on all the parties with mention notices and hearing notices for the subsequent dates which they never honoured.
10. The 2nd Defendant's director finally deponed that that at all material times to the suit, she has been ready to proceed with the matter; that the Plaintiff has no interest in the suit and that the Plaintiff has been grossly abusing the process of this court.
11. The parties appeared before me on 5th November 2013 and made oral submissions which I have considered. I have also considered the authorities filed by the parties.

Analysis and findings

12. The Plaintiff filed this suit on 28th April 2011 seeking for a declaration that he is the lawful owner of plot number 988/Watamu Township. The Plaintiff filed his list of witness statements, list of documents, and a chamber summons seeking for injunctive orders on the same day.
13. The Application for injunction was certified as urgent and interim orders of injunction were issued on 28th April 2011.
14. The Application was mentioned on several days and on 11th November 2011, the parties informed the court that they were negotiating the matter. All along, the 2nd Defendant represented itself through its director. The matter was fixed for mention on 8th December 2011. There are no minutes in the court file to indicate what transpired on 8th December, 2011.
15. The matter was not fixed for hearing until 5th June 2012. However on said date, the Plaintiff was not in court. According to the report of the Executive Officer of 5th June 2012, it is not clear how the date of 5th June 2012 was fixed because there were no minutes in the file. The Judge, in the presence of the 2nd Defendant's director fixed the matter for mention on 25th June 2012 with a view of taking a hearing date.
16. The Plaintiff or his counsel did not attend court on 25th June 2012 although, according to the Affidavit of service of the 2nd Defendant's director sworn on 21st June 2012, the Plaintiff and the other Defendants were served with the Mention Notice. The Mention Notice was served upon the Plaintiff's firm by way of G4S courier whose receipt was annexed on the affidavit of service.

17. The Plaintiff's advocate has not denied that the address indicated on the receipt issued by G4S Courier Services does not belong to the firm. Indeed, the said address does not belong to the clerk whom the advocate says was sacked in July 2012.
18. When the matter came up for mention on 25th June 2012, the Plaintiff or his advocate was not in court. On the said date, Meoli J directed that the 2nd Defendant do invite the other parties to fix the matter for hearing and if they fail to attend, the matter to be fixed for hearing in the month of October 2012.
19. On 27th June 2012, the 2nd Defendant's Director invited the Plaintiff's advocate together with the 1st Defendant to fix the suit for hearing as directed by the court. The letter was received by a Mr. Morris Ngonyo for Mutisya Bosire & Co. Advocates. The stamp of the firm is embossed on the said letter. The said letter was served by one Samson Nyangena on the Plaintiff's Advocate clerk in his office and an affidavit of service was duly filed.
20. It will appear that no date was fixed on 11th July 2012. However, the minutes show that on 18th September 2012, the 2nd Defendant fixed the matter for hearing for 6th December 2012 and served the Plaintiff's advocates with a hearing notice. According to the Affidavit of Service by the process server, the hearing notice was served on Ms Purity, the Plaintiff's Advocate secretary on 20th November 2012. The said secretary stamped the hearing notice and wrote her name on the face of the hearing notice and signed it.
21. The Plaintiff's advocate or the Plaintiff was not in court on 6th December 2012. The matter did not proceed on the said date because there was no affidavit of service in respect to the 3rd defendant. However, the Plaintiff's advocate had been properly served with the hearing notice of the said date. On the same day, the 2nd Defendant's director fixed the matter for hearing in the registry. She, through the court process server, again served a hearing notice for 7th February 2013 on the Plaintiff's advocate on 7th December 2012.
22. The Plaintiff or his advocate did not appear in court on 7th February, 2013. The 2nd Defendant's director informed the court on that day that she had filed all the requisite documents and she was ready to proceed with the hearing. In the absence of the Plaintiff or his advocate, she submitted, the suit should be dismissed for non-attendance and want of prosecution.
23. I went through the entire file and noted the occasions the Plaintiff and his advocate had failed to appear in court even after being served with hearing notices and dismissed the matter for want of prosecution.
24. I have considered the reasons given by the Plaintiff's advocate not to attend court on all those occasions and I am satisfied that they are not plausible. The advocate claims that the clerk who used to receive the hearing notices in his office did not bring the matter to his notice and that he has since sacked him. However, as I have shown above, some of the hearing notices were served on his secretary, one Purity, and yet counsel still did not appear in court. Even if it is true that the matter was never brought to his notice, the Plaintiff or his advocate have not offered any explanation as to why they never bothered to either fix the matter for hearing or to find out the position of the file since 11th November 2011 when they were last in court.
25. The Plaintiff and his advocate was aware of the existence of the matter and the Application which was pending but did not take any step to prosecute either the Application or the suit. The Plaintiff and his advocate, despite being served with the hearing notices more than once by the 2nd Defendant did not take any step in the suit.
26. In view of the fact that the Plaintiff's advocate did not call for cross examination any of the process-servers who served the hearing notices on his office, and being satisfied that the various mentions and hearing notices were served upon the Plaintiff's advocates office, I find that the Plaintiff or his advocate or both of them had lost interest in this suit.
27. It is not enough for the Plaintiff to claim that the suit was not ready for hearing. That is what he should have told the court on the numerous occasions that the 2nd Defendant's director served his advocate with the hearing notices. A party cannot file a claim and sit back because he has not complied with the provisions of the Civil Procedure Rules, 2010.
28. If a party does not comply with the requirements of order 11 of the Civil Procedure Rules, 2010, which provides that after the close of the pleadings parties shall within ten days complete, file and serve the pre-trial questionnaires, the Defendant may fix the suit for hearing and apply for the

dismissal of the suit in the absence of the claimant. The Defendant cannot be accused of taking proactive steps to have the suit prosecuted expeditiously just because the Plaintiff is reluctant to do.

29. In the circumstances, and for the reasons I have given above, I decline to set aside my orders dismissing the suit for want of prosecution. Consequently, I dismiss the Plaintiff's Application dated 6th May 2013 with costs.

Dated and Delivered in Malindi this **19th** Day of **December**, 2013

O. A. Angote

Judge