



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 373 OF 2017

(Formerly Machakos ELC No. 254 of 2010)

DR. PETER MUREITHI NYAMU.....PLAINTIFF

VERSUS

COUNCILLOR EZEKIEL BENE.....1ST DEFENDANT

COUNTY COUNCIL OF OLKEJUADO.....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Application dated the 25th March, 2019 brought pursuant to sections 1, 1A, 3, 3A of the Civil Procedure Act, Order 50 of the Civil Procedure Rules. The 1st Defendant seeks to set aside orders issued on 9th October, 2018 and reinstate the suit in his favour. He further seeks leave to file and serve Defence and Counterclaim out of time and for injunctive orders to be issued to restrain the Plaintiff from developing, leasing, charging or subdividing land reference number Residential plot No. 51 Ngong (Now Ngong Township/ Block 2/ 659) and a restriction to be registered against the said title by the 2nd Defendant.

The application is premised on the grounds that the 1st Defendant is owner of Residential plot No. 51 Ngong (Now Ngong Township/ Block 2/ 659). He became aware the suit was dismissed for want of prosecution on 9th October, 2018. Further, that his advocate never informed him of the service of Notice to Show Cause why suit should not be dismissed for want of prosecution. He claims the former advocates did not represent him well as they filed a response to the Plaintiff's application but failed to file further pleadings despite proper instructions to them. The Plaintiff is interfering with the suit land by constructing permanent and temporary structures thereon. The Applicant intends to lodge a Counterclaim in his Defence. Further, the application has been brought without delay since the Applicant only came to know that the suit was dismissed for want of prosecution on 18th March, 2019.

The application is supported by the affidavit of COUNCILLOR EZEKIEL BENE who is the 1st Defendant herein where he reiterates his claim above and deposes that he has been paying rents to the 2nd Defendant. He contends that the 2nd Defendant has acknowledged through minutes and letters that he is the proprietor of the suit land. He explains that the dispute over ownership of the suit land started way back in the year 2007 between the Plaintiff, one Steve Leteiyo Selele and himself, which culminated in the institution of this suit.

The Plaintiff opposed the Application and filed Grounds of Opposition dated the 20th May, 2019 where he avers that the application is frivolous and a gross abuse of the Court process. He contends that the Applicant has not shown sufficient legal or factual grounds to warrant reinstatement of the suit. Further, that the Applicant is guilty of laches and is the author of his own misfortune. He confirms that he is not interested in pursuing this suit and the Applicant cannot compel him to be a party to the said suit. He reiterates that the Applicant having failed to file a Defence and Counterclaim in the dismissed suit cannot be heard to say that it has a suit against the Plaintiff. Further, that the Applicant lacks locus to mount the current application. He insists the Applicant should file his own suit rather than piggy back on his dismissed suit. He concludes that the Applicant will not suffer any prejudice if the application is disallowed.

Both the 1st Defendant and the Plaintiff filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion Application dated the 25th March, 2019 including the respective affidavits as well as the parties submissions filed herein, at this juncture, the only issue for determination is whether this suit should be reinstated.

The 1st Defendant claims the suit should be reinstated to enable him file a Defence including a Counterclaim as they raise triable issues. The Plaintiff has opposed the Application and confirms lack of interest in pursuing this suit. In his submissions, the 1st Defendant has stated that his Defence and Counterclaim raise serious triable issues. He had relied on the case of **Mbogo & Another V Shah EALR 1968; HCC**

MISC. No. 720 of 2009 Professor Mwangi S. Kimenyi V the Hon. Attorney General & Anor to buttress his arguments. In the Plaintiff's submissions, he insists the 1st Defendant will not suffer any prejudice if this application is disallowed.

Order 12 rule 7 of the Civil Procedure Rules provides that: ***'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'***

According to the Court records, I note the 1st Defendant's Counsels by then messrs Ochieng Opiyo & Co. Advocates filed a Notice of Appointment on 15th December, 2010. I note they never filed any Defence to the suit despite participating in the matter and even filing an application seeking to issue a third party notice. The 1st Defendant insists that the lawyers failed to file a Defence despite having given them adequate instructions. He now seeks to reinstate the suit and file a Defence including counterclaim out of time claiming the lawyers did not represent him well. Further, that mistake to Counsel should not be visited upon him.

In the case of **W. Muchanga & E. Olunga t/a Womi Associates v Attorney General [2017] eKLR**, my brother Justice Ochieng while faced with a similar situation to reinstate a suit which had been dismissed for want of prosecution declined to do so and stated that the delay was inordinate and not explained.

In associating myself with this decision, I find that the 1st Defendant has actually not explained the delay in failure to file his Defence and Counterclaim. Except for blaming his former advocates, he has not demonstrated whether he sought any updates from them in respect of this suit. To my mind, I deem failure to file a Defence for a period of Nine (9) years in excusable. The Plaintiff is categorical that he is not interested in pursuing this suit and insists the 1st Defendant can file a fresh suit to pursue his claim. I indeed concur with the Plaintiff on this point as this suit was last in court on 18th April, 2017 before its dismissal for want of prosecution on 9th October, 2018. It is my considered view that as a Court, I cannot compel a Plaintiff to proceed with a suit, which he is not interested in pursuing. I will hence decline to reinstate this suit. I will further not consider the application for injunction and registration of a restriction as this could only be considered in a suit and not at this juncture when there is no suit.

In the circumstance, I find the application dated 25th March, 2019 unmerited and will dismiss it.

Dated signed and delivered in open court at Kajiado this 13th day of November, 2019

CHRISTINE OCHIENG

JUDGE