



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 55 OF 2012

WILSON CHEPKWONY.....PLAINTIFF

VERSUS

JAMLECK MWANGI KARIUKI.....DEFENDANT

RULING

1. On **24/7/2018** this matter came up before court upon a Notice To Show Cause issued for the parties on **12/7/2018**. The same was dismissed for want of prosecution as none of the parties attended.

2. The plaintiff subsequently lodged the application dated **18/4/2019** seeking the following orders:-

(1) That this application be certified as urgent and its service be dispensed within the first instance.

(2) That the court be pleased to set aside and/or review the orders made on 24th July, 2018 dismissing the plaintiff suit for want of prosecution and that the plaintiff's suit be reinstated.

(3) Costs be in this cause.

3. In the supporting affidavit and the grounds at the base of the application the plaintiff avers that his suit was dismissed for want of prosecution; that the plaintiff's suit had very high chances of success; that the case is a land matter which has serious and triable issues; that the plaintiff is still interested in prosecuting the case and that he should be allowed to do so as directed by the principles of nature justice; that the plaintiff was not notified of the dismissal; that the plaintiff has approached the court in good faith, that he stands to suffer irreparable loss and no prejudice will be suffered by either party if the orders sought are granted.

4. In his response to the application, the defendant filed a replying affidavit dated **11/7/2019**. The affidavit is sworn by his counsel who depones that the suit was filed in **2012**; that the defence was filed in **2012**; that the suit has never proceeded to hearing owing to reluctance on the part of the plaintiff; that on **21/10/2013** the defendant applied for dismissal for want of prosecution which application was disallowed and the plaintiff given **21 days** to set the suit down for hearing; that when next the suit came up for hearing on **29/5/2014** it never proceeded due to absence of plaintiff's counsel and a date was fixed by consent; that on the following hearing date that is **3/7/2014** the suit was again adjourned for reasons associated with inability of the plaintiff's counsel to proceed with the matter; that upon the exit of the then plaintiff's counsel the plaintiff failed to appoint an advocate and the case remained in limbo from **29/7/2014** to **24/7/2018** on which date the court dismissed the case on its own motion; that the plaintiff has not demonstrated good grounds for the reinstatement of the suit or explained the delay occurring between **29/7/2014** and **24/7/2018**; that there was no error on the part of the court in dismissing the plaintiff's case; that the plaintiff delayed for more than one year after the dismissal before lodging the instant application and the delay has not been explained. It is argued that litigation come to an end without unnecessary delay.

5. The plaintiff filed submissions on the instant application on **2/8/2019** while the defendant filed his on **15/8/2019**. I have considered those submissions.
6. The main issue for determination in this application is whether the court should set aside the dismissal order and reinstate the plaintiff's suit for hearing on its merits.
7. I must indicate at inception that the application dated **6/6/2019** has been brought under the wrong provisions of the law. Reliance on **Order 12 rule 7** of the Civil Procedure Rules is inappropriate since the dismissal was made not on a date when the matter came up for hearing but upon issuance of a Notice To Show Cause under **Order 17 rule 2** of the Civil Procedure Rules.
8. That notwithstanding I must disregard that point as technicality that does not go to the merit of the application since in any event **Order 51 rule 10 (1)** provides that failure to state the legal provisions under which an application is brought is not fatal to that application and **Order 51 rule 10 (2)** provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.
9. Under **Order 17 rule 2 (1) - (4)** a plaintiff's suit slides into grave danger of being dismissed for want of prosecution when no party takes any step in furtherance of the prosecution of the suit for a period of **12 months**.
10. At the end of that period the court may of its own motion issue notice to the parties to show cause why the suit should not be dismissed for want of prosecution.
11. Where the court does not issue such notice any party may apply for an order of dismissal for want of prosecution on the same ground. However upon the notice to show cause or application as the case maybe, where cause is shown as to why the suit should not be dismissed the court will exercise its discretion and spare the suit from dismissal.
12. By the time of dismissal by the court *suo motu* on **24/7/2018** this suit had already narrowly survived an earlier application for dismissal under **Order 17 rule 2(1) and (3)**, when the court issued a ruling disallowing the application with the condition that the plaintiff should fix the suit for hearing within **21 days** from **24/2/2014**.
13. The circumstances surrounding the latest order dismissing the suit are that after the last *inter-partes* appearance on **11/4/2017**, a period longer than **12 months** elapsed before any party took any step in the matter.
14. I have perused the grounds on which the application is made and I find that the main ground was that the plaintiff was not notified of the dismissal. I must therefore refer to the notice of dismissal dated **12/7/2018** for evidence of service upon the plaintiff.
15. On the face of that notice appears a stamp from Ndegwa Waweru & Co. Advocates a law firm that does not feature in these proceedings.
16. Though one of the addressees named in the Notice To Show Cause appears to be Ms. Komen Kipchirchir & Co. Advocates of P.O. Box 1898 - 30100, Eldoret, there is no certificate of posting or service demonstrating that they were served with that notice of dismissal.
17. This court's quest for evidence of service of the Notice To Show Cause is at an end. There is no evidence that the plaintiff was ever served with the Notice To Show Cause dated **12/7/2018** on the strength of which the proceedings of **24/7/2018** vide which the plaintiff's suit was dismissed were taken.
18. I therefore find that the application dated **6/6/2019** has merit and the same is allowed in terms of prayer **Nos. (2) and (3)** thereof. The hearing of this matter shall be fixed upon the reading of this ruling.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGÉ

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Kaosa for Respondent

N/A for the Applicant

COURT

Ruling read in open court.

MWANGI NJOROGÉ

JUDGE

30/9/2019



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