REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 606(B) OF 2008

CHRISTOPHER KANAI KAMAU.....PLAINTIFF

VERSUS

TERESIAH NJEHIA.....1ST DEFENDANT

PETER GICHERU NGOME.....2ND DEFENDANT

PATRICK NDEGWA KIMANI.....3RD DEFENDANT

PATRICK M. MUTHANDE.....4TH DEFENDANT

RULING

What is before the court is the Plaintiff's Notice of Motion application dated 26th October 2020 in which the Plaintiff (hereinafter referred to as "the Applicant") has sought the following orders;

1. The court be pleased to set aside the orders made on 1st February 2016 dismissing the Plaintiff's suit and all other consequential orders thereto.

2. The court be pleased to reinstate the Plaintiff's suit.

3. Costs be in the cause.

The application is based on several grounds set out on the face thereof. The application is supported by the affidavit of Muendo Festus Muteti advocate in which the basis of the application is set out as follows: The Applicant is the registered owner of all that parcel of land known as Limuru/Township/370 (hereinafter referred to as "the suit property"). The Applicant brought this suit in the High Court against the Respondents through a plaint dated 18th December 2008 that was amended on 26th March 2009. In the amended plaint, the Applicant contended that the Respondents were wrongly occupying part of the suit property and operating a slaughterhouse on the same. The suit was transferred to this court following its establishment. On 1st February 2016, the suit was dismissed for want of prosecution when it came up for hearing. The hearing date was taken on 26th May 2015. On that day, the advocate then on record for the Applicant did not show that a hearing notice had been served on the Respondents.

The Applicant averred that after the dismissal of the suit, the advocate then on record for the Applicant started showing disinterest in the matter forcing the Applicant to appoint another advocate to pursue the reinstatement of the suit. The Applicant averred that despite his new advocates' efforts to come on record, they were unable to do so because the court file could not be found. The Applicant averred that he instructed another advocate whose correspondence with the court eventually led to the file being found. In

conclusion, the Applicant averred that the court should reinstate the suit since the order of dismissal of the suit had occasioned him undue hardship. The Applicant averred that he was willing to expeditiously prosecute the suit. He urged the court not to visit his initial advocate's oversight on him.

The Respondents opposed the application through a replying affidavit sworn by Teresia Njehia and Patrick Ndegwa Kimani in which they stated as follows: They were the 1st and 3rd Defendants in the suit. The case as against the 2nd and 4th Defendants had abated as they passed away. The application for reinstatement was brought after five years which was inordinate. Further, they averred that the reasons given by the Applicant for the delay were not justifiable as they involved the Applicant's previous advocates who were not parties to the suit. They averred that the Applicant owned a non-existent property which was superimposed on their property known as Plot No. 82. They averred that the Applicant had filed another suit namely, ELC No. 78 of 2020 for compensation.

The Applicant swore a supplementary affidavit on 24th March 2021, in which he stated as follows: He was the owner of the suit property having acquired the same by first registration in 1992. He sued the Respondents as representatives of Ngome Gicheru Self Help Group which did not have legal personality. Even though the suit as against the 2nd and 4th Defendants had abated the suit continues against the remaining Defendants. The Applicant averred further that his pursuit of justice though long had been steady and relentless. He stated that the Respondents were trespassing on his land and that the Plot No. 82 they were referring to did not exist and even if it did, the same was of no interest to him. On ELC No. 78 of 2020 referred to by the Respondents, the Applicant stated that the same had no bearing on the current suit as it involved compensation for construction of a 15 metre road. In conclusion the Applicant stated that he authorized his advocate to swear the affidavit dated 26th October 2020 as he was under quarantine after being exposed to Covid-19.

The application was heard orally. The Applicant's advocate relied on the supporting affidavit, supplementary affidavit and the bundle of authorities dated 21st September 2021. He submitted that the Applicant should have his day in court as the order dismissing the suit was draconian and against the Constitution. He submitted that the Applicant was not given an opportunity to show cause why the suit should not be dismissed before it was dismissed. He submitted that the Applicant's advocate made a mistake which should not be visited on the Applicant. He submitted further that the Applicant would suffer great prejudice if the application is not allowed while the Respondents would suffer no prejudice if the suit is reinstated.

The Applicant's advocate submitted that ELC No. 78 of 2020 was seeking compensation for a road constructed through the suit property. He submitted that the Respondents were not part of the said activity. In conclusion he urged the Court to pardon the Applicant's default and allow the application.

The Respondents advocate in his submission relied on the replying affidavit of the Respondents and the annexures thereto. He submitted that the Respondents were sued in their individual capacities. Further, he submitted that Order 1 Rule 8 of the Civil Procedure Rules had not been complied with. He submitted that a suit cannot be reinstated against a deceased party. The Respondent's advocate wondered why the Applicant who was seeking compensation for land that he claimed to have been taken by a road in its entirety would be pursuing the Respondents for the same land. In conclusion he submitted that the delay in bringing the application was unexplained and the application had no merit.

In reply, the Applicant's advocate submitted that in their defence, the Respondents had admitted that they were officials of Ngome Gicheru Self Help Group. On the issue of compensation, he submitted that the same was in respect of only a part of the suit property taken by the road.

Determination:

I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit and the submissions that were made before me by the advocates for the parties. The following is my view on the matter. From the record, the court stated as follows while dismissing the Applicant's suit:

"This matter was fixed for hearing today. There is no evidence on record that this Defendant was served with a hearing notice. This matter was fixed way back on 26th May 2015 for hearing. The Plaintiff's counsel should have filed the affidavit of service to show service of the hearing notice on the Defendant at least 3 days from today. In the absence of evidence of service and considering that this matter was fixed in May 2015 and in view of the fact that this Court has travelled from Malindi to specifically hear this matter, I find that the Plaintiff's failure to serve today's hearing notice amounts to an act of

a person who was not ready to prosecute this suit. In the circumstances I dismiss this suit with costs for want of prosecution."

Order 12 Rule 6(1) of the Civil Procedure Rules provides as follows:

"Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit."

Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

"Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."

It is clear from the foregoing that the court has a discretion to reinstate a suit dismissed for want of prosecution or for non-attendance. In HAM *v* SOS [2021] eKLR, the court stated that:

"In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice."

In Shah *v* Mbogo [1967] EA 116 the court stated as follows on the exercise of discretion:

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

I am inclined to exercise my discretion in favour of the Applicant. I am satisfied that the Applicant has an arguable case against the Respondents. I have noted that the Applicant's former advocates attended court on all previous occasions when the suit come up for pre-trial case conference. The said advocates took the hearing date for the suit and attended court when the suit was dismissed. This shows that the Applicant was all along keen on prosecuting this suit. The fault of the Applicant's previous advocates was their failure to serve the Respondents' advocates with a hearing notice. I am of the view that failure to serve a hearing notice was inadvertent on the part of the Applicant's previous advocates. In Belinda Murai & 9 others v Amos Wainaina [1979] eKLR the court stated as follows:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

It is admitted that the Applicant's advocate made a mistake by not serving a hearing notice and filing an affidavit of service. While the court does not condone such acts of negligence, I am of the view that it would be too harsh to deny the Applicant his day in court on account only of that negligence. On the issue of delay, this has also been admitted. I am satisfied that the delay has been reasonably and sufficiently explained. The delay is in the circumstances excusable.

The Respondents have not persuaded me that they will suffer prejudice if the application is allowed. The issue of the death of some of the Respondents is neither here nor there. The Respondents before the court have not demonstrated that the suit cannot proceed as against them in case the suit has abated as against the other Respondents.

Conclusion:

In conclusion, I allow the Notice of Motion dated 26th October 2020. The orders dismissing this suit made on 1st February 2016 are set aside and the suit is reinstated for hearing on merit as against the Defendants who are alive. The Respondents shall have the costs of the application assessed at Kshs. 20,000/- payable forthwith and in any event within 30 days from the date hereof in default of

which the Respondents shall be at liberty to execute for the recovery thereof.

Dated and Delivered at Nairobi this 17th day of March 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omulanya for the Plaintiff

Ms. Muhoho for the Defendants

Ms. C. Nyokabi-Court Assistant