



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL CASE NO. 45 OF 2012

JOSEPH ORIANG OCHOLLA

CASPER OCHOLLA OUKO.....APPLICANTS

VERSUS

PATRICK OBONGO JUMBE & 13 OTHERS.....RESPONDENTS

RULING

The Applicants, **JOSEPH ORIANG OCHOLLA** and **CASPER OCHOLLA OUKO** have lodged an application dated 28th November 2019, seeking the reinstatement of the suit.

1. The said suit had been dismissed for want of prosecution on 3rd May 2016.
2. It is the Applicants' case that it would be fair and just if their case was heard and determined on merits.
3. It was asserted by the Applicants that if their case was not reinstated, they would have been deprived the opportunity to put forward the merits of their case.
4. In this case, the Applicants attribute the dismissal of the suit to matters which were beyond their control. In the first instance, they say that the advocates they had engaged, did not take action in a satisfactory manner. The slow pace at which the advocates moved caused the Applicants to instruct another Law Firm.
5. The Applicants pointed out that their new advocate was frustrated by the disappearance of the court file.
6. The Applicants exhibited a letter dated 19th May 2014, from Advocate **L. A. SECHELE**, who was requesting the learned Deputy Registrar to assist in tracing the missing Court File.
7. Although the Respondents acknowledge that the Applicants sought the assistance of the Deputy Registrar, they submitted that the said action was too little.
8. The Respondents pointed out that apart from the letter dated 19th May 2014, the Applicants appear to have failed to take any steps to prosecute their case.
9. It is common ground that the dismissal of the suit took place almost 2 years after the Applicants had sought assistance from the Deputy Registrar, to trace the Court File.
10. A period of 2 years if unexplained, would ordinarily have been deemed to be inordinate.
11. The Respondents submitted that the Applicants had slept on their rights for 2 years, during which period they took no action in the proceedings.
13. It is correct that between May 2014 and May 2016, no steps were taken in the proceedings. The question that then arises is whether or not the Applicants were in deep slumber during the said period.

14. If the Applicants slept on their rights, and if the period when they enjoyed the sleep was inordinate, the court would do no more than to remind them that equity aids the vigilant.
15. Parties who are indolent cannot expect equity to come to their aid.
16. In this case, I do find that Advocate L. A. Sechele, who was then practicing at the Law Firm of Wasuna & Company Advocates, had personal conduct of the Applicants' case.
17. Regrettably, Ms Sechele passed away.
18. The Respondents have reasoned that the demise of the said advocate ought not to have led to the failure by the Applicants to prosecute their case, as the Applicants were represented by a law firm.
19. I note that whilst it is a law firm that was on record as representing the Applicants, the Respondents have not shown that it was not Ms Sechele who had the personal conduct of the Applicants' case.
20. I find that the demise of the advocate who had personal conduct of the Applicants' case, most probably had an adverse impact upon the progression of the case.
21. The Respondents' other contention was that it was the duty of the Applicants to visit the registry and to take steps towards getting the case ready for hearing.
23. It is true that ultimately each case belongs to the parties thereto. However, it is equally true that when a party has instructed an advocate, he or she ought not to bypass the said advocate, by visiting the registry to take steps in the case.
24. By the letter dated 19th May 2014, Ms Sechele Advocate indicated that the Applicants were exerting pressure upon their advocates to take action in the case. In effect, the Applicants did not just have a laid-back attitude: The Applicants did not sleep on their rights.
25. By a letter dated 21st February 2019, the Deputy Registrar of the High Court of Kenya, Kisumu, informed the Commission On Administrative Justice, (which is popularly called "*Office of the Ombudsman*") that after the suit was dismissed for want of prosecution;
- "The file was taken to our archives after the dismissal and is not lost as alleged thereof."***
24. In the light of that revelation, the court appreciates why the Applicants may have been unable to take steps in the proceedings, after the suit was dismissed.
25. The court file not available at the registry. It was in the archives.
26. In the circumstances, I find that the Applicants have tendered reasonable explanations for their failure to prosecute the suit expeditiously.
27. I have also taken into account the Applicants' assertion, that they are the registered proprietors of the parcels of land which are the subject matter of the case.
28. If, as the Applicants have asserted, the Respondents have trespassed onto the said parcels of land, justice demands that the issue be determined on its merits. None of the parties can have peace of mind until the court accords them an opportunity to put forward their respective cases on the delicate and emotive subject of land ownership.
29. Accordingly, the orders made on 3rd May 2016 are set aside and the suit is thus reinstated.
30. The costs of the application dated 28th November 2019 shall be in the cause, in the substantive suit. Whichever of the parties is ultimately successful in the suit, shall also be deemed to have been awarded the costs of the said application.

DATED, SIGNED and DELIVERED at KISUMU This 22nd day of September 2020

FRED A. OCHIENG

JUDGE