



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC CASE NO.57 OF 2021

THOMAS ONGWEN ODONGO.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, SIAYA.....2ND DEFENDANT

SIAYA COUNTY COUNCIL.....3RD DEFENDANT

RULING

Introduction

1. By an amended plaint dated 18/05/2011, the plaintiff sought orders for nullification of the registration of LAND PARCEL NUMBERS **West Alego/Sigoma Uranga/684, West Alego/Sigoma Uranga/685 and West Alego/Sigoma Uranga/686 [suit properties]** which were in the name of the 3rd defendant and for him to be declared the rightful owner of the suit properties. The 1st and 2nd defendant entered appearance and filed a defence dated 16/11/2011 in which they denied the plaintiff's claim. The 3rd defendant neither entered appearance nor filed a defence.

2. By its directions dated 21/7/2014, the court directed the parties to fix a date at the registry however, neither of the parties attempted to fix the case down for hearing and consequently, the court on its own volition fixed the case down for hearing on 16/05/2017. Despite service of this notice, neither of the parties attended court on 16/05/2017 and consequently, the suit was dismissed for want of prosecution.

3. Unaware of this dismissal, the plaintiff changed advocates and filed an application dated 6/08/2019. When this application came up for hearing on 3/12/2020, the court informed the parties that the suit had been dismissed for want of prosecution. In view of this, the plaintiff filed the instant motion dated 14/09/2021 which is the subject of this ruling.

Plaintiff's case and submissions

4. The motion is brought within the provisions of **Article 159** of the **Constitution**, **Sections 1A, 3A** and **63(e)** of the **Civil Procedure Act** and **Order 12 Rule 7** of the **Civil Procedure Rules** in which the plaintiff has sought the following main reliefs;

a) This honourable court be pleased to set aside the order made on 16/05/2017 dismissing the plaintiff's suit.

b) Pursuant to prayer being granted, the plaintiff's suit be reinstated and be heard on merit.

5. The motion is supported on the grounds set out on the face of the motion and the supporting affidavit of the plaintiff's advocates **OORO FREDRICK AWANA** dated 14/09/2021.

6. The plaintiff filed written submissions dated 30/11/2021. He contended that the plaintiff only became aware that the suit had been dismissed for want of prosecution after the firm of Wakla & Co. Advocates came on record on his behalf. He averred that he was not aware that the suit had been dismissed and argued that the mistakes of his previous advocates should not be visited upon him. He submitted that the defendants will not be prejudiced if the suit is reinstated because the defendants can be remedied by payment of costs. He contended he will be prejudiced if the suit is not heard on merits. The plaintiff identified one issue for determination: whether the plaintiff herein has demonstrated sufficient grounds that would warrant the suit being reinstated.

Defendants case and submissions

7. Despite service, the defendants have neither filed a response to the motion nor filed written submissions and in essence the motion is unopposed. However, this court is called upon to determine the motion on its own merits.

Analysis and determination

8. I have carefully considered the plaintiff's motion and supporting affidavit and his written submissions and the only issue falling for determination is whether the plaintiff has demonstrated sufficient grounds for reinstatement of the suit.

I will proceed to analyse the legal and jurisprudential framework.

9. **Article 50** of the **Constitution** recognises the right of a party to fair hearing while **Sections 1A** and **3A** of the **Civil Procedure Act** provides that courts in seeking to give effect to the overriding objective should facilitate the just, expeditious, proportionate and affordable resolution of disputes. The case of **Ivita -vs- Kyumbu (1984) KLR 441** clearly sets out the principles that guide courts in exercising its discretionary powers on whether or not to reinstate a suit as follows;

“the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time”

10. From the court record, parties were in court for close to 6 years prior to its dismissal and looking at the chronology of proceedings in the court record, it is evident that prior to 7/03/2013, the plaintiff was keen to prosecute his case. However circumstances changed in 2014 when parties attempted to settle the matter out of court. It would seem, negotiations foundered and parties lost interest in the suit. The court issued a hearing notice for 16/05/2017 but for one reason or the other, the plaintiff and defendants failed to attend court and ultimately the suit was dismissed for want of prosecution.

11. Unaware of this turn of events, the plaintiff filed a notice of change of advocates and by an application dated 6/08/2019, he sought to transfer this suit from ELC Kisumu to Siaya Principal Magistrate's Court. However, when this matter came up hearing on 3/12/2020, the court notified the parties that the matter had been dismissed for want of prosecution.

12. From the chronology, the plaintiff's assertion that his previous advocates on record did not notify him that the suit was dismissed for want of prosecution is not farfetched.

13. It is the considered view of this court that the dismissal of a litigant's case for want of prosecution is draconian in nature with far reaching implications and in my view, the overriding objective of our constitutional and statutory framework is to ensure substantive justice is achieved to parties and the inconvenience that maybe suffered by the defendants as a result of such reinstatement can be adequately remedied through an award of costs. The conduct of the plaintiff in the proceedings does not demonstrate that she has interest in the suit.

14. In the premises, and for the foregoing reasons, the court is satisfied that it is in the interest of justice to allow the plaintiff's motion with costs to the defendants.

15. Ultimately, I make the following orders in disposing the Notice of Motion dated 14/09/2021.

a) The order dismissing the suit for want of prosecution is hereby set aside and the suit herein is hereby reinstated.

b) The plaintiff shall pay the 1st and 2nd defendant's costs of Ksh. 20,000/- within 21 days and in default, the order reinstating this suit shall stand vacated.

c) The plaintiff and defendants to comply with Order 11 of the Civil Procedure Rules within 14 days from the date of this ruling.

d) The court orders and hearing notice to be served upon the defendants within 5 days from the date of this ruling and an affidavit of service to be filed.

e) In default of service and filing of the affidavit of service within 14 days from the date of this ruling, this suit shall stand dismissed.

f) The suit shall be heard on 2/03/2022 in open court.

RULING DELIVERED VIRTUALLY

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY, 2022

In the Presence of:

Mr. Ooro for the plaintiff/applicant

Mr. Kobimbo for 1st and 2nd respondents

Court assistant: Olivia Nyumba.

HON. A. Y. KOROSS

JUDGE

27/1/2022