



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 195 OF 2013
(FORMERLY BGM CMCC NO. 205A OF 2009)

1. PATRICK MANG'ARA WASIKE

2. WILLIAM WAFULA NDENPLAINTIFFS

VERSUS

1. FREDRICK MAYENDE WANYONYI

2. DICKSON WAFULA NDEGEDEFENDANTS

RULING

[1] The applicants in this case filed a Notice of Motion under Order 12 rule 7 and Order 51 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. They pray that the court orders of 12/5/2015 dismissing this suit for want of prosecution be set aside and that this court fixes this suit for hearing and final determination.

The applicants' reasons for that application is that, they did not know the case was listed down for hearing on 12/5/2015. They state that they were previously represented by M/s Kraido & Company Advocates. That the said Kraido and Company advocates relocated their offices and that the Bungoma office is closed. They state in their affidavit that due to that reason they were unable to know the status of their suit. They state that later while perusing the file they realized that the date had passed and the suit had been dismissed for want of prosecution.

[2] The defendants through an Affidavit sworn by Fredrick Mayende Wanyonyi stated that, that this suit was filed in March 2009. That since the inception of the suit, the plaintiffs have not been ready to move the court. They argue that it is their advocate who has been moving the court. Annexed were annexures F.M.W.1 (a) (b) (c) and (d). They further argued that the hearing date for 12/05/2015 was by consent. They stated that the firm of Kraido & Co. had not re-located and that the same firm is at Teachers Sacco Plaza, 4th floor, Room 132, Bungoma Annexed. There were copies of Affidavit of Service on that address marked, F.M.W. 11(a) (b) and (c). The respondents also stated that the appointment of M/s C.K. Areba & Co. Advocates was in violation of the Mandatory Provisions of Order 9 Rule 9 of the Civil Procedure Rules. They applied for the application to be struck out.

[3] I have carefully perused the court file. I note that this case was fixed by consent of the parties on 20/11/14 by the advocates for the parties. George appeared in the court registry for Kraido & Company Advocates for the plaintiff while Edel appeared for fixing for Onchiri & Company Advocates for the

defendants. The plaintiffs Advocate was therefore aware of the hearing date since 20/11/2014. Could it be that the applicants never went to their advocates offices since that date upto 12th May 2015? The applicants argue that their advocates relocated their offices. If that is so, and they were unable to trace them, could they not peruse the court file to find out the position of their case over the period 20/11/14 to 12/5/2015? The applicants have not shown the court, at what time they became aware of their lawyers relocation. My perusal of the Notice of Appointment of advocates by C.K. Areba & Co. Advocates dated 14th July, 2015 shows the address of M/s Kraido & Co. Advocates is indicated as P.O. Box 1608 Bungoma. The consent order between C.K. Areba & Co. Advocates and Kraido & Co. for the current applicants' advocates(to come on record) is signed by both the former and current advocates. It is dated 15/7/2015. The same day the Notice of appointment was filed showing the address of M/s Kraido & Company Advocates as P.O. Box 2574 Bungoma.

[4] There is merit, in the respondents argument therefore, that M/s Kraido & Co. never relocated and that their address is Teachers Sacco Plaza, 4th Floor Room 132 Bungoma.

There is no affidavit from M/s Kraido & Co. Advocate to say they ever left Bungoma or that through inadvertence or otherwise, they failed to inform their client of such move. Mr. Kraido still appears before me in court till now. He is still in practice. There is no allegation by the applicants that the court file was missing or could not be found. I am requested to apply the court powers under Section 3 and 3A of the Civil Procedure Code. These inherent powers of the court should be exercised judiciously. They should not be used to aid a litigant that that has slept on his rights or one that has been indolent like this suit. The applicants herein are obliged under Order 1A(3) of the Civil Procedure Act to further the overriding objective of the court by among other orders, to participate in the process of the court. Such participation is persuing their case with diligence by following its progress with their advocates and by inquiring its progress in the court registry. They never did so. As a consequence the suit which was fixed for hearing by consent, was dismissed for want of prosecution on the consented day of the hearing.

[5] Under the circumstances, I find myself unable to exercise my discretionary power under Order 12 rule 7. If I did so, such discretion would lead to an injustice to the respondents.

The application is dismissed with costs to the respondent.

Dated signed and delivered this 27th day of July 2016

S.MUKUNYA - JUDGE

In the presence of

Joy/Gladys court Assistants

M/s Bett h/b for Areba for plaintiff/applicant

Mr. Ikapel for Onchiri for the respondent