



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO.188 OF 2016**

**VINCENT OTIENO OPOLO.....APPLICANT**

**VERSUS**

**JOHN OMOLO OYANGE.....RESPONDENT**

**RULING**

**BRIEF FACTS**

VINCENT OTIENO OPOLO the Applicant herein filed a Notice of Motion Application dated 15<sup>th</sup> December seeking for the following orders:

- 1. That the Application dated 31/10/2018 be listed for hearing in the first instance on a soonest possible date to enable fast-tracking of the main suit of the hearing.**
- 2. That there be a stay of execution of taxed costs vide notice to show cause dated 9/11/2021 pending the hearing and determination of the main suit.**
- 3. That costs be in the cause.**

The Application was based on grounds that the Applicant through his Counsel had at the onset of this suit obtained interlocutory injunctive orders against the Respondent with regards to the suit property being KISUMU/KOCHOGO/909 and later on Counsel for the Applicant went missing in action without formal communication to the Applicant and thereby causing the suit to be dismissed.

That having obtained interim orders from the Respondent, the Applicant had a prima facie case which would have been concluded if not for the negligence on Counsel side. That as per the order dated 17/8/2016, the Applicant stands to suffer permanent loss of property if the taxed costs are executed and if this Application is allowed, the Respondent will not suffer any harm or loss.

The Application was supported by the Affidavit of VINCENT OTIENO OPOLO dated 15<sup>th</sup> December 2021 and filed on the same day where he relied on the grounds in the Application.

The matter was not certified urgent and the court gave orders that the Applicant to serve the Application within 7 days, the Respondent to respond within 7 days of service, the Applicant to file supplementary Affidavit with submissions within 7 days of service and the Respondent to file and serve submissions within 7 days of service.

The Applicant filed a Supplementary Affidavit on 4<sup>th</sup> January 2022 where he relied on the grounds of the Application.

The Respondent filed a Replying Affidavit on 25<sup>th</sup> January 2022 where he deposed and stated that the information provided by the Applicant is not true as he is the legal proprietor of the suit property. He stated that the delay is inordinate since it was on the Applicant's part to follow up on his case.

He further stated that the Applicant is not the owner of the suit property neither does he have any identifiable interest in the land and therefore the Application should be dismissed. That on 22<sup>nd</sup> July 2016, a survey team visited the area and identified the full extent of the various parcels and the Applicant's parcel was on land parcel number KISUMU /KOCHOGO/897 and not the Respondent's parcel number KISUMU/KOCHOGO/909.

That he will suffer irreparable loss as he is the registered proprietor of the suit property and that the Applicant should pay the bill of costs as was recommended by the court.

The Applicant filed a further Supplementary Affidavit on 2<sup>nd</sup> February 2022 where he stated that the Respondent's affirmation that he is the legal proprietor of the suit property can only be established at trial. That the survey report which the Respondent has mentioned in his Replying Affidavit can only be adopted, rejected or ascertained at trial hence the Respondent's assertions are premature.

### **Applicant's Submissions**

The Applicant filed his submissions on 4<sup>th</sup> January 2022 where he raised two issues for determination as discussed below:

On the issue of whether the orders to dismiss the suit can be set aside; he stated that the only reason the suit was dismissed is as a result of the Advocate negligence and the dismissal of the suit would prejudice the Applicant as he stands to lose possession of the suit property.

That in dismissing the suit, the Applicant shall be condemned unheard and he relied in the case of **Edney Adaka v Equity Bank (2014)**.

On the issue of whether the taxed costs vide notice to show cause dated 9/11/2021 should be stayed pending hearing and determination of the main suit; the Applicant submitted that the Respondent did not earn the costs on merit and if the main suit had been heard fully with participation by both parties, the court would have awarded costs on merit.

That the Applicant did not file a formal application for reference to object the costs but this application should be treated as stay of the said costs. He submitted that he had a right to object the taxed costs and relied in the case of **Labh Singh Harman Singh V Attorney General & 2 Others (2016) e KLR**.

The Applicant submitted that the Application is merited and should be allowed.

### **Respondent's Submissions**

The Respondent filed his submissions on 5<sup>th</sup> January 2022 and on the issue of whether the orders of the court for dismissal should be set aside and the Plaintiff's case reinstated; the Respondent submitted that the suit was dismissed on 13<sup>th</sup> July 2015 and the Applicant avers that he was not aware that his case was coming up for dismissal.

The Respondent relied in the case of **Jesse Kimani v Connel (1966) EA 547,555F**.

The Respondent stated in his submissions that the Applicant stands to suffer no loss and that the Respondent will suffer irreparable loss as he is the registered proprietor of the suit parcel. That the Application to set aside a dismissal is discretionary and is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. The Respondent relied in the case of **Shah v Mbogo (1967) EA 116 at 123B and Shabir Din v Ram Parkash Anand (1955) 22 EACA 48**.

The Respondent therefore prayed that the Application be dismissed with costs.

### **Analysis and Determination**

The Applicant filed this suit through his Advocate together with an interlocutory application seeking injunctive orders restraining the Respondent from trespassing or in any way alienating or interfering with the Applicants quiet enjoyment of land parcel number KISUMU/KOCHOGO/909 pending the hearing and determination of the suit. That the orders were granted. The matter was fixed for hearing of the main suit however the Applicant's Advocate failed to inform the Applicant that the matter was coming up for hearing. The Applicant has alleged that he was not aware that the matter was coming for hearing hence there is negligence on the part his Advocate. That the matter was dismissed for want of prosecution.

The Respondent on the other hand has alleged that the delay on the part of the Applicant is inordinate since the Applicant was required to follow up upon his case. That as per the survey report, it was ascertained that the suit property belongs to the Respondent as the Applicant's house is erected on land parcel number KISUMU/KOCHOGO/897. It is the Respondent's case that the Applicant stands to suffer no loss and the Applicant should pay the costs ascertained in the bill of costs.

In the case of **Phillip Chemwolo & Another V. Augustine Kubende (1982-88 1 KAR 1036**, Apaloo, J.A. enunciated the broad equitable approach in these sort of cases as follows:

**“ I think a distinguished equity Judge has said: ‘Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits’.**

**I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.**

In the case of **Maina V. Muriuki (1984) KLR 407**, Justice O'Kubasu stated as follows:

**“the court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence. In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.**

In **Patel –Vs- E.A. Cargo Handling Services Limited [1974] E.A. 75** at 76, Duffus P. stated as follows;

**"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.**

**The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."**

The suit was dismissed with costs and the bill of costs was taxed at Kshs.201,990/=. It is clear that the Applicant was not aware of the progress of his suit until when he was issued with a notice to show cause. It is this court's view that the Applicant has made out a case to warrant the positive exercise of the court's discretion to grant the orders being sought. The Applicant lodged this suit through Originating Summons dated 29<sup>th</sup> July 2016 seeking orders for adverse possession. The Respondent on the other hand averred that he is the registered owner of the suit property.

On the issue of whether this court should stay execution of the taxed costs pending the hearing and determination of the main suit; practice dictates that any party aggrieved with the decision of taxing master may file a reference. This court is of the considered view that what has transpired from the dismissal of the suit was a negative order where the Respondent herein was entitled to costs which have already been taxed by the taxing master.

In the case of **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

***“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered”***

Based on the above decision, it is this court's finding that costs cannot be stayed. There is no loss that the Applicant will suffer if the costs are paid.

## **Conclusion**

This is an old matter and it is in the best interest of all parties that the suit be heard and determined as soon as possible. Accordingly, this court orders that the orders made on 18<sup>th</sup> February 2019 be set aside and in effect the order dismissing the suit herein is vacated.

This court directs the Applicant to pay the costs of this Application to the Respondent and take all necessary steps within 30 days to fix new hearing dates failure which the suit shall stand dismissed with costs to the Respondent.

**DATED AT KISUMU THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**