



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 88 OF 2000

JULIUS K. TUWEIPLAINTIFF

VERSUS

JOSEPH BIRECH

SIMON ROTICH.....DEFENDANT

RULING

1. The applicant filed a notice of motion dated 14th April, 2014 in which he sought the following reliefs;-

(a) That the matter be certified urgent and heard ex-parte in the first instance owing to reasons of urgency.

(b) That the Honourable court be pleased to grant leave to M/S Rotuk & Co. Advocates to appear and act for the plaintiff herein.

(c) That this Honourable court be pleased to set aside its ruling dated 3/2/2010 ordering the dismissal of the plaintiff/Applicants suit for want of prosecution.

(d) That this Honourable court be pleased to reinstate, stay, set aside and or vary the order of dismissal of the suit and execution of the decree and all consequential orders emanating therefrom pending the inter-partes hearing of the application.

(e) That item "C" above be granted pending the hearing and determination of the suit.

2. Before I come to the application a brief background of this matter is necessary. The applicant in the present application filed a suit against the three defendants on 25/5/2000. He contemporaneously filed an application for injunction. The application was placed before the Deputy Registrar on 23/10/2000. The Deputy Registrar certified the same urgent and placed it before the Judge on the same day. Temporary orders of injunction were issued on the same day. The application was fixed for inter-partes hearing on 23/11/2000. On the 23/11/2000, the advocate for the respondent indicated to court that he had a preliminary objection to raise. The

preliminary objection was set down for hearing on 13/12/2000. For one reason or the other, the preliminary objection was not argued until 31/5/2001 when the same was heard. A ruling was delivered on 4/7/2001 dismissing the preliminary objection. In the meantime the Judge had directed the Deputy Registrar who went to the suit land and filed a report in form of a ruling on the observations made on the ground.

3. The application for injunction was never prosecuted. On 24/11/2003 the applicant herein filed an application seeking to amend the plaint to bring in two additional defendants. This application was withdrawn by the applicant on 29/11/2005.
4. There was no action taken on the part of the plaintiff to fix his suit for hearing. The defendants filed an application seeking dismissal of the suit for want of prosecution on 14/3/2008. This application was never fixed for hearing. On 15/12/2009 the court issued notices to both the plaintiff and the defendants advocates asking them to show cause why the suit should not be dismissed for want of prosecution. The advocates were to show cause on 3/2/2010. No advocate appeared before court on that date prompting the court to dismiss the suit under the provisions of order XVI Rule 2 (c) 1 of the Civil Procedure Rules.
5. The defendants Advocates filed their bill of costs which was taxed in the presence of the plaintiff's Advocate. Execution proceeded partially before the judgement debtor became violent. The judgement creditor's Advocates came to court for police security to accompany the auctioneers so as to complete the execution. These orders were granted on 2/4/2014.
6. It is after this that the applicant moved to court and filed the present application. The applicant contends that the defendants are executing against him when he was not given an opportunity to be heard on merits. What I find interesting is that the applicant does not seem to know how his suit was dismissed. A look at paragraph 20 of the applicant's supporting affidavit indicates that the applicant is contending that when the respondent's application for dismissal came up for hearing, his advocate sent someone to court to hold his brief and that the said advocate was forced to proceed with the application without proper instructions. This is not the position as the suit herein was not dismissed at the instance of the respondent's Advocate. This case was dismissed by court upon due notices being given out by the court as required by the Civil Procedure Rules. The applicant's ignorance of what happened to his suit shows how casual he and his lawyers have been in this matter.
7. The applicant is seeking to have the suit reinstated so that he can be heard on merits. In the applicant's own affidavit, the applicant has said that the two parcels of land he is claiming are now registered in the names of Stanley Cheruiyot Cherutich and Reuben Argut. These two are not parties to this suit. There was an attempt by the applicant to amend the plaint to bring in these two defendants. The application was withdrawn by his lawyer. One then wonders what purpose will be served by the suit being reinstated when it is clear that the suit lands are registered in the names of persons who are not parties to this suit.
8. During the hearing of this application, it turned out that the three defendant/Applicants are members of AIC Olare Church. The church and the applicant had wanted to exchange their respective parcels. The church had been allotted two plots of 5 acres each at Kapsitwet Farm. The defendant had also a 5 acre plot next to AIC church Olare at Burnt Forest. The church wanted to take the 5 acres at Burnt Forest in exchange for the two plots of 5 acres each at Kapsitwet. It is contended by the respondents which contention is not controverted by the applicant that the deal did not go through. The applicant took back his 5 acres at Burnt Forest and the respondents surrendered the two plots at Kapsitwet to the Government which allocated the same to third parties.
9. The provisions under which the suit was dismissed provide that the plaintiff may bring a fresh suit subject to limitation. It will have been better for the applicant to bring a fresh suit instead of pursuing the option of reviving a dismissed suit which may not see the light of the day in view of

the facts emerging that the properties are now in the hands of third parties. The church had nothing to do with the allocation of the land to the third parties. The applicant contends that he was allocated the two parcels by the Government. He does not say why he was not registered as owner of the two parcels of land. A person only becomes owner of Government land upon getting a letter of allotment, meeting the conditions of allotment getting lease and certificate of title in accordance with the relevant laws. The two plots are now in the names of third parties. If the applicant has any claim, he should direct the same against the allocating authority as well as the registered owners thereof.

10. Litigation has to come to an end. One of the lawful ways of terminating litigation is by dismissal of the suit after the court has given due notice and the plaintiff has failed as in this case to show cause why the suit should not be dismissed. The suit was dismissed in February, 2010. The applicant participated in the taxation of costs. It is only after four years that he came to court seeking to set aside the dismissal orders. This was after he faced execution. I find that in the circumstances the orders of dismissal of the plaintiff's suit cannot be set aside. The applicant's application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Bitok for applicant and Mr Chemwok for respondent. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

31/7/2014