



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 44 of 2002

ROTICH CHERUIYOT & 3 OTHERS:.....PLAINTIFFS

VERSUS

- 1. THE DIRECTOR OF SURVEYS:.....1ST DEFENDANT**
- 2. THE CHAIRMAN NYARU FARMS:...2ND DEFENDANTS**

RULING

The Defendant/Applicant has taken out a Notice of Motion under sections 3 and 3A of the Civil Procedure Act and Order L Rules 1 and 17 of the Civil Procedure Code praying that the exparte orders issued on the 10th May 2006 dismissing the defence application dated 2nd September 2003 be set aside and the said application be set down for hearing and be determined on merit. There is a prayer for costs. That application is based on the grounds that the application of 2nd September 2003 was dismissed for want of prosecution though it was merited and deserves a hearing as the suit against the Defendant discloses no cause of action and if it proceeds it will affect persons not listed as Defendant's and the Director of Survey was wrongly sued. The final ground is that the Respondent will not suffer any prejudice if the application is heard. An affidavit is filed in support.

That application is opposed and grounds of opposition are filed. Such grounds are that the application is bad in law, frivolous and vexatious and an abuse of the court process and the delay in making the present application is inordinate and inexcusable. That the Applicant has not tendered sufficient reasons for non attendance in court on the date when the application was dismissed and allowing the application will not serve any useful purpose and in any case there is another pending application raising the same issues raised in the application sought to be reinstated.

At the hearing counsel for the applicant submitted that the application which was dismissed raised weighty issues of fact and law and deserves a hearing on merit as parties not named in the suit are likely to be affected by the suit. He added that failure to attend court was inadvertent and no prejudice can be suffered by the Respondent that cannot be compensated by way of costs.

Mr. Sitima Learned Counsel for the 1st Defendant associating himself with the submissions of counsel for the applicant added that the dismissed application raised issues of law as per the Government Proceedings Act and the court needs to investigate those issues and hence a reinstatement of the application is necessary.

The application dated 2/9/2003 and dismissed on 10/5/2006 for non attendance (non-prosecution) of the applicant and his counsel sought to strike out the suit herein for not disclosing a reasonable cause of action and for having been overtaken by events and for being frivolous and vexatious and scandalous and Res Judicata. The reason given for the non attendance by 2nd Defendants counsel to court on the date he had fixed for the hearing of his application is that he inadvertently forgot to diarize the case but that this court should lean towards substance and not technicalities and as the Respondent will not suffer any prejudice then the application that was dismissed should be reinstated and heard on its merit.

I note that the application that was dismissed for non prosecution and now being sought to be reinstated was filed in court on 18th September 2003. It is dated 2nd September 2003. That application was first fixed to be heard on 26.11.2003 which turned out to be a Public Holiday. It was then fixed to be heard on 13.05.2004 on which date it was taken out of the day's cause list and fixed to be heard on 19.7.2004. No reasons are apparent on the court file for the application not being heard. On 17.7.2004 the matter could not be heard as the 2nd Plaintiff had passed on. The application was then fixed to be heard on 26/01/2005 but the 2nd Plaintiff was yet to be substituted.

On 23.02.05 the Defendants and their counsel were not in court and on 6/4/05 the application did not proceed to hearing and no reasons are given. Then it was dismissed on 10.5.2006 as stated above. What the above shows is that the application was never prosecuted for reasons of the defence absence from court as well as at the Plaintiff's request. That then must dislodge the Respondent's contention that the application has never been prosecuted as attempts to prosecute where at times frustrated by the Plaintiffs.

The application under consideration was filed on 29/10/2008 while the application it seeks to have reinstated was dismissed on 10.5.2006. That by any standard is inordinate delay and as counsel for the 2nd Defendant/Applicant depones in his affidavit, he had not considered it necessary to bring the application and so the contention that it was brought as an afterthought and after inordinate delay has merit.

On the 16th July 2007 the 2nd Defendant filed a Preliminary Objection seeking the same relief's sought by the application sought to be reinstated. This Preliminary Objection has similarly not been prosecuted. In this case I find the reasons for not attending court on 10.05.2005 not plausible and not acceptable. There is also no acceptable explanation for the apparent delay in bringing the application under consideration. For those reasons the application dated 29th October 2008 is found to be unmeritorious and is accordingly dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF DECEMBER, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF

Mrs. Lagat holding brief for Mr. Gicheru for the Plaintiffs

Mr Kiboi holding brief for Mr. Limo for the Defendants

Court Clerk – Paul Ekitela.