



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 272 OF 2002

JOHN OKUMU.....PLAINTIFF

VERSUS

MARY OYUGI.....1ST DEFENDANT

BENJAMIN ODHIAMBO OSIANY.....2ND DEFENDANT

OMULO OGOLLA.....3RD DEFENDANT

ANDITI OJWANG.....4TH DEFENDANT

RULING

INTRODUCTION

1. What is before me is the Plaintiff's Notice of Motion dated 7th September 2016 brought pursuant to Order 12 Rule 7 and Order 17 Rule 2 (2) of the Civil Procedure Rules, seeking that the order of dismissal of the suit herein made on 29th April 2009 be set aside and the suit be reinstated for hearing on merit. The second limb of the Application is that upon reinstating the present suit, order 11 be complied with by the parties forthwith to hasten the process of hearing urgently.

2. The Application is premised on the grounds that Applicant's advocate Joel Mainye died before fixing the case for hearing and the Plaintiff was unable to trace the file from the firm of Mainye & Company Advocates. The Plaintiff was therefore not aware that the suit had been dismissed for want of prosecution. The Application is also based on the Applicant's supporting affidavit sworn on the 7th day of September 2016 in which he depones that after filing this suit, his advocate Joel Mainye applied for the suit to be heard by the Rongo Land Disputes Tribunal. Unfortunately, his advocate died before the case was fixed for hearing. He further depones that he sought assistance from Kituo Cha Sheria and he later engaged the firm of Sagwe & Company Advocates but the file could not be traced for some time.

3. In opposing the Application, the 1st Respondent filed a Replying Affidavit sworn on the 22nd July 2020, in which she depones that the Application lacks merit and is merely filed to delay the due process of law. She depones that the Applicant filed another suit being **Civil Suit No. 264 of 2010 (O.S)** against her and the 2nd Defendant over the same matter but the claim was dismissed in her favour. She further depones that the Applicant filed an Appeal against the said decision but the Appeal was dismissed. She depones that a similar matter having been heard by a court of competent jurisdiction, this court lacks jurisdiction to hear this suit as the same is *res judicata*.

4. On his part the 2nd Defendant filed a Replying Affidavit sworn on 2nd November 2020 in which he depones that after the Plaintiff filed the instant suit the same was referred to Rongo Land Disputes Tribunal which heard and determined the matter on its merits. The award of the Tribunal was filed and adopted as a Judgment of the court. The Plaintiff did not appeal against the said Judgment and the matter was therefore finally determined. He depones that the Plaintiff filed another suit being **KISII HCCC NO. 264 of 2010** between the same parties and the same subject matter and the court held inter alia that the Plaintiff failed to prove that he acquired plots No. 1440, 1450 and 1451 by adverse possession and that the Defendants held the said parcels of land in trust for him hence the Originating Summons was accordingly dismissed with costs to the Defendants. It is the 2nd Defendant's contention that the Applicant's claim against the 2nd Defendant's father MARTINUS OGOLA MALIMU in respect of L.R No. KAMAGAMBO/KANYAJUOK/832 was defeated in view of the adoption of the award of the Tribunal as a Judgment of the court and the same cannot be reopened.

5. He depones that the Applicant has not fulfilled the conditions for reinstatement of the suit as the matter was fully heard and determined on merit and reinstating the same would amount to seeking orders in vain. His contention is that the Applicant's only remedy was to Appeal against the judgment within the statutory period which he failed to do. He contends that the Applicant is guilty of laches and he is therefore not entitled to the orders sought as equity aids the vigilant and not the indolent.

6. The court directed that the Application be canvassed by way of written submissions and both parties filed their submission to argue their positions.

ISSUES FOR DETERMINATION

7. The singular issue for determination is whether the order of dismissal of the suit made on 29.4.2009 ought to be set aside.

ANALYSIS AND DETERMINATION

8. In his submissions dated 21.9.2020 learned counsel for the Applicant submitted that the Plaintiff's suit was dismissed for want of prosecution on 29.4.2009 and the Plaintiff was not aware of the said dismissal as his advocate had died. He concedes that the matter was referred to Rongo Land Disputes Tribunal and the award of the Tribunal was adopted by Rongo SRM's Court. He is of the view that the said award ought to be filed in this honourable court for further directions.

9. Leaned counsel for the 2nd Defendant/Applicant submitted that the Applicant has not fulfilled the conditions for reinstatement of the suit as the matter was fully heard and determined on merit and the same does not lie for determination. He cited the case of **Wanjiku v Tabitha Kamau & 3 others (2014) eKLR** where the court set aside the judgment on the grounds that the Defendant had not been served and also because she was satisfied that the Defendant had a defence that raised triable issues.

10. Unlike the case of Wanjiku Kamau (supra) the Plaintiff herein has not demonstrated that the suit was dismissed without his knowledge. From the proceedings on record, it is clear that the suit was heard on its merits by the Rongo Land Disputes Tribunal whose award was duly adopted by the court. The said award was not challenged by the Plaintiff. Granted that the Plaintiff's advocate died, there is no indication that he was unaware of the proceedings before the Tribunal before his demise as he is the one who had proposed that the matter be referred to the Tribunal. It does not help that the Applicant has not indicated when his advocate died, nor has he attached the proceedings of the Tribunal and my sense is that he is trying to use this as an excuse to reopen the case. I am inclined to believe the 2nd Defendant' version that the suit was heard on the merits and there is therefore no reason why the award of the Tribunal that was adopted as a Judgment of the court should be set aside. In the circumstances, I find no merit in the Application and I dismiss it with costs to the Respondents.

Dated signed and delivered at Kisii this 10th day of February 2021.

J.M ONYANGO

JUDGE