



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE NO. 51 OF 2013

TIROGO KIPTARUS NGETICH.....1ST PLAINTIFF

GEORGE KIBET TARUS.....2ND PLAINTIFF

VERSUS

EVANS KIBET TARUS.....1ST DEFENDANT

MOSES KIPKENEI TARUS.....2ND DEFENDANT

SAMSON KIPRUTO TARUS.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 29th July 2020 seeking for the following orders;

- a) That this Honourable Court be pleased to set aside its orders issued on 5th September 2019 dismissing the applicant's application dated 19th February 2020 herein for want of prosecution, reinstate the same and set it down for hearing upon such conditions as may be determined by the court.
- b) That the costs of the application be provided for.

The application was dismissed for want of prosecution on 10th March 2020 which order was made due to non-attendance of the applicants together with their counsel.

The application is supported by an affidavit sworn by both plaintiffs whereby they depone that their advocate on record informed them that the application dated 19th February 2020 was coming up for hearing on 12th March 2020.

They further deponed that on that date they went to court and waited for their matter to be called out but they never heard it being called necessitating their counsel on record to follow up with the registry whereby he found out that the matter had been listed for hearing on 10th March 2020.

It was their submission that the error was a bonafide and genuine mistake on their counsel's part and that the same should not revisited upon them, that they are interested in prosecuting the application hence pray that the orders made on 10th March 2020 dismissing the application be varied, reviewed and set aside

The defendants have opposed the application through the replying affidavit sworn by the 1st defendant on 30th July 2020 where they contend that the supporting affidavit to the application is fatally defective having failed the requirements of Oaths and Statutory Declarations Act for being sworn by two deponents.

The defendants further stated that this is a 2013 matter which had been dismissed due to the plaintiffs lack of interest in prosecuting the matter hence the application does not serve any purpose as the suit property has already been subdivided vide **Eldoret HCCC No. 28 of 2015** and there is nothing left for this court to determine

That should the court be inclined to allow the application, then an order for payment of thrown away costs Kshs. 20,000/ should be granted.

ANALYSIS AND DETERMINATION

The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 10th March 2020 and reinstate the application dated 19th February 2020 dismissing the suit for want of prosecution.

Courts have inherent powers to make such orders as may be necessary for the ends of justice to be met as provided for under Section 3A of the **Civil Procedure Act**. Order 51 rule 15 of the **Civil Procedure Rules** gives the court power to set aside any order made ex parte.

The test to be applied by the courts in an application for the dismissal of a suit for want of prosecution was laid down in the case of **Ivita vs. Kyumbu (1984) KLR 441**. First, the court has to consider whether the delay is prolonged and inexcusable and secondly, whether justice can be done despite the delay

Further, the court's exercise of this judicial discretion was laid down in the classical case of **Shah -vs- Mbogo & Another (1967) EA 1116**, where the court stated on the matter of its discretion, that

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

In a nutshell, this means that the court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.

I note that this application was filed three months after the application was dismissed. There was no inordinate delay in the lodging of the application.

Consequently, I hereby exercise my discretion and grant orders of reinstatement of the application dismissing the application dated 29th July 2020 and further order that the suit herein is reinstated for hearing and determination. The plaintiffs to pay thrown away costs of Kshs. 20,000/= within 14 days' failure to which the order lapses.

The plaintiff to set down the suit for hearing within 30 days from the date hereof.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF MARCH, 2021

M. A. ODENY

JUDGE