



**Cheboi v Boswony (Environment & Land Case 2 of 2022)
[2023] KEELC 16262 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 2 OF 2022**

L WAITHAKA, J

MARCH 14, 2023

BETWEEN

RICHARD RUTO ARAP CHEBOI PLAINTIFF

AND

STANLEY KELWAN BOSWONY DEFENDANT

RULING

1. Pursuant to a Notice to Show Cause (NTSC) why this suit should not be dismissed for want of prosecution issued by the court to the parties to this suit under Order 17 Rule 2 of the Civil Procedure Rules (CPR), 2010, dated 3rd February 2021, this court (read the Environment and Land Court) dismissed this suit for want of prosecution on 22nd February, 2021.
2. Claiming that he was not served with the NTSC, the plaintiff filed the Notice of Motion dated 27th September 2022 praying that the order of dismissal of the suit be reviewed or set aside and the suit be reinstated and set down for hearing.
3. The application is premised on the affidavit of the counsel for the plaintiff/applicant sworn on 27th September 2022 and the grounds on its face. Essentially, the plaintiff counsel claims that neither he nor his client was served with the NTSC; that the failure of the plaintiff to respond to the NTSC was not deliberate.
4. Terming the plaintiff an innocent litigant who is keen on having the suit determined on its merits, counsel for the plaintiff contends that it is in the interest of just that the application be allowed.
5. In reply and opposition to the application, the respondent, through the affidavit (replying) he swore on 22nd November 2022 contends that both parties were served with the NTSC; that the applicant was aware of the dismissal of the suit and that there was inordinate and unexplained delay in bringing the application for review/setting aside the order of dismissal of the suit. The respondent further contends



- that the conduct of the plaintiff before and after the suit was dismissed disentitles him the orders sought.
6. I have considered the reasons given by the plaintiff in support of the application and the objection by the respondent. The key issue/question arising from the application is whether the parties were aware of the NTSC issued by the court.
 7. The plaintiff/applicant's counsel has, through the affidavit he swore in support of the application, deponed that neither he nor his client was served with the NTSC.
 8. The respondent on his part, has deponed that the parties were served. However, he has not indicated the basis for asserting so. He does not states whether that is information within his own knowledge or information given to him by his advocate.
 9. The court record shows that both the plaintiff and the defendant were absent when the matter came up for hearing on 22nd February, 2021. The respondent in his replying affidavit, has deponed that his counsel did not attend court because he had technical challenges accessing the court online. Yet again, it is not clear whether that averment is based on the deponents own knowledge or on information given to him by his advocate.
 10. I have perused and checked the court record with a view of ascertaining whether there is any proof of service or indication of the mode of service used to effect service of the NTSC on the parties. I found nothing in the court file capable of helping this court to determine with certainty that the parties were indeed served with the NTSC and the mode of service used to effect service on the parties.
 11. In the case of *Trade Circles Limited v. Family Bank Limited & Another* (2021) eKLR it was held:-

“it is unfair and unjust to lock out a party from access to justice if it is not abundantly clear that it is the party that was indolent and delayed after being properly informed and/or served by the Court on the next mention/hearing date.”
 12. There being no evidence of service or mode of service of the NTSC, I will give the benefit of doubt to the plaintiff's counsel who has in his affidavit deponed that neither he nor his client was served with the NTSC. This is not to say that proof of service was required as the law does not require that a NTSC issued under Order 17 Rule 2 be served. All what is required is that the parties be notified of the notice. In that regard see the case of *Celyne Odembo & another v Evaline T Omware & 6 others* [2019] eKLR

“Dismissal of suit for want of prosecutions is governed by Order 17 Rule 2(1) of Civil Procedure Rules, 2010 which provides:
“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.” (emphasis added)
 13. In applying the said legal provisions, the Court has the discretion, which must be exercised judiciously, on whether or not to dismiss a matter.
 14. In *Nilesb Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR it was stated;

“ 11. discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in



prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay”

15. The Court in Nilesh Shah case (ibid) referred to the decision in *Ivita vs. Kyumbu* [1984] KLR 441 where the principles for reinstatement of suit were set out thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

16. On the importance of the giving notice to parties, it was held in *Eunice Soko Mlagui v Suresh Parmar & 3 others* [2018] eKLR, that;

“The rules of natural justice require that before an order adverse to any party is made by a court, that party ought to be heard and be allowed to make representations.”

It is my view that even if the orders sought are granted the defendants will not be unduly prejudiced as they will be accorded an opportunity to defend the suit should they so wish.

17. I have carefully gone through the instant matter and I have ascertained that the following documents requisite for dismissal of a suit are on record; The Notice to Show Cause (NTSC) dated 6th November 2018, issued by Court under Order 17 Rule 2(1), the Affidavit of service dated 17th December 2018 and the Decree dismissing the suit. I am satisfied on their authenticity.

18. Nonetheless, the affidavit of service, is want of some important information and supporting annexures that go into demonstrating that indeed service was effected. In paragraph 3, the deponent, Alice Ntabo, while swearing to the fact that the NTSC was dispatched and accordingly posted, deposed as follows;

“5. That I do confirm that (sic) the same were posted on 1/12/2018 as per the postage stamp/receiving stamp issued by the postal corporation.”

19. In the record, there is no postage stamp/receiving stamp issued by the postal corporation to corroborate the deposition that it was received by the Corporation. In her own words, the deponent says, “as per the postage stamp/receiving stamp issued by the corporation” the NTSC was served. The applicant challenged Service of the NTSC. In their response, the 1st and 2nd Respondents simply state that the applicants were duly served. further in paragraph 9, the 2nd respondent deposed as follows;

“9. That the applicant has not provided any piece of evidence to challenge the fact of service but merely alleges that she was not served.”

20. Two things emerge from the above scenario. First, it is an extremely arduous task to expect a litigant to prove the negative. In this scenario, to expect the applicant to prove that she did not get service is



to overstretch the burden of proof as envisaged under section 107 of the Evidence Act (Cap 80 Laws of Kenya).

21. Therefore, this is one of those instances where the burden of proof shifted to the respondents. They had the option of calling the court bailiff as a witness to give evidence and produce receipts stamped by the Corporation to prove that indeed posting was duly done; see also Order 5 Rule 16 of the Civil Procedure Rules, 2010.
22. Accordingly, I find and hereby hold that the applicant was not duly served. In the premises, the dismissal of the suit was unprocedural for want of proper service and the requirements of the doctrine of natural justice as recognized in *Re Hebtulla Properties Limited* (1976-80) 1 KLR 1195 at 1209. To that end, I find that the applicants have established a sufficient cause to allow reinstatement of the suit.
23. One important question that I must address is the nature of prejudice if at all, that will be suffered by the respondents in the event of a reinstatement. In doing so, it is not lost on this Court that a defendant or respondent must satisfy that he will be dealt a huge injustice due to the delay. He has the obligation to demonstrate that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.
24. In the instant case, the respondents have not raised any tangible prejudice that a reinstatement will cause. The 2nd respondent only mentions in paragraphs 13, 14 and 15 of his replying affidavit that his proprietary interests in the suit property was unchallenged; that he is a bona fide purchaser and he has not committed any breach by developing the suit properties. Notably, he does not indicate the nature of prejudice or injustice that will be visited upon him as a result of a reinstatement. As such, I do find and hereby hold that the totality of the circumstances of the case call for a reinstatement. It is in the interests of justice that the parties be heard. The injustice likely to be caused to the applicant by a dismissal will be greater than the harm that will be suffered by the respondents as a result of the reinstatement.
25. In the end, I hereby allow the application dated 23rd July 2019 in terms of only orders 2 and 4 sought therein.
26. Although the manner in which the plaintiff conducted the suit before and after its dismissal has not struck me as the conduct of a serious litigant, on account of lack of evidence of service or information on how service was effected on the parties, I am inclined to allow the application but on condition that the plaintiff will take measures to ensure that the suit shall be heard and determined within ninety (90) days from the date of delivery of this ruling. If the suit shall not be heard and determined within the time given, upon lapse of the time herein given, the suit shall automatically stand dismissed with costs to the defendant.
27. Orders accordingly.

RULING READ, DELIVERED, DATED AND SIGNED AT 14TH DAY OF MARCH, 2023

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:

N/A for the plaintiffs

Cheboi for the defendants

Christine Towett – court assistant

