REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 158 OF 2017

EUNICE NELIMA WEBO & RODAH NASIKE WAFULA

(Suing as the legal representatives of the estate of SIMON WELANGAI MAKUTO).....PLAINTIFFS

VERSUS

BUTLIN LUVONGA WEKESA

(Suing as legal representatives of the Estate of JAVANWEKESA SONGOI)

LAND REGISTRAR BUNGOMA.....DEFENDANTS

R U L I N G

On 23rd June 2021, this Court on it's own motion and having issued notices to the parties dismissed the plaintiffs' suit for want of prosecution.

I now have before me the plaintiffs' Notice of Motion dated 28th July 2021 and premised under the provisions of **Sections 3** and **3A** of the **Constitution** as well as **Order 12 Rule 7** of the **Civil Procedure Rules** seeking the following Orders: -

1. **Spent**

2. **Spent**

3. **That the Court's order dated 23rd June 2021 dismissing this suit for want of prosecution be set aside.**

4. **That costs of this application be provided for.**

The application is premised on the grounds set out therein and is also supported by the affidavit of **MR DAVID WERE** Counsel for the plaintiffs.

The gist of the application is that although this Court directed that notices of dismissal be served, the plaintiffs' Counsel was not served yet they are still interested in prosecuting this suit. That on 27th July 2021, the plaintiffs' Counsel was surprised when he was served with the defendants' bill of costs. That the notices of dismissal were only served upon the Counsel for the 1st and 2nd defendants and the notice for Counsel for the plaintiffs may have erroneously been served upon another firm also bearing the name **D. L. WERE & WERE ADVOCATES** based in **ELDORET** due to similarly of names. However, the plaintiffs' Counsel practices under the name **WERE & COMPANY ADVOCATES** but are based in **BUNGOMA**. That on the date when the plaintiffs' suit was dismissed, Counsel was infact within the precincts of this Court handling two (2) criminal cases at the High Court and could not have willfully failed to attend this crucial land matter. That in preparation for the hearing of the suit, Counsel had prepared, filed and served the plaintiffs' documents and even prepared a draft statement of agreed issues and it is Counsel for the 1st defendant who has adjourned the matter severally when it came up for pre – trial directions. That the 1st defendant has already filed his bill of costs in the sum of Kshs. 987,145/= and if the same is taxed, the plaintiffs will have been condemned un –heard. It is in the interest of justice therefore that this application be allowed.

Annexed to the affidavit are the following documents: -

1. **Affidavit of service by SARAH W. KAMAU, a Process Server of this Court, dated 22nd June 2021.**

2. Notices for dismissal of suit addressed to the parties.

3. Counsel's diary for 23rd June 2021 showing the cases he handled on that day.

4. Statement of agreed issues drawn by plaintiffs' Counsel.

In opposing the application, **MR OMUNDI BW'ONCHIRI** Counsel for the 1st defendant filed a statement of grounds of opposition dated 3rd August 2021 describing the application as frivolous, vexatious and an abuse of the due process of the Court. That the Certificate of Urgency dated 28th July 2021 clearly demonstrates that Counsel for the plaintiffs is **D. L. WERE ADVOCATES OF P. O. BOX 1809 – 50200 BUNGOMA** and this suit which is now 3½ years in Court was last mentioned on 11th December 2019. That the delay in having this case heard has not been caused by the 1st defendant and in any event, this suit is a non – starter as is clear from the defence. Further, that this Court gave notice of dismissal both through its official website and cause list and therefore, the allegation of non – service is unfounded, baseless and hollow.

The application has been canvassed by way of written submissions. These have been filed both by **MR DAVID WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the plaintiffs and by **MR OMUNDI BW'ONCHIRI** instructed by the firm of **OMUNDI BWONCHIRI ADVOCATES** for the 1st defendant. The 2nd defendant did not file any response to the application.

I have considered the application, the supporting affidavit and annextures thereto as well as the grounds of opposition and submissions by Counsel.

In his submissions, **MR WERE** has taken issue with the fact that the 1st defendant opted to file grounds of opposition through which he ventilated issues of facts instead of addressing the law. It is correct that grounds of opposition should only address issues of law and no more. The 1st defendant has raised issues of facts in his grounds of opposition which ought to have been done through a replying affidavit. However, rather than treat the application as un – opposed, I shall invoke the provisions of **Article 159(2) (d)** of the **Constitution** and consider those grounds of opposition as a sufficient reply to the application.

Order 17 Rule 2(1) of the **Civil Procedure Rules** provides as follows: -

> **"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 it's satisfaction, may dismiss the suit."** Emphasis added.

It is clear from the above that under **Order 17 Rule 2(1)** of the **Civil Procedure Rules**, it is not mandatory that the Court gives a party notice before dismissing a suit where no step has been taken for one year. It is also clear that the dismissal of such a suit is not mandatory. Rather, it is permissive hence the use of the word ***"may"***. Having said so, before this suit was dismissed on 23rd June 2021, this Court had made the following orders on 15th February 2021.

> **"TAKE NOTICE that the above suit shall be placed before HON MR JUSTICE BOAZ N. OLAO on 23rd June 2021 for dismissal unless sufficient cause is shown as to why such order should not be made."**

Those notices dated 23rd February 2021 were then handed over to **SARAH W. KAMAU** a Senior Court Bailiff attached to this Court for purposes of service upon the parties. **MR WERE** has submitted that the dismissal notice was not served upon his office and may have been served upon another firm bearing an almost similar name of **D. L. WERE ADVOCATES** and based in Eldoret and not his firm whose name is **M/S WERE & COMPANY ADVOCATES** based in Bungoma. Counsel also points to the fact that the Notice purportedly served on his office has the name **BUNGOMA** cancelled and substituted with **ELDORET**. **MR BWONCHIRI** on the other hand has made the following submissions on that issue: -

> **"We urge your Honour to find that there was proper Notice issued by Hon Court both through the Court's official website and cause list hence the allegation of non – service is unfounded and a gimmick by the plaintiffs to ask for sympathy from the Hon Court while aware that service was proper."**

Whether or not there was communication through the Court's official website and cause list, the view I take of the matter is that the Court having directed that ***"Notices to issue that the suit will be dismissed on 23rd June 2021 unless cause is shown to the contrary,"*** and further, those notices having been handed over to the Court Bailiff for service upon the parties, then it was imperative that those notices are brought to the attention of the parties. That could only have been through a proper service. The term serve is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

> **"1: To make legal delivery (of a notice or process …….**
>
> **2: To present (a person) with a notice or process as required by law ……"**

Was there proper service upon Counsel for the plaintiffs? Service of Court processes is a very important element in the administration of justice. Even if there be one reason or another to deny a party audience before the Court, it can never be justified if the party had no notice of the case facing him. That is what the Rules of Natural justice embody. That is also why there is a Constitutional imperative under **Article 50 (1)** of the **Constitution** on fair hearing.

I have looked at the dismissal notice that was purportedly served upon the plaintiffs' Counsel. It bears the name ***"D. L. WERE & CO ADV BOX 1809 BUNGOMA."*** However, the name **BUNGOMA** is cancelled and replaced with **ELDORET**. Counsel for the plaintiffs has stated and it is not in dispute, that he practices under the name **M/S WERE & CO ADVOCATES BUNGOMA** and not **D. L. WERE ADVOCATES** who are based in **ELDORET**. I also notice from the said dismissal notice that whereas there is a stamp of the firm of **OMUNDI BWONCHIRI ADVOCATES** indicating that they are no longer on record and also remarks to the effect that the Attorney General was served, there are no such comments as against the name of **D. L. WERE & CO ADVOCATES**. **MR WERE** has annexed to his supporting affidavit a page of his diary for 23rd June 2021 showing that he was in **BUNGOMA HIGH COURT** on that day and could not therefore have failed to attend Court had he been served with the dismissal notice. Taking all the above into account, I am persuaded that there was no service of the dismissal notice upon the plaintiff's Counsel.

It is also clear as I have stated above that the dismissal of a suit for want of prosecution is not automatic. That decision is only made taking into account the particular circumstances of each case. These will include, but are not limited to, whether there has been inordinate delay, the prejudice that will be occasioned to the other party etc. In the case of **IVITA .V. KYUMBU 1984 KLR 441 CHESONI J** (as he then was) laid down the following guidelines that a Court should consider in an application of this nature.

> **"The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is both for 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 week due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the Court that he 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 it's 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."**

In **JASON MUDAKI KIVATI .V. DAVID KENYANI ONGUSU 2018 eKLR**, the Court held as follows: -

> **"It is clear therefore that while exercising it's discretion whether or not to dismiss a suit for want of prosecution, the Court will consider whether the delay is inordinate, if so, is it excusable and any prejudice that will be caused to the other party. The Court will also consider if justice can still be done to the parties notwithstanding the delay. It must also be remembered that under Article 50 of the Constitution, a party has a right to a fair trial and unless such a trial is no longer possible, a Court should aim at saving rather than dismissing a suit."**

I am also guided by the words of **AINLEY J in JAMNADAS SODHA .V. GORHANDAS HEMRAJ 1952 7 U.L.R 11** that: -

> **"…… it should always be remembered that to deny the subject a hearing should be the last resort of a Court ……."**

Guided by the above, the plaintiffs' suit was dismissed on 23rd June 2021 and on 27th July 2021, Counsel was served with the 1st defendant's bill of costs. This application was filed on 28th July 2021 just a day later. There is therefore no delay. I have not heard the 1st defendant allege that he will suffer any prejudice if this suit is reinstated to hearing. The case of **KESTEM COMPANY LTD .V. NDALA SHOP LTD & OTHERS 2018 eKLR** cited by Counsel for the 1st defendant does not aid his case because the delay in that case was 10 years and the Judge found it to be inordinate. As I have already stated above, there is no delay in this case.

In **KESTEM COMPANY LTD** (supra), **OMBWAYO J** while dismissing an application to reinstate a dismissed case made the following observations: -

> **"On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that the delay of 10 years has not been satisfactorily explained and is (sic) and do further find the delay is a source of prejudice to the Respondent as it affects the administration of justice. Article 47 of the Constitution of Kenya 2010 provides for the right to Administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said Constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of the Constitution of Kenya 2010 as the failure delayed justice in the matter."**

Those finds are very distinguishable from the circumstances in this case as there is absolutely no delay in this matter.

The up – shot of the above is that having considered all the issues in this case, I make the following orders: -

1. **This Court's orders issued on 23rd June 2021 dismissing this suit for want of prosecution are set aside.**

2. **The matter be mentioned virtually before the Deputy Registrar on 24th November 2021 for purposes of taking a date for hearing.**

3. **Costs shall be in the cause.**

BOAZ N. OLAO.

J U D G E

3RD NOVEMBER 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 3rd day of November 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

3RD NOVEMBER 2021.

Explanatory notes: -

This ruling was due for delivery on 14th October 2021 but I was un – well and out of the station until 27th October 2021. The delay is regretted but was inevitable given the circumstances.

BOAZ N. OLAO.

J U D G E

3RD NOVEMBER 2021.