



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND COURT CASE NO. 34 OF 2013

JOAN NELIMA CHESOLI.....PLAINTIFF

VERSUS

FRED MUKHEBI CHESOLI.....1ST DEFENDANT

SAMMY WANYONYI CHESOLI.....2ND DEFENDANT

BARASA CHESOLI.....3RD DEFENDANT

BENARD SIMIYU CHESOLI.....4TH DEFENDANT

DANCAN WAFULA CHESOLI.....5TH DEFENDANT

CHRISTOPHER WASIKE CHESOLI.....6TH DEFENDANT

RULING

This is in respect to the plaintiff's Notice of Motion dated 28th January 2019 seeking the main order that her case which was dismissed for want of prosecution be reinstated for hearing and final disposal.

The application is supported by the plaintiff's affidavit in which she has deponed, inter alia, that she had instructed the firm of **WANYAMA WANYONYI ADVOCATES** to file this suit on her behalf which they did and the defendants filed a defence through their **ADVOCATE M/S ANNET MUMALASI**. However, her advocate passed away in a violent manner before the suit could be listed for hearing. She was informed that another advocate would take over the firm of her deceased advocate but after a long wait, she realized that nothing was happening and that is when she started visiting the Court to enquire about her file and it was not until 21st January 2019 when she learnt that it was traced in the archives having been dismissed. That she was not served with the dismissal notice otherwise she would have attended and shown cause why the suit should not have been dismissed. In any case, even the defendants' advocate did not attend Court and the Court moved on it's own motion. It is her plea that this case be heard on it's merits.

The defendants filed grounds of opposition dated 29th April 2019 and raised the following, inter alia:-

- 1. That the application is an afterthought lacking merit and should be dismissed with costs.**
- 2. That the plaintiff has not come to Court with clean hands and is also guilty of laches as she has not explained why she did not move the Court between 15th November 2016 and 30th January 2019 and cases belong to parties not advocates.**
- 3. That upon the demise of MR WANYAMA ADVOCATE, MR EDWINS KWEYU ADVOCATE was appointed by the Law Society of Kenya to wind up the firm and so the plaintiff is indolent and cannot blame her advocate.**

The 2nd defendant **SAMMY WANYONYI CHESOLI** also filed a replying affidavit reiterating the grounds of opposition above.

The application has been canvassed by way of written submissions which have been filed both by **MR OMUKUNDA ADVOCATE** for the plaintiff and **MS MUMALASI ADVOCATE** for the defendants.

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

I have also perused the record herein and I find that on 25th October 2016, this suit came up for dismissal and notices had been issued to the firm of **WANYAMA WANYONYI ADVOCATE** for the plaintiff and **ANNETE MUMALASI ADVOCATE** for the defendants. Against the name of **WANYAMA WANYONYI ADVOCATE** there is also the name of **KWEYU ADVOCATE BUNGOMA**. It would appear that the said notices were not served because when the matter came up before **MUKUNYA J** on 25th October 2016, the late Judge made the following order:-

“No appearance of parties. No return of service. The same to be filed. Dismissal on 15th November 2016”

From the record, fresh notices dated 3rd November 2016 were issued to both **ANNETE MUMALASI ADVOCATE** for the defendants and **WANYAMA WANYONYI ADVOCATE** for the plaintiff indicating to them that the suit would come up for dismissal on 15th November 2016 unless sufficient cause is shown why such an order should not be made.

From the record, on 15th November 2016 the Judge made the following order:-

“Parties are absent. They are served. Suit dismissed under Order 17(2) CPR.”

It is not clear exactly when the plaintiff’s previous advocate **MR WANYAMA** passed away but in her submissions, **MS MUMALASI** states that it was in 2013. That is not really in dispute. In that case, the notices for dismissal dated 3rd November 2016 directing that the suit would be dismissed on 15th November 2016 were directed at a deceased person. If **MR KWEYU ADVOCATE** was appointed to wind up the firm of **WANYAMA WANYONYI ADVOCATE**, it is not clear if he was made aware about the notices of dismissal dated 3rd November 2016. I notice that the notices for dismissal dated 4th August 2016 and which showed that the suit would be coming up for dismissal were also directed at the firm of **KWEYU ADVOCATE**. However, the notices dated 3rd November 2016 were not similarly directed to that firm. In the circumstance, when the plaintiff depones as she has done at paragraphs 5 and 6 of her Supporting Affidavit:-

5 “That I on many occasion visited my advocates offices as there as (sic) an indication that another advocate could take over the office.”

And,

6 “That after a long time I realized that the offices would not operate and that is when I started visiting the Court house in search of my file.”

those averments cannot be dismissed off hand. She is simply saying that she did not know that the firm of **KWEYU ADVOCATE** would henceforth handle her suit. It would be harsh to punish her given those circumstances.

On the issue of laches, the plaintiff has averred, and that has not been rebutted, that it was not until 21st January 2019 when she sought the services of her current advocate that her file was traced in the registry having been dismissed. This application was thereafter filed one week later on 28th January 2019. While it is true that the dismissal order was made on 15th November 2016 almost three (3) years ago, it would be unjust to blame the plaintiff for what transpired then because she did not have notice of either the dismissal or that the firm of **KWEYU ADVOCATE** was now seized of her matter. And as I have already indicated above, there is no evidence that the firm of **KWEYU ADVOCATE** had notice of the said dismissal.

In the circumstance, the Notice of Motion dated 28th January 2019 is well merited and must be allowed. To drive a party from the right to litigate his case in a situation such as this one where the plaintiff has expressed a desire to prosecute this suit and is not to blame for the dismissal order would be unjust. I would also not penalize the plaintiff with costs given the history of this matter.

Ultimately therefore, I make the following Orders:-

- 1. The dismissal order dated 15th November 2016 is set aside.**
- 2. The parties to comply with the pre – trial procedures and have this suit ready for hearing.**
- 3. This appears to me to be a matter for the subordinate Court and with the consent of the parties, I intend to transfer it to that Court.**
- 4. No orders as to costs.**

Boaz N. Olao.

J U D G E

11th July 2019.

Ruling dated, delivered and signed in Open Court this 11th day of July 2019 at Bungoma.

Mr. Wamalwa for Ms Mumalasi for defendant present

Mr. Onyando for Mr Omukunda for defendant present

Plaintiff present

Gladys – Court Assistant present

Court:- By consent of the parties, this suit is hereby transferred to the Chief Magistrate's Court, Bungoma for hearing and final disposal. It be mentioned in that Court on 1st August 2019 for purposes of fixing a hearing date.

Boaz N. Olao.

J U D G E

11th July 2019.