REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 675 OF 2017

(Formerly Kisii Elc Case no. 492 OF 2012)

GEORGE OUMA ODHIAMBO.....PLAINTIFF/APPLICANT

VERSUS

PHILIP JUMA OKELLO.....DEFENDANT/RESPONDENT

AND

MICHAEL OWITI OMOGO.....INTERESTED PARTY

RULING

1. This ruling is in respect of an application by way of a Notice of motion dated 7th January 2019 and filed in court on 8th January 2019 under sections 1A,1B,3 3A and 63 (e) of the Civil Procedure Act, Article 159 (d) of the Constitution of Kenya 2010 Order 12 Rule 7 of the Civil Procedure Rules and all enabling provisions of the law. The applicant who is the plaintiff and represented by Kwanga Mboya and company Advocates herein is seeking the following orders:-

a) Spent

b) THAT the order dismissing the suit herein for want of prosecution be set aside and or vacated.

c) THAT the suit be reinstated for hearing inter partes.

d) THAT suit be certified to be heard expeditiously on priority basis.

e) THAT this Honourable court be pleased to issue directions for proper and fair hearing of this matter.

2. The application is premised on 17 grounds on it's face. These include:-

i. THAT the suit herein was dismissed for want of prosecution on the 22nd November 2018 in the absence of the counsel for the plaintiff but due to the fact that despite the fact that Notice to show cause was served upon a secretary one Irene Muli who never diarised the same hence was not aware that it was scheduled for hearing on the 22nd November 2018, besides the said secretary has also since left employment with the applicant's counsel whose failure to attend court was not deliberate hence excusable.

ii. THAT in any event the principal of natural justice dictate to us that an advocates mistake ought not to be visited on the client.

iii. THAT the applicant will be condemned unheard if this matter is not reinstated and heard on merit inter partes.

iv. THAT this application has been brought without any delay and ought to be certified urgent and heard expeditiously under the court policy of expeditious disposal of hearing.

v. THAT the applicant will suffer great prejudice and injustice if the suit is not reinstated on the other hand the respondents will not suffer any prejudice if the matter is reinstated for hearing interpartes on merit.

vi. THAT the applicant has always pursued matter and he has therefore been vigilant and not in any way indolent and the court ought to grant an order of reinstatement and preservation of the property pending the hearing of this application and the entire suit.

3. The application further finds support in a 21 paragraphed supporting affidavit sworn on even date by the applicant's learned counsel, Mr. T. Kwanga Mboya (not Shadrack Amakoye Balimo as indicated therein). It is deponed, inter alia, that failure to attend court on the part of the applicant was not deliberate despite the fact that the notice to show cause was served on his secretary Irene Muli who failed to diarise the matter and has since left employment with the applicant's counsel hence the mistake is excusable.

4. In his replying affidavit sworn on 18th March 2019 and filed in court on 20th March 2019, the defendant Philip Juma Okello (the respondent) who is represented by learned counsel, Mr. Agure Odero, opposed the application. He deponed, inter alia, that the same is a caught up with laches doctrine under **Article 159 of the Constitution of Kenya 2010** and it should not be entertained . That the applicant did not swear an affidavit to corroborate the averments of his counsel thereof thus sought dismissal of the application with costs.

5. The respondent further deponed as follows;-

> ***a) THAT this suit that was filed in 2012 and no appropriate action has been taken, Article 159 of the Constitution is very clear that laches in a suit should not be entertained.***
>
> ***b) THAT an Advocate can not swear an affidavit without his client's affidavit to corroborate the averments thereof.***

6. By his submissions dated 3rd May 2019, learned counsel for the applicant referred to the orders sought in the application and urged this court to consider issues (a) to (e) therein which include whether failure by the applicant's counsel to attend court was deliberate or in execusable and whether the applicant is likely to be unfairly condemned, unheard. That the applicant has always pursed this matter and that he be given a chance to prosecute his case in the interest of justice in the circumstances.

7. In his submission dated 8th September 2019, learned counsel for the respondent urged the court to dismiss the application as litigation has to come to an end. Counsel also submitted, inter alia, that justice delayed is justice denied as provided under **Article 159 (supra).** That the application is caught up with laches and that the suit was dismissed as the applicant failed to give proper reasons for his failure to prosecute the same.

8. I have duly considered the entire application, the replying affidavit and submissions by counsel for the respective parties herein. So, is the instant application merited in the circumstances?

9. The applicant is challenging this court's orders made pursuant to **Order 17 rule 2 (supra)** which reads:-

> ***"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."***

10. The application is brought under the provisions of the law which I note accordingly. In particular, **Order 12 rule 7 of the Civil Procedure Rules 2010** provides thus;-

> ***"Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set a side or vary the judgment or order upon such terms as may be just "***

11. The notice to show cause was brought after one (1) year and 7 months as the suit was last in court for hearing on 24th May 2017. The said notice under **Order 17 rule (2) (supra)** was issued on 4th July, 2018 and received by the respondent counsel on 9th October 2018 as admitted by counsel for the applicant.

12. It is common baseline that the suit was dismissed on 22nd November 2018. The instant application was commenced on 8th January, 2019. In that regard, was the application originated timeously?

13. In the case **of Chairman, Kenya National Union of Teachers and another –vs- Henry Inyangla and 2 others (2018) eKLR,** the applicant prayed for an extension to file notice of appeal out of time after 15 months. However, the Supreme Court of the Republic of Kenya disallowed the application on the ground of inordinate delay.

14. **Article 159 (2) (b) of the Constitution of Kenya,2010** stipulates that justice shall not be delayed. **Section 3 of the Environment and Land Court Act, 2015 (2011)** provides for the overriding objective of this court whose ultimate goal is to dispense justice without delay.

15. Notably, the suit was filed on 26th October, 2012. It remained unheard for close to fix (6) years until it was dismissed upon sufficient notice duly served on the respondent's counsel.

16. This court is aware that mistake of counsel should not be visited upon a client; see **Shabir Din –vs- Ram Parkash Anand (1955) EACA Volume -22 page 48.**

17. It is trite law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see **Onyango Oloo –vs- Attorney General (1986-1989) EA 456** and the case of **James Kanyiita Nderitu and another –vs- Mariosphilotas Ghikas and another (2016) eKLR.**

18. In the case of **Mwangi and another –vs- Mwangi (1986) KLR 328,**it was observed that land is an extremely important aspect of the

lives of ordinary people and land cases must be heard as quickly as possible by any forum provided by law or as agreed by parties. That such cases must get better priority than even accident injury cases. I fully endorse the said observation owing to the nature of land disputes in our society including the instant dispute.

19. Be that as it may, the applicant was accorded a chance for the hearing of his matter as he was duly served before the adverse decision was taken against him on 22nd November 2018. There was inordinate delay on his part to prosecute his suit which was dismissed in accordance with the law. He has not advanced any sufficient reasons to fortify the instant application.

20. Moreover, the cardinal principle is that litigation has to come to an end; see **Halsbury's Laws of England (4th Edition) Volume 22 page 273** and the decision in **Eunice Wangui Muturi –vs- Francis Kamande and another (2017) eKLR**. Therefore I decline to grant the orders sought in the application.

21. The upshot is that the application dated 7th January 2019, is absolutely without merit. I proceed to dismiss the same with costs to the respondent.

22. It is so ordered.

DELIVERED, DATED and **SIGNED at MIGORI this 2nd day of October 2019.**

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Agure Odero learned counsel for the defendant/respondent

Tom Maurice – Court Assistant.