



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU

ELC CASE NO. 41 OF 2012

CHRISPINE ONYANGO OTIENO.....PLAINTIFF

VERSUS

THOMAS FRANCIS OUMA OTIENO.....1ST DEFENDANT

JOHN OWINO OTIENO.....2ND DEFENDANT

RULING

1. Through the notice of motion dated 30th October 2017, **Chispine Onyango Otieno**, the Plaintiff, seeks for setting aside and or vacating and reinstating his suit dismissed on the 19th October 2017. The Plaintiff listed four grounds on the face of the application which is supported by his affidavit sworn on the 30th October 2017 to which is attached among others, two documents from Ukwala Sub County Hospital showing that the Plaintiff had been attended there following a road traffic accident on the 14th February 2017.
2. The application is opposed by **Thomas Francis Ouma Otieno**, the 1st Defendant, through the grounds of opposition filed through M/S Moses J. Orengo Advocates dated 13th November 2017.
3. The application came up for hearing on the 7th February 2018 when the Plaintiff in person and Mr. Orengo, learned counsel for the 1st Defendant, made their oral submissions.
4. The issues for determination are as follows;
 - a) Whether the Plaintiff has shown reasonable cause why his suit should not have been dismissed for want of prosecution.
 - b) Who pays the costs.
5. The court has after considering the grounds on the notice of motion, grounds of opposition, affidavit evidence, the oral submissions tendered come to the following findings;
 - a) The suit was commenced by the Plaintiff in person through the plaint dated 29th August 2012 and filed on the 31st August 2012. That the two named Defendants filed their joint statement of defence dated 20th September 2012 on the 24th September 2012 in person. The Plaintiff filed his reply to the defence dated 16th November 2012 on that same date and obviously, the pleadings closed after 14 days thereafter in accordance with **Order 2 Rule 13** of Civil Procedure Rules.
 - b) That the 1st Defendant filed the notice of motion dated 23rd January 2013 seeking for the dismissal of this suit in view of Land disputes Tribunal case No.Siaya/94/2010 and Kisumu H.C CA No.193 of 2011 which had been decided. The Plaintiff then filed the notice of motion dated 22nd October 2015 seeking among others to set aside the order given on the 6th April 2011 in Siaya R.M. Land Case No.SYA/13/2011 and for stay of execution of the High Court order of 6th April 2011. The 1st Defendant appointed M/S Moses J.A. Orengo Advocate who came on record vide notice dated the 29th February 2016, and through whom the replying affidavit by the 1st Defendant sworn on the 29th February 2016 was filed.
 - c) The notice of motion filed by the Plaintiff dated 22nd October 2015 was heard on the 10th May 2016 and the ruling delivered on the 22nd June 2016 dismissing it with costs in the cause. That no other action was taken by the parties for over one year by the time the court issued and served the Notice to show cause dated the 14th July 2017 under **Order 17 Rule 2** of Civil Procedure Rules.

That it is apparent that both the Plaintiff and counsel for the 1st Defendant received the notice to show cause but the Plaintiff did not attend the court as required on the 19th October 2017 to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff in reply to the 1st Defendant's counsel's submission, on the 7th February 2018 indicated that he had arrived late to court on that day of the notice to show cause. There is however nothing in the record or in the notice of motion dated 30th October 2017 to confirm that allegation.

d) That in deciding whether or not the Plaintiff's application has merit, the court has looked at the grounds on the notice of motion, the supporting affidavit and the Plaintiff's oral submissions to find out whether he has set out any reasonable grounds, that he would have presented had he attended court when the order to dismiss the suit was made. That the hospital documents attached to the supporting affidavit only confirms that the Plaintiff would not have taken any such step for the period of the two weeks that he was admitted in hospital from 14th February 2017. That as the period of one year from the date of the ruling of 22nd June 2016 ended on or about the 21st June 2017, and that the notice to show cause was not issued until the 14th July 2017, the court finds that no reasonable cause has been shown why no action had been taken for more than one year.

6. That for the above reasons, the Plaintiff's notice of motion dated 30th October 2017 is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF MAY 2018

In presence of;

Plaintiff Present

Defendants 1st present

Counsel Mr. Orengo for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE