



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. NO. 374 OF 2015 (FORMERLY HCC 63 OF 2006)

PAUL ONYANGO SULE.....PLAINTIFF

VERSUS

CHARANJIT SINGH HAYER.....1ST DEFENDANT

GURGUX SINGH HAYER.....1ST DEFENDANT

RULING

1. Paul Onyango Sule, the Plaintiff, filed the application dated 13th November 2017 seeking for the order of 30th March 2017 dismissing the suit to be discharged and or set aside and the suit be reinstated plus costs. The application sets out ten grounds marked (i) to (x) on its face and is supported by the affidavit of the Plaintiff sworn on the 13th November 2017. The Plaintiff's case from the grounds and the affidavit evidence is that the delay in prosecuting the case was due to break down of communication between him and M/s Onsongo & Co. Advocates who were his counsel on record then.

2. The notice of motion came up for hearing on the 17th April 2018 when M/s Otieno for M. M. Omondi for the Plaintiff submitted that no replying papers in opposition had been filed and the application should be granted as prayed.

3. The issues for determination are as follows;

a) Whether the Plaintiff has presented sufficient explanation for delaying for more than one year without taking steps to prosecute this case.

b) Who pays the costs of the application.

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the Plaintiff, the record and come to the following determinations;

a) That this suit was commenced by the Plaintiff through the plaint dated 2nd May 2006 and filed on 3rd May 2006 in person. The suit names Charanjit Hayer and Gurbux Singh Hayer as the 1st and 2nd Defendants respectively.

b) That M/s Ouma Njoga & Company Advocates entered appearance for the 1st Defendant through the Memorandum of Appearance dated 3rd July 2006. They then filed the 1st Defendant's statement of defence dated 23rd August 2006 on the 25th August 2006.

c) That a letter of consent dated 15th October 2009 and filed in court on the 13th July 2010 was entered on the 8th August 2011 settling the suit. That a decree was issued on the 13th December 2012.

d) That the court issued the notice to show cause dated 9th March 2017, under **Order 17 Rule 2 of the Civil Procedure Rules**, for hearing on the 30th March 2017. The notice was addressed and served upon M/s Onsongo & Co. Advocates for the Plaintiff on the 13th March 2018 and upon the counsel for the Defendant. That M/s Onsongo & Company Advocates had filed their notice of appointment of Advocate dated 7th September 2013 on the 10th September 2013 and when the notice come up for hearing on the 30th March 2015, the counsel indicated that they did not have the file on the matter and that it may be dismissed. That the court went ahead to make the dismissal order now sought to be set aside and or discharged.

e) That in view of the finding in (c) above, the suit filed by the Plaintiff has already been wholly settled and the decree issued. That the notice to show cause dated 9th March 2017, the proceedings and order of dismissal of 30th March 2017 were all issued in error as there was then no suit pending capable of being dismissed since the entry of the consent order on the 8th August 2011. That

accordingly the notice of motion by the plaintiff dated 13th November 2017 though unopposed is incapable of being allowed as the order it seeks to set aside is a nullity having been issued in a settled suit.

f) That for whatever is worth, the court has noted that there is no evidence of service of the notice of motion dated 13th November 2017 upon counsel on record for the Defendant. That though counsel for the Plaintiff had on the 11th February 2018 informed the court that they had served the notice of motion, he had gone ahead to state that they had not filed an affidavit of service. That the court has perused the record and noted no affidavit of service of the said notice of motion has been filed to date as the one by James Otieno Okundo, sworn and filed on the 16th April 2018, is about service of a hearing notice.

5. That for the reasons set out above, the Plaintiff's notice of motion dated 13th November 2017 has no merit and is dismissed with no orders as to costs. That for avoidance of doubts, this suit remains settled in terms of the letter of consent dated 15th October 2009, signed by the Plaintiff and counsel on record for the 1st Defendant, that was filed on 13th July 2010 and adopted as an order of the court on the 8th August 2011. That the file is therefore ordered closed.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF OCTOBER 2018

In the presence of:

Plaintiff Present

Defendants Absent

Counsel M/s Otieno for M. M. Omondi for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE