



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 352 OF 2012

DAVID NZUMA.....1ST PLAINTIFF

NDUKU DANIEL.....2ND PLAINTIFF

VERSUS

STANLEY GATHOGO GIKONYO.....1ST DEFENDANT

LAND REGISTRAR.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 8th October, 2019 filed under a Certificate of Urgency, the 1st Defendant/Applicant is seeking for the following orders:-

a. Spent.

b. That this Honourable Court do issue an order of reinstatement reinstating this suit.

c. That costs be in cause.

2. The Application is supported by the Affidavit of the 1st Defendant/Applicant. The Application was not opposed by Plaintiffs/Respondents.

3. The court issued a notice to show cause why this suit should not be dismissed for want of prosecution dated 2nd March, 2018 pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules, 2010. Both the Applicant and the Respondents were absent in court on that date. The court proceeded to dismiss the suit for want of prosecution.

4. In support of his Application, the Defendant/Applicant deponed that he filed a Counter-claim dated 31st October, 2012 which he is desirous of prosecuting; that he came to learn in the year 2019 that the 1st Plaintiff/Respondent died as per the Confirmation of Grant attached to his Affidavit and that his previous advocate was not served with the Notice to show cause why the suit should not be dismissed. The Applicant has asked the court to reinstate this suit failure to which he will be prejudiced.

5. I have read and considered the Application and the Supporting Affidavit. The only issue for determination is *whether there are sufficient reasons that warrant the reinstatement of the suit*. Reinstatement of this suit as sought by the Applicant is discretionary. The discretion is couched under Order 12 Rule 7 of the Civil Procedure Rules 2010 as follows:-

“Setting aside Judgment or dismissal.

Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

6. The court issued a notice to show cause why this suit should not be dismissed pursuant to the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules. However, neither the Plaintiffs nor the Defendants attended court on the date the Notice came up for hearing. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

“(2) 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.

(2) *If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*”

7. The record shows that this suit was commenced by way of a Complaint dated 18th September, 2012. The 1st Defendant filed his Defence and Counter-claim through his advocate on 7th November, 2012. Since the matter was filed in the year 2012, it was placed before the court only once, that is on 12th November, 2014. On the said date, the Plaintiffs’ advocate informed the court that the 1st Plaintiff had passed on and that the said Plaintiff was to be substituted.

8. Since 12th November, 2014 when the matter was last in court, it remained in abeyance until 2nd March, 2018 when this court dismissed the matter *suo moto* for want of prosecution. The Notice to show cause shows the name of the Defendants’ advocate and his postal address. The said advocate has not denied that he was served with the Notice or that the postal address indicated on the face of the copy of the Notice to Show cause is his.

9. Furthermore, the 1st Defendant has not explained to this court why he did not seek to substitute the deceased 1st Plaintiff within a reasonable time to enable him prosecute his Counter-claim. Having not given good reasons why his advocate did not attend court when the matter came up for Notice to show cause, or why this Application was not made within a reasonable time after the dismissal of the suit on 2nd March, 2018, it is my finding that the Application by the 1st Defendant is not meritorious.

10. For those reasons, the Application dated 5th October, 2019 is dismissed with no order as to costs. For avoidance of doubt, this suit stands dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE