



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 52 OF 2020**

**REDEEMED GOSPEL CHURCH..... PLAINTIFF**

**VERSUS**

**JOHN EGIELAN.....DEFENDANT**

**WILLIAM ABOK.....INTERESTED PARTY**

**RULING**

**The Application**

1. The background to the instant application is that the instant suit was fixed for hearing on **4/5/2021** when the Ms. Masai appeared holding brief for Mr. Ambutsi for the plaintiff and informed the court that Mr. Ambutsi had failed to trace his client whereupon the court dismissed the suit with costs for want of prosecution on the same day notwithstanding the submission of Ms. Efedha holding brief for Mr. Mbugua for the defendant that Mr. Mbugua was not objecting to the adjournment of the matter on that date.

2. The instant Notice of Motion is dated **11/5/2021** and filed in court on **28/5/2021** and is brought under **Section 1A, 1B, and 3A** of the **Civil Procedure Act** and **Order 51 Rule 15** of the **Civil Procedure Rules**. In it, the plaintiff sought the following orders:

- (a) **That the order dismissing the plaintiff's suit together with all other consequential orders issued on 4/5/2021 be and is hereby set aside.**
- (b) **That this honourable court be pleased to reinstate the plaintiff's suit for hearing and determination.**
- (c) **Costs of this application be provided for.**

3. The application is supported by the affidavit of the plaintiff's counsel sworn on **11/5/2021**. The grounds on the face of the application and in the supporting affidavit are that the counsel had finally found his client through a third party on **3/5/2021**; that unfortunately the plaintiff (though the fact that the plaintiff named is a church) fell ill and opted to seek medical attention and could not therefore attend court on **4/5/2021**; that the applicant is keen on prosecuting the suit; that the plaintiff has a good case and this court had in appreciation of that fact issued interim orders protecting the suit property and the respondent would suffer no prejudice if the orders sought were issued.

**The Response**

4. Notwithstanding Ms Efedha's submission on the date of dismissal, the defendant surprised the plaintiff with some quite strong opposition to the instant application for setting aside of the dismissal orders. The defendant filed grounds of opposition dated **8/6/2021** and opposed the plaintiff's application dated **11/5/2021** on the following grounds:

- (1) **The application is frivolous, vexatious and an abuse of the due process.**
- (2) **That the reasons advanced for the failure to prosecute the suit on 4/5/2021 are not justiciable.**
- (3) **The interim orders complained about had lasted their life and were ripe for discharge.**
- (4) **The deponent of the affidavit in support is an advocate who is barred by dint of Order 19 Rule 3 of the Civil Procedure Rules from deponing on matter in the personal knowledge of another.**
- (5) **Default to prosecute its case has consequences, which the plaintiff has not live with.**

**(6) Plaintiff has not offered to pay costs to court and the defendant and is therefore unworthy of the court's discretion.**

5. However the interested party did not oppose the application dated **11/5/2021**

**6. Submissions**

7. The parties filed their written submissions as ordered by the court.

**Analysis and Determination**

8. I have perused the application, the supporting affidavit, the grounds of opposition and the submissions filed. The main issue that arise from the instant application is whether the applicant has established that it deserves the grant of the setting aside and reinstatement orders sought in the application.

9. A bus receipt is attached to the supporting affidavit in proof of the fact that one **Joshua Masika** travelled to Kitale from Lodwar on **3/5/2021**. A further document a medical attendance sheet from Kitale county hospital is attached to the supporting affidavit showing that one **Joshua Masika** was ill on **4/5/2021**.

10. I consider the attachments mentioned in the preceding paragraph sufficient to persuade this court that the witness for the plaintiff had a plausible reason for not attending court on **4/5/2021** for the hearing of the suit. I also consider that the fact that the defendant had already conceded to the application for adjournment on the said date of dismissal without indicating that they had been ready to proceed or not disentitles them to raise any such stringent opposition or at all to the dismissal application.

11. I have also considered that the suit sought to be reinstated concerns a land dispute and an organization, possibly with many members beyond the witness who failed to attend court. Consequently I find that the plaintiff's application for setting aside dismissal orders has merit. Therefore I hereby exercise my unfettered discretion in favour of the plaintiff Church. The application dated **11/5/2021** is hereby granted in terms of **prayers nos (a) and (b)** thereof. The plaintiff's suit is reinstated for hearing on the merits. Each party shall bear their own costs of the application. The suit shall be mentioned on the **6/10/2021** for issuance of a hearing date.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 6TH DAY OF AUGUST, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**