



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELCC NO. 19 OF 2021

(FORMERLY MIGORI ELCC NO. 139 OF 2017)

ABDUL OKOTH MASUD.....APPLICANT

VERSUS

ISHA NGOMA ABDI.....RESPONDENT

RULING

1. In a Notice of Motion dated 31st March 2021 and filed herein on 8th April 2021 pursuant to **Article 50 of the Constitution of Kenya, 2010** (The Constitution) and **Order 51 of the Civil Procedure Rules 2010** (The application herein), one Abdul Okoth Masudi (the applicant) who appears in person, is seeking orders as follows;

- a) That the Honourable court be pleased to reinstate the suit dismissed on 14th day of March 2019
- b) That the cost of this application be in the cause.

2. The application is anchored on the applicant's 12-paragraphed supporting affidavit sworn on even date. In a nutshell, he complains that he was the plaintiff in the present matter and engaged M/S Odingo and Company Advocates to represent him in the suit. That all along he knew that the suit was pending until 30th March 2021 when he discovered from the Environment and Land Court Registry that it was dismissed for want of prosecution on 14th March 2019. That he was not informed about it and the dismissal was not his own mistake. He urged the court not to condemn him unheard and that the suit be determined on merits. That the orders sought in the application are in the interest of justice and the respondent will not be prejudiced thereby.

3. By a 13-paragraphed replying affidavit sworn on 20th May 2021, the respondent, Isha Ngoma Abdi through M/S Achillah and Company Advocates, opposed the application, termed it devoid of merit and urged the court to dismiss the same with costs. He deposed that the applicant neglected to prosecute the suit for over four years yet he was ably represented by counsel.

4. The respondent further deposed that the applicant did not advance an explanation for the delay in the prosecution of the suit. That the application is time barred and fails to disclose any cause of action.

5. On 3rd June 2021, the court ordered and directed that the application be argued by way of written submissions by dint of **Order 51 Rule 16 of the Civil Procedure Rules 2010**.

6. The applicant filed submissions dated 9th June 2021 on even date. He contended that he has a good cause and that he should not be denied an opportunity to prosecute his case. To reinforce the submissions, he cited **sections 1 and 1B of the Civil Procedure Act Chapter 21 Laws of Kenya, Belinda Murai and others-vs-Wainaina (1978), Philip Chemwolo and another-vs-Augustine Kubende (1982-88) KAR 103, Article 50 of the Constitution and Patel-vs-East Africa Cargo Handling Services Ltd (1974) EA 75**, among others.

7. The Respondent, too, filed submissions dated 28th June 2021 where she stated that the suit came to an end more than two years ago and that the application is devoid of merits thus, should be dismissed with costs. She relied on, inter alia, this court's decision in **George Ouma Odhiambo-vs-Philip Juma Okelo (2019) eKLR**.

8. I have duly considered the application, the replying affidavit and the rival submissions in their entirety. On that score, has the applicant shown sufficient cause to prompt the court to set aside the orders of 14th February 2019?

9. Notably, the complaint of the applicant is that the suit was dismissed due to mistake of his counsel. In the case of **Shabir Din-vs-Ram Parkash Anand (1955) EACA Volume 22 at page 48**, William Duffus, P, noted that mistake of counsel should not be visited upon a client.

10. It is trite law that the litigants and their professional advisors are the best judges of their affairs; see **Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

11. In the case of **Philip Keipto Chemwolo (supra)**, the Court of Appeal pronounced itself for merit determination of cases and further held;

“.....There are triable issues which should not be shut out.....”

12. The Respondent submitted that the applicant failed to prosecute the suit for over four years. **Article 159 (2) (b) of the Constitution** reads;

“Justice shall not be delayed”

13. Besides, access to justice is anchored under **Article 48 of the Constitution**. Indeed, the applicant has an undoubted right to the hearing of the suit on merits; see also **Butt case** (supra).

14. Moreover, the right to fair hearing is enshrined in **Article 50 (1) of the Constitution**. In the case of **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR**, the Court of Appeal held that the right to be heard is fundamental and permeates the entire justice system.

15. To that end, I find that the applicant has demonstrated that the dismissal of his suit on 14th July 2019 was a mistake occasioned by his counsel. That he has an unhindered access to justice, the limitless right to fair hearing. The application is meritorious in the circumstances.

16. A fortiori, the application dated 31st March 2021 and filed in court on 8th April 2021 is hereby allowed in terms of an order for as per paragraph 1 (a) thereinabove and the orders of 14th July 2019 are set aside with costs in the cause.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 27TH DAY OF OCTOBER 2021

G M A ONGONDO

JUDGE IN THE PRESENCE OF;

MR MIGELE HOLDING BRIEF FOR MR T ACHILLAH, LEARNED COUNSEL FOR THE RESPONDENT