



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 28 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 228 of 2015}

JOSEPH OMBATI NYAMWEMBE (Suing as administrator of estate of OIGORO

NYAMIKE(deceased).....PLAINTIFF/APPLICANT

=VERSUS=

JOSEPH MOGENI NYANGWESO.....DEFENDANT/RESPONDENT

RULING

This is a case of a Plaintiff going to sleep and the Defendant decides to do the same. In his Application dated 24/03/21 the Plaintiff prays for Orders as follows: -

- 1. Spent.**
- 2. Spent**
- 3. THAT this Honourable court be pleased to set aside the dismissal orders made on 29/01/21 dismissing the Applicant’s suit under Order 17 Rule 2 of the Civil Procedure Rules 2010.**
- 4. THAT the suit be transferred to Nyamira Law Courts for hearing and determination as the said court has pecuniary jurisdiction to hear the matter.**
- 5. Costs of the Application be provided for in any event.**

Under Order 17 Rule 2 (1) the court may dismiss a suit where no step has been taken by either party for one year after giving notice to all the parties to the suit and if no cause is not shown to the court’s satisfaction. It is clear from the court record that a NTSC under Order 17 Rule 2 (1) of the Civil Procedure Rules was prepared by the court inviting the parties to appear in court on 29/01/21 and show cause why the suit should not be dismissed for want of prosecution. The same is dated 14/12/20. What is not clear is whether the same was ever served on the parties or not and particularly the Plaintiff. On 29/01/21, Mr. Kaba held brief for Mr. Nyatundo for the 1st Defendant and there was no appearance for the Plaintiff. Mr. Kaba prayed for the suit to be dismissed for want of prosecution. By making this prayer, Mr. Kaba was riding on the back of the court which had commenced the process sui moto. The court did dismiss the suit for want of prosecution with costs to the Defendant.

Thereafter, the Defendant filed his Bill of Costs with a figure Kshs. 94,750/= and it is only when the Plaintiff was served with this Bill dated 10/02/21 that he came to know that the suit had been dismissed. Although in his Affidavit in support of this Application, the Plaintiff says that the Defendant will not suffer any prejudice as a result of the reinstatement of the suit and even runs fast to Article 159 (2) (d) which provides that justice should not be administered without undue regard to technicalities, he fails to recognize that on his way to Article 159 (2) (d) there is another conspicuous Sub-Article (b) which keeps reminding him that justice shall not be delayed. This is a 2015 matter and was 6 years old in court by the time it was dismissed. The Defendant on his part and by way of a Replying Affidavit seems to celebrate the dismissal of the suit which is a natural consequence.

I have also looked at the written Submissions of both parties and even allowed them to highlight what they felt ought to be given more weight by the court. As noted above, it is not clear whether the NTSC dated 14/12/20 ever reached the Plaintiff or his counsel. This was a necessary and in fact a requisite step before the suit was dismissed and I therefore agree with the Plaintiff/Applicant that he was condemned unheard. The court does not agree with the Plaintiff’s Submissions that the failure to prosecute the suit was due to Covid-19 pandemic in the absence of evidence and/or clarification.

Since this court has unfettered discretion in a prayer such as is before the court the same will be exercised in favour of the Plaintiff/Applicant but with the following conditions: -

1. **THAT** the suit be set down for hearing within the next 10 days from the date hereof.
2. **THAT** there shall be no further adjournment in this case unless the same is inevitable.
3. **THAT** Prayer No. 4 of the Applicant date 24/03/21 has not been proved and the suit shall therefore be heard by this court.

Since the Defendant never assisted the court in either taking steps to fix a hearing date for the suit or moving the court to dismiss the same for want of prosecution he is not entitled to thrown away costs. The upshot of the above is that the suit is hereby reinstated with no orders as to costs.

This is the order of the court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 19TH DAY OF OCTOBER, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant:

Plaintiff's Counsel –

Defendants' Counsel –