



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAROK

ELC CASE NO. 41 OF 2017

(FORMERLY NAKURU ELC NO. 341 OF 2013)

(FORMERLY NAIROBI CIVIL SUIT NO. 95 OF 2003)

AMOS S. KOROS (Suing as the legal administrator ad litem of the Estate of

LEMITEI OLE KOROS (Deceased).....1ST PLAINTIFF

PARIT OLE SETEK.....2ND PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

KIPIRA OLE SANTAI.....2ND DEFENDANT

TULASHA ENOLE NYAMO AND PETER KESUE NYAMO AS

ADMINISTRATORS OF THE ESTATE OF MEMUSI OLE NYAMO....3RD DEFENDANT

OLOTUEK NYAMO AND KAMIINGIINA NYAMO As administrators of the estate of

KING'ORE OLE NYAMO (Deceased).....4TH DEFENDANT

RULING

By a Notice of Motion dated 9/11/2020 the Plaintiff/ Applicant sought the following orders:-

1. Spent

2. THAT this Honourable court be pleased to set aside the ex-parte orders and directions issued on the 5th of November 2020 and order for the reinstatement of this suit.

3. THAT this Honourable court be pleased to stay the proceedings in this matter including taxation proceedings pending the hearing and determination of this application.

4. THAT costs of this application be in the cause.

The application is based on the grounds that the plaintiff suit was dismissed on 5/11/2020 for want of prosecution due to non- attendance and that counsel on record was unable to reach the plaintiff and witnesses to make arrangement for the hearing. The applicant further contends that the contact person one Amos Koros was ill and had undergone surgical operation thus he was unable to make the necessary arrangements and that the plaintiff/applicant ought not to be denied the chance to be heard. The applicant further stated that the defendant/respondent will not suffer any prejudice and he is willing to abide by any condition that the court will impose.

The application was supported by the affidavit of Mutai K. Owen Advocate who is acting for the plaintiff/applicant. He deponed that he is

aware that the suit was dismissed on account of want of prosecution caused by the non-attendance of the plaintiff. He said it was caused by the lack of making necessary arrangement to enable counsel and the witness in the matter attend court. He averred that this was occasioned by inability to reach Mr. Amos Koros who was the contact person on behalf of the plaintiff who was admitted in hospital and underwent a surgical operation. He annexed to his affidavit, a letter showing the said contact person was admitted to Tenwek Hospital on 1/11/2020 and due for operation on 2/11/2020 stating that their non-attendance was unintentional and herein excusable. He contends that the plaintiff/applicant should not be denied an opportunity to be heard on merit as the right to be heard is the constitution of our justice system.

The application was opposed by the respondents. The 3rd and 4th respondents had filed a replying affidavit sworn by Mr. Mayian Sankale Advocates counsel on record for them. He averred that on 5/11/2020 when the suit herein was slated for hearing the matter called out the plaintiff and their counsel were absent, he requested the file to be placed aside and he contacted Mr. Makau Advocate of Kiplenge and Kurgat Advocates who informed him that he was aware of the hearing date but would not attend court as he had issues with his client and when he reported the telecommunication to the court, the suit was dismissed.

The 3rd and 4th respondents further contended that even though the 1st plaintiff was allegedly admitted in hospital, counsel ought to have reported the same to the court and counsel for the defendant and further that the absence of the 2nd plaintiff and his witness was not explained. The 3rd and 4th defendants/respondents had also invested a number of instant case totaling nine (9) times when the hearing was adjourned and the filing of a number of application which were meant to delay the hearing of the suit and consequently the plaintiff/applicants have not been vigilant and thus they should not enjoy any reprieve from the court.

The application was canvassed by way of written submissions. The plaintiff/applicant in his submissions framed the issue for determination as whether the instant application meets the threshold for an application to reinstate a suit. The defendants /respondents on their part have framed the issues for determination as whether there was inordinate delay in the prosecution of the case, whether the court was right in dismissing the suit for non-attendance and lastly whether the court should exercise its discretion in favour of the applicant. I have considered the application before and the rival submissions filed by the parties and it is my considered view that the issues for determination is whether the plaintiff/applicant had been served during the date the suit was fixed for hearing leading to the dismissal of the suit was excusable and whether the court should exercise its discretion to reinstate the dismissed suit.

On the first issue it is clear that the hearing date of 5/11/2020 was taken by consent of the matters in the presence of Mr. Mutai Owen counsel for the plaintiff's and Mr. Meingati Advocate for the defendant, wherein Mr. Mutai informed the court that all parties had complied with Order 11 and the matter could be certified as ready for hearing. The court taking account that the suit having been filed in court on 31/1/2003 confirmed the matter for hearing.

Despite the prevailing conditions with regard to the Covid 19 pandemic. However, on the said date neither the plaintiff nor their counsel was present in court and when the file was placed aside, counsel for the 3rd and 4th defendants confirmed to the court that the defendant's advocates were aware of the hearing date and he had communicated with Mr. Makau Advocate who informed him that they will not come to court as there had issues with their client. Mr. Mutai Owen in his affidavit in support of the intended application did not state the above facts and the only reason he advanced why they were not present was that the first plaintiff who was there contact person had an operation and hence they could not contact him. It is worth noting that the hearing of the matter was fixed in July 2020 and it will be unreasonable that the advocate did not communicate with their client in three (3) months. Furthermore, the annexure to the affidavit of Mr. Mutai Owen is just a schedule of the cost of surgical operations at the Tenwek Hospital other than having the name of the 1st plaintiff. There is nothing to show that indeed the said Mr. Amos K. Koros underwent the claimed surgery. No surgical discharge summary, payment receipts and follow up review report were presented and in the absence of the same, the contention that the 1st plaintiff was in hospital is highly doubted.

Further to the above, the absence of the 2nd defendant/respondent has not been explained to date and in the circumstance I find that the absence of the plaintiff is unexcusable.

I thus, find no merit in the Notice of Motion dated 9/11/2020 and the same is dismissed with costs.

DATED SIGNED AND DELIVERED, VIRTUALLY AT MIGORI THIS 30TH DAY OF NOVEMBER, 2021

MOHAMED N. KULLOW

JUDGE

In presence of :-

Mr. Sankale for Plaintiff/Respondent

Nonappearance for Defendant/Applicant

Court Assistant – Tom Maurice