



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 294 OF 2013

SAIDI TSUMA CHIMERA..... PLAINTIFF

VERSUS

JOSEPH HAMISI TUL.....DEFENDANT

RULING

(Application seeking to set aside an order that dismissed the suit for failure to show cause why it should not be dismissed for want of prosecution; counsel failing to attend at the hearing of the notice to show cause; court giving benefit of doubt to the reasons given for failure by counsel to attend; order dismissing the suit set aside and suit reinstated)

1. The application before me is that dated 20 May 2019 seeking to set aside the order made on 8 May 2019. The order mentioned was one that dismissed this suit for failure to show cause why the suit should not be dismissed for want of prosecution.
2. To put matters into perspective, this suit was commenced by way of a plaint which was filed on 11 December 2013. The suit is brought on behalf of the estate of the late Juma Chimera Makwakwa (deceased). It is averred that the deceased was the lawful owner of the land parcel Mazeras/Mgumo Patsa/911 and it is contended that on 15 November 2013 the defendant unlawfully entered the suit land and commenced construction in it. The plaintiff sought orders inter alia of a declaration that the defendant is in trespass and for an injunction to restrain him from the land. I have not seen a defence filed, but in a replying affidavit to an application for injunction which was filed alongside the suit, the defendant claimed to have properly purchased the portion that he is said to be in unlawful occupation. The matter was in court for various mentions resting with that of 12 February 2018.
3. I have noted from the record, that through a notice dated 1 April 2019, the plaintiff was asked to show cause why his suit should not be dismissed for want of prosecution. The hearing of the notice was scheduled for 8 May 2019 but on that date there was no appearance on the part of counsel for the plaintiff and the suit was dismissed for want of prosecution after the court observed that counsel for the plaintiff was duly served with the notice. It is following that dismissal that this application was filed.
4. The supporting affidavit to the application is sworn by Godfrey Mutubia an Advocate practising in the law firm of M/s Sherman Nyongesa & Mutubia Advocates, which firm is on record for the plaintiff. Mr. Mutubia has deposed inter alia on the nature of the dispute before the court and on attempts to have the dispute resolved by various authorities. In respect of failure to attend court on 8 May 2019, he has deposed that he proceeded to Court No. 5 where Honourable Justice Waitthaka (who is the Judge who attended to the notice to show cause and was in the station for service week) previously sat but was informed that the Judge was not sitting in this court. He deposed that by the time he arrived at the correct court, he found the suit already dismissed. He has deposed that his failure to attend court was based on that reason.
5. I have gone through the record and I observe that Mr. Mutubia did attend court after the suit had been dismissed and the court noted down his late attendance. It is therefore probable that counsel got derailed with the location that the court was sitting hence his late appearance. Having said that, I think it behoves counsel to prepare themselves early, for if Mr. Mutubia had attended court early enough, he ought to have directed himself to the correct court in good time before the matter was called out. I will nonetheless give counsel benefit of doubt on why he was late and thus set aside the order that dismissed the suit for want of prosecution. In essence, I allow the application.
6. Ideally I should relist the matter for the notice to show cause to be heard afresh but having gone through Mr. Mutubia's affidavit, I am persuaded that the failure to prosecute the matter was because parties were engaged in attempts to settle the matter out of court. There would therefore be no point to set the matter down for another hearing of the notice to show cause. Instead, I direct the plaintiff to ensure that his case is ready for hearing within the next 30 days.
7. The defendant did not oppose this motion and I therefore make no orders as to costs.

8. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of January 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Ms. Oguna holding brief for Mr Mutubia for the applicant.

Mr Kiarie present for the respondent.

Court Assistant; David Koitamet.