

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 70 OF 2011

JOHN MUTURI NJUGUNA.....PLAINTIFF

VERSUS

KAMENE MUSYIMI IKOMBO.....DEFENDANT

RULING

1. In the Notice of Motion dated 22nd June, 2018, the Plaintiff is seeking for the setting aside of an order dated 19th February, 2018 dismissing the suit.
2. The Application is premised on the grounds that this suit is still at the pre-trial stage; that the Environment and Land Court had not been constituted by the time the suit was filed and that the Plaintiff was never served with a Notice to show cause why the suit should not be dismissed.
3. According to the Plaintiff's advocate, the failure to fix the matter for pre-trial conference cannot be attributed to the Plaintiff because the court was not in place for a long period and that the failure to fix the matter for hearing was not intentional.
4. In his Replying Affidavit, the Defendant's advocate deponed that this suit was filed by the Plaintiff on 21st March, 2011 claiming for a liquidated sum of Kshs. 2,600,000; that after the close of the pleadings, the Plaintiff did not take any steps to prosecute the suit and that the Plaintiff's suit was rightfully dismissed by the court on 19th February, 2018.
5. In the Supplementary Affidavit, the Plaintiff's advocate deponed that other than the reasons given in the Supporting Affidavit, their primary witness, Fred Abuga Onsongo, did not sign a witness statement.
6. In his submissions, the Plaintiff's advocate submitted that the jurisdiction to set aside an ex-parte Judgment is purely the discretion of the court which must be exercised judiciously and that this court do exercise its discretion by setting aside the order dismissing the suit and reinstate the same so as to allow the suit to be determined on merit.
7. This suit was commenced by way of a Plaint dated 18th February, 2011. The Defendant filed his Defence on 19th April, 2011, with the Reply to Defence being filed on 26th July, 2011. The record shows that this matter came up for mention only once, that is, 15th October, 2012, when the court was informed by the Defendant's counsel that the parties were negotiating the matter. Indeed, on that day, the Plaintiff's counsel was not in court. It is the Defendant's counsel who fixed the date of 15th October, 2012.
8. It is therefore obvious that since this suit was filed on 21st March, 2011, the Plaintiff never fixed it for pre-trial or for hearing. Indeed, the matter remained in abeyance until when the court served on both parties with a Notice to show cause why the suit should not be dismissed for want of prosecution, which notice came up for hearing on 19th February, 2018.
9. The Plaintiff's advocate has not denied that the postal address indicated on the Notice to show cause is his. Although the Plaintiff's counsel has deponed that it took long for the establishment of the Environment and Land Court, it is trite that all land matters that were filed in the High Court continued being heard by the High Court until after the Supreme Court, on 26th May, 2017, declared that it is only this court that can hear and determine land matters (*See the case of Republic vs. Karisa Chengo & Others (2017) eKLR*).
10. Indeed, even after the said decision by the Supreme Court, the Plaintiff did not fix the matter for hearing or pre-trial directions. That being the case, and considering that the court has the mandate to dismiss matters which have not been prosecuted for more than one (1) year, the dismissal of the suit for want of prosecution was legal and valid.
11. In the absence of a plausible explanation why this matter was never fixed for pre-trial directions or hearing since 2012, I decline to set aside the order dismissing the suit for want of prosecution. The Application dated 22nd June, 2018 is therefore dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE