



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 1203 OF 2016

RICHARD OBUBA KATELINA.....1ST PLAINTIFF/APPLICANT

FLORENCE KERUBO ONGERA.....2ND PLAINTIFF/APPLICANT

VERSUS

EDMOND OBUBA MAEBA.....DEFENDANT/RESPONDENT

RULING

BACKGROUND

1. By a Notice of Motion dated 14th June 2019 the Plaintiffs/ Applicants filed an application seeking a reinstatement of their suit which was dismissed on 9th November 2015 for want of prosecution. The said application is anchored on the grounds stated on the face of the Notice of Motion and the supporting affidavit of Francisca Kerubo Ongoro sworn on the 19th June 2019. The Applicants contend that they only learnt that their suit had been dismissed on 13th June 2019. They further contend that even though they were represented by an advocate, there is no evidence that he was served with the Notice to Show Cause why the suit should be dismissed. They argue that this being a land matter it ought to be heard on its merits.

2. The application is opposed by the Respondent through his Replying Affidavit sworn on the 30th September 2019. In the said affidavit the Respondent takes issue with the fact that the supporting affidavit is sworn by a stranger one Florence Kerubo Ongera who is not a party to the suit. He also contends that the suit was dismissed after the court satisfied itself that the advocates for the Plaintiffs were served and if that is not the case then it was incumbent upon the said advocate to swear an affidavit disputing service. He contends that the Plaintiffs have filed the application 3 1/2 years after the suit was dismissed and therefore they do not deserve an order of reinstatement. He avers that in any event the parties had commenced negotiations for an out of court settlement and even though they did not reach a settlement it was common ground that the suit property was registered in the names of Plaintiffs and the Defendant and they had applied for consent of the Land Control Board to have the land sub-divided into three, hence it would serve no useful purpose to revive the case after many years.

ISSUES FOR DETERMINATION

3. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

The only issue for determination is whether the order for dismissal of the suit should be set aside.

ANALYSIS AND DETERMINATION

4. Under Order 17 Rule 2 (1) of the Civil Procedure Rules, this court has jurisdiction to dismiss a suit for want of prosecution, if no step has been taken by either party for one year. In the instant case the period of delay was about a year. However the said delay has not been satisfactorily explained. To make matters worse there has been inordinate delay in filing the application to set aside the dismissal. What is clear is that the Plaintiffs have not been interested in prosecuting their case.

5. I am guided by the case of **Netplan East Africa Limited V Investment and Mortgages bank Limited (2013) eKLR** where the Court held as follows:

“I find that the delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable... From what I have stated earlier, the plaintiff has failed to offer any plausible reason for its failure to prosecute the suit since 23rd November 2009. The plaintiff even after dismissal of the suit on 9th January 2009 did not file the present

motion until ten months later on 17th January 2013. This is undue laches. A portrait emerges of a lethargic litigant completely disinterested in the prosecution of its suit. Under such circumstances the Court was well entitled to dismiss the suit under Order 17 Rule 2(1) of the Civil Procedure Rules 2010 and the inherent powers of the Court. See Mukisa Biscuits Manufacturing Company V West End Distributors Ltd (1969) E.A 696.”

6. What is of greater concern to the court is that the supporting affidavit is in the name of a stranger who is not a party to this suit. This shows lack of seriousness on the part of the Plaintiffs. What emerges is a portrait of litigants who do not take their case seriously. Not only have they failed to explain the reason why they did not attend court on the date when the case was dismissed, they have filed this application after a period of 3 1/2 years and purported to enjoin a party without leave of the court.

7. Article 159 2 (b) of the Constitution of Kenya 2010 enjoins the courts to administer justice without delay while the oxygen rule under sections 1A and 1B of the Civil Procedure Act is to ensure the just, expeditious, proportionate and affordable disposal of cases. I find no good reason why this case should continue pending in this court. The Plaintiffs have failed to persuade this court that they deserve to have their case reinstated. Accordingly, the application lacks merit and it is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Kisii this 6th day of March 2020.

J.M ONYANGO

JUDGE