



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC ASE NO. 859 OF 2012

ANTHONY NJAU GITAU.....PLAINTIFF/APPLICANT

VERSUS

REGINA MUGURE GITAU.....DEFENDANT/RESPONDENT

RULING

The applicant filed the present application seeking orders that the orders made on 25th November 2019 dismissing the suit for want of prosecution be set aside. The applicant filed this application and stated that he was not served with the notice for dismissal of the case and that he is desirous of prosecuting the case. It was his submission that there is a Succession Cause No. 115 of 1996 of which this suit land is subject of. He therefore urged the court to allow the application as prayed.

The respondent filed a replying affidavit on 19th February 2020 and deponed that the applicant was served with the notice and annexed the same as RMG1. That both Counsels were present on 27th June 2018 when the matter was put off to 30th October 2018. The respondent urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination in an application for reinstatement of a dismissed suit for want of prosecution are as to whether the applicant has shown sufficient cause for the court to exercise its discretion in its favour to grant the order and whether the application has been filed without inordinate delay.

In the case of **Fran Investments Limited v G4S Security Services Limited [2015] eKLR** Gikonyo J stated that:

“Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ‘‘sword of the Damocles’’. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.

The Judge further stated that Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ‘‘give notice’’. The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules. But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules.

On 15th May 2019 the court gave an order directing the Deputy Registrar of the court to issue a Notice for dismissal of the plaintiff’s suit for want of prosecution under Order 17 Rule 2 (1) of the Civil Procedure Rules which was effected on 14th November 2019. The same was served on both Advocates for the parties.

Even though the court is under no obligation to serve the notice after issuance of the same, it went ahead and served it but from the record the notice does not bear the stamp of the recipient parties. This would give the applicant a leeway to claim that they were never served.

The other issue that the court must deal with is as to whether the application was filed without inordinate delay. The case was dismissed on 25th November 2019 and the applicant filed the application on 21st January 2020. Taking into account that Order 50 Rule 4 of the Civil

Procedure Rules provides for a period when time does not run for purposes of computation of time. It provides as follows:

Order 50 Rule 4:

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

I find that the application was filed timeously and in the circumstances this threshold has been met by the applicant. Further I have also looked at the official search attached to the pleadings dated 23rd January 2012 indicating that there should be no dealings until the hearing is determined. The parties had mentioned that there was a pending Succession Cause No. 115 of 1996 of which the suit property is subject of.

I have considered the application in its totality and find that the same has merit and is therefore allowed as prayed with costs to the defendant. The plaintiff to Fast track the hearing of this case within 30 days failure of which it shall stand dismissed. The plaintiff should also tell the court about the progress of the Succession Cause.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE