



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 74 OF 2016

FREDERICK OTIENO OTIENO PLAINTIFF

VERSUS

STEPHEN OLUOCH OPOT DEFENDANT

RULING

The Plaintiff filed an application dated 7th February 2019 seeking orders that:

- 1. This Honourable Court be pleased to set aside orders made on 14th May 2018 dismissing this suit for want of prosecution.**
- 2. This Honourable Court be pleased to reinstate the Plaintiff's suit.**
- 3. The costs of this application be provided for.**

The application is based on the grounds set forth in the body of the application and the supporting affidavit of the Plaintiff dated 7th February 2019. The Plaintiff deposed that his former Advocates never fixed the matter for hearing after filing and serving the plaint dated 6th April 2016. That the mistake of his former advocates should not be visited upon him. That the Plaintiff had a strong and meritorious case against the Defendant. That the Plaintiff has always been ready and willing to prosecute the suit. That the application has been brought without unreasonable delay and that no prejudice will be suffered by the Defendant should the suit be reinstated.

The Defendant filed a replying affidavit in opposition to the application dated 2nd September 2019. The Defendant contended that the order for dismissal was made under Order 17 Rule 2 of the Civil Procedure Rules, and that the order arising from the Plaintiff's failure to show cause could only be set aside through a review or an order of a higher appellate court. That the Plaintiff invoked the Court's jurisdiction to set aside the order as if it was made under Order 12 of the Civil Procedure Rules which was not the case.

The Defendant asserted that the Plaintiff had not explained his failure to take any steps to prosecute the suit for two years. That the Plaintiff's claim in his application that his previous Advocates were to blame for failing to set a hearing date lacked an accompanying deposition in an affidavit and was therefore unreliable. That the Plaintiff had not introduced any new matter or facts that could disturb the Court's finding on the reasons for the Plaintiff's failure to commit the suit to hearing.

Whether orders sought are merited

The suit was dismissed under Order 17 Rule 2 of the Civil Procedure Rules which provides that:

“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in

writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

The parties were served with a notice to show cause on 11th April 2018 and both the Plaintiff and Defendant were present on the scheduled date of 14th April 2018. The Plaintiff was given an opportunity to show cause why the suit should not be dismissed. The court was not satisfied with the reasons proffered by the Plaintiff and proceeded to dismiss the case.

The order of the judge, who arrived at his decision after hearing the matter on its merits, renders this court *functus officio* as far as this application is concerned as it involves the decision of a judge of concurrent jurisdiction. Any attempt to consider reinstating the suit would amount to an appeal or review of the judge’s decision. The proper cause of action for the aggrieved Plaintiff would have been to appeal the decision to dismiss the suit.

The application should therefore be and is hereby dismissed with costs to the Defendant.

DATED AT KISUMU THIS 12TH DAY OF MAY 2020

**A.O. OMBWAYO
ENVIRONMENT & LAND
JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

**A.O. OMBWAYO
ENVIRONMENT & LAND
JUDGE**