



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 59 OF 2006

GIO FO INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

1. MARTIN CHARO MWANDUKA

2. KARISA MASHA

3. GEORGE MASHA

4. KAHINDI MASHA.....DEFENDANTS

RULING

1. By this Notice of Motion dated 12th October 2018, the four (4) Defendants herein pray for an order that the orders issued on 11th October 2018 and all consequential proceedings and orders arising therefrom be set aside.

2. The application which is supported by an affidavit sworn by the 1st Defendant Martin Masha is premised on the grounds

i) That on 15th March 2018, the 1st Defendant visited the Court for the umpteenth time following up on their letter dated 8th June 2017 and were finally informed by the Deputy Registrar that they should make a formal application for the reconstruction of the file as the same could not be traced.

ii) That on 15th August 2017, the Plaintiffs Advocate Thomas Maosa Maranga died.

iii) That instead of a notice informing the parties that the file had finally been found, the Deputy Registrar issued a notice for dismissal of the suit.

iv) That on 11th October 2018, their previous Counsel who is well equipped with the file, failed to give the necessary information knowing well that there was a Counterclaim to be filed.

3. The application is opposed. In a Replying Affidavit sworn by its Director Alfonso Forino and filed herein on 30th November 2018, Gio Fo Investments Ltd (the Plaintiff) avers that it is more than 12 years since the suit was filed in the year 2006 and that the same was properly dismissed for want of prosecution on 11th October 2018.

4. The Plaintiff further avers that looking at the amendments made to the Defence, the only reason the Defendants apply for reinstatement is to enable them apply for adverse possession, a claim already time-barred. The Plaintiff further avers that there is no evidence that the Defendant took any steps to prosecute the suit in the 12 years it was in Court.

5. I have perused and considered the application and the response thereto. I have equally perused the submissions filed herein by Ms Mwangi, Learned Advocate for the Defendants.

6. The Plaintiff filed this suit on 6th July 2006 and the Defendants filed their own Statement of Defence on 2nd August 2006. On the date the suit was filed, the Plaintiff filed an application for injunction against the Defendants. On their part, the Defendants filed a similar application dated 16th August 2006 seeking orders of injunction against the Plaintiff. Following a Ruling delivered by the Honourable W. Ouko J. (as he then was) on 13th November 2006, the parties did not take any steps herein until six years later in November 2012 when they tried to fix it

for hearing.

7. From the record, nothing much happened for another four years. On 20th June 2016, the parties appeared before the Honourable J.N Wandia, Deputy Registrar of this Court for the hearing of an application by the Defendants to amend the Defence dated 23rd July 2013. The application did not proceed as Mr. Okuto Advocate for the Defendants urged the Court to take it out.

8. No proceedings were again taken in the matter for two years. By a Notice to Show Cause dated 30th July 2018, this Court directed the parties to appear before it on 11th October 2018 to show cause why the suit should not be dismissed for want of prosecution. The suit was accordingly dismissed on that date the parties having failed to show cause.

9. By the application before me, the Defendants now urge the Court to reinstate the same on the ground that the Court file had been missing and that they were always ready to amend their Counterclaim and to proceed with the prosecution thereof.

10. As it were the Defendants have not put before me any evidence that the Court file was missing and for what period. They have similarly not put before me any evidence of any efforts they have diligently made on their part since this suit was filed 14 years ago in 2006 to prosecute their defence and Counterclaim.

11. A Court's discretion must be exercised judiciously based on facts and the law. In this respect, a party seeking to reinstate a dismissed suit must also demonstrate properly the circumstances that prevented them from prosecuting the matter. Given the history of this matter as I have cited hereinabove since the year 2006, I am not in the circumstances persuaded that this is a matter in which I should exercise my discretion to reinstate the suit.

12. The Motion dated 12th October 2018 is accordingly dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE