



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LANDS COURT AT NAROK**

**ELC CAUSE NO. 44 OF 2017**

**JOSEPH MALIT MAEKU & 60 OTHERS.....PLAINTIFFS**

**-VERSUS-**

**NKURUNAH OLE MASIKONDE & 7 OTHERS.....DEFENDANTS**

**RULING**

The Defendant/Applicant had by a Notice of Motion dated 10<sup>th</sup> October, 2019 sought for orders to set aside the dismissal of a Preliminary Objection on point of law dated 10<sup>th</sup> January, 2019 and that the said Notice of Preliminary Objection be reinstated. The Application was based on the grounds that the said Preliminary Objection was dismissed without notice and that the same raises point of law that goes to the root of the case, and further that it shall serve the interest of justice to reinstate the same and the respondent will not be prejudiced if the same is reinstated.

The Application was further supported by the affidavit of Mr. Ojwang Agina counsel for the applicant in which he deponed that the dismissal of the notice of Preliminary Objection was as a result of non-attendance of both parties. However, the applicant is desirous to prosecute the same and hence urged the court to exercise its discretion.

The Application was opposed by the respondent/plaintiff by way of grounds of opposition and a replying affidavit. The respondent contends that the application is incompetent and that the same does not warrant the grant of orders sought. The respondent further contends that the applicant has not diligently explained the reasons for non-attendance warranting the dismissal of the said Preliminary Objection.

I have considered the application and the grounds of opposition to the same and the replying affidavit.

The applicants in their submissions have contended that it was mistake on their part not to have been present on the date when the Preliminary Objection was dismissed for non-attendance by their advocate which they highly regret and that the mistake should not be visited upon them as they have been ready and willing to prosecute the dismissed Notice of Preliminary Objection and the substantive suit.

This is that sought of application in which the discretion of the court is sought by a party. I have taken cognizance of the fact that the applicant and his advocates were not present on the date the said Preliminary Objection was heard from the affidavit the advocate has not explained what had caused their inability to attend court save for the fact that they said it was just a mistake, the order for dismissal was made way back on 4<sup>th</sup> April, 2018 and the instant application was made on 10<sup>th</sup> October, 2019 almost one year and half since the order of dismissal was made and I find this as inordinate delay on the part of the applicant to have the reinstatement of the dismissed Preliminary Objection and furthermore the court had directed that the suit herein be set down for hearing.

In view of the above and the lack of any plausible explanation by the applicant to justify the reinstatement of the Preliminary Objection I find that the application lacks merit and since this is a matter that has been in court since 2011 where countless applications were filed by the parties. I find that allowing the application will further delay the hearing of the substantive suit and I accordingly dismiss the Notice of Motion dated 10<sup>th</sup> October, 2019.

**DATED, SIGNED and DELIVERED IN OPEN COURT at NAROK on this 11<sup>th</sup> day of JUNE, 2020.**

**Mohammed Kullow**

**Judge**

**11/6/2020**

In the presence of:

CA:Chuma

Ms Karia holding brief for Agina for the Defendants/Applicants

Mr Tanyasis holding brief for Osoro for the Plaintiff/Respondents

**Mohammed Kullo**

**Judge**

**11/6/2020**