



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 5 OF 2012

NICHOLAS PATRICE TABUCHE.....PLAINTIFF

VERSUS

ANSAZI GAMBO TINGA

SAFARI GAMBO TINGA

THE REGISTRAR OF TITLES, KILIFI.....DEFENDANTS

RULING

1. By this Notice of Motion application dated 15th April 2019, Nicholas Patrice Tabuche (the Plaintiff) urges this Court to be pleased to set aside its orders issued on 25th March 2019 dismissing the matter for want of prosecution. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

a) Counsel who had been detailed to hold brief for the Plaintiff's Advocates when the matter came up for a Notice to Show Cause on 25th March 2019 explained the status of the matter but the Court could hear none of it;

b) The order of dismissal of the suit was so made, despite an order of stay being in place, issued on 16th February 2015 staying proceedings in this case pending the hearing and determination of High Court Succession Cause No. 140 of 2010; Ansanzi Gambo Tinga & Safari Gambo Tinga –vs- Nicholas Patrice Tabuche; and

c) It is thus fair, just, equitable and in the interest of justice that the orders sought for in the application be granted.

2. The application is opposed by the 1st and 2nd Defendants. In a Replying Affidavit sworn on their behalf by Ansazi Gambo Tinga (the 1st Defendant) and filed herein on 12th July 2019, they aver that the application has no merit and assert that the grounds and facts disclosed in support of the application are untrue and do not meet the threshold required for an application of this nature.

3. The 1st Defendant further avers that contrary to the Plaintiff's averments, ***Mombasa High Court Succession Cause No. 140 of 2010*** was determined on 21st July 2017 by a Ruling delivered thereon by the Honourable Justice Thande in the presence of the Plaintiffs Advocates. Despite the said Ruling, the Plaintiff failed to take any steps to prosecute the suit for another two years.

4. I have perused and considered the application and the response thereto. I have also perused and considered the submissions filed before me by the Learned Advocates for the parties.

5. 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 suit may be dismissed.

6. By a notice dated 14th February 2019, the parties herein were given notice to appear before this Court on 25th March 2019 to show cause why this suit should not be dismissed for want of prosecution. On the said date, the Plaintiff's Advocates briefed another Advocate who informed the Court that the matter herein had been stayed in 2014 to give room for ***Mombasa Succession Cause No. 140 of 2010*** to be completed. The said Advocate further informed the Court that the said Succession Cause was presently before the Court of Appeal although he had no evidence of that position.

7. As it were, this matter had earlier on, on 11th October 2018 been listed for dismissal for want of prosecution on the Court's own motion after it was noted that the matter had not proceeded since 12th May 2015 when the same had been stayed pending determination of the said ***Mombasa Succession Cause No. 140 of 2010***. When the matter came up on the said 11th October 2018, the Counsel holding brief for the Plaintiffs Advocates was unaware of the position in ***Mombasa Succession Cause No. 140 of 2010***. On that basis, this Court fixed the matter for mention on 4th February 2019 to enable Counsel to find out the position and for the parties to come and report to Court accordingly.

8. On the said 4th day of February 2019 however, none of the parties attended Court. Noting the age of the suit herein, this Court directed the Deputy Registrar of this Court to serve the parties with a Notice to Show Cause and to require them to attend Court for that purpose on 25th March 2019. That then was the genesis of the Notice to Show Cause dated 14th February 2019.

9. As it turned out, the Counsel holding brief for the Plaintiff's Advocates again turned up in Court without any evidence as to the position in regard to the ***Mombasa Succession Cause No. 140 of 2010***. Having heard his submissions, this Court was not satisfied that any cause had been shown why no steps had been taken to prosecute the matter and proceeded to dismiss the same for want of prosecution.

10. Some one month down the line, the Plaintiff filed this application on the grounds that the Court failed to listen to its explanation and that the order was made despite another one issued earlier staying the proceedings. In my view, this Court had already pronounced itself on the matters being raised by the Plaintiff and this Court is functus officio in so far as those matters are concerned.

11. The Plaintiff herein does not ask the Court to review the said orders made on account of some error on the face of the record. Instead, he is asking this Court to make a different determination from that it made when the issues were first brought to its attention on 25th March 2019. That is a path this court is unprepared to go.

12. In the premises, I think it will suffice to state that the application before me is misconceived and that the orders sought therein are unwarranted. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 24th day of July, 2020.

J.O. OLOLA

JUDGE