



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 99 OF 2010**

**DR. CHRISTOPHER KAMANDE KIMANI.....PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN NYANDOYA C. WASILWA.....DEFENDANT/RESPONDENT**

**RULING**

The application for determination is a Notice of Motion dated 8<sup>th</sup> May 2012 brought by the Plaintiff under Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff is seeking to set aside orders issued on 15<sup>th</sup> December 2010 dismissing his suit with costs for failure to show interest in prosecuting the suit. The application is supported by an affidavit sworn on 8<sup>th</sup> May 2012 by **Edward M. M. Mwangi** who avers that he is a recognized agent and holder of a general power of attorney by the Plaintiff.

The Plaintiff gave a chronology of the events in the suit herein. He states that the suit was filed on 5<sup>th</sup> March 2010 under certificate of urgency and that an injunction to restrain the Defendant from interfering with his quiet possession was issued by the Court on 9<sup>th</sup> March 2010. The Plaintiff avers that the order and summons to enter appearance was served upon the Defendant on 18<sup>th</sup> March 2010 and that on 14<sup>th</sup> May 2010, he simultaneously filed applications requesting for interlocutory judgement and seeking leave to commence committal proceedings against the Defendant.

The Plaintiff contends that the two applications were scheduled for hearing on 19<sup>th</sup> July 2010 when the court file went missing and was therefore not listed. He annexed correspondences dated 27<sup>th</sup> October 2010 and 10<sup>th</sup> November 2010 eliciting the assistance of the Deputy Registrar in securing the court file. It is the Plaintiff's averment that the court file emerged on 30<sup>th</sup> July 2010 when the Defendant's advocate fixed an ex-parte hearing date for hearing of his application dated 14<sup>th</sup> July 2010 on 28<sup>th</sup> October 2010. The Plaintiff contends that he was not served with an invitation letter or hearing notice and that in his absence, the suit was dismissed for his lack of interest in prosecuting the same.

The Applicant states he was called through his mobile on 27<sup>th</sup> October 2010 by someone from the Defendant's office, notifying him of the scheduled hearing the next day but the Plaintiff contends that he had another matter scheduled in Nyahururu for the day and that he wrote a letter in protest to the Deputy Registrar which has been exhibited as **"EMMM 5"**. The Plaintiff avers that he is a layman who approached the Court lawfully, constitutionally and in good faith and that his suit deserved consideration and/or amendment rather than dismissal which may occasion him irreparable loss. He contends that delay in prosecuting the suit was not deliberate and was excusable and that it was fair and in the interest of justice that the orders sought be granted to allow hearing and determination of the suit on merit.

The Defendant opposed the application through his replying affidavit sworn on 9<sup>th</sup> July 2012 where he contends that the suit herein was not dismissed for want of prosecution. The Defendant contends that the suit was struck out for being incurably defective, frivolous and an abuse of the court process and he annexed as evidence a copy of his application dated 14<sup>th</sup> July 2010 as well as the ruling derived on 15<sup>th</sup> December 2010.

The Defendant admits that the suit was not listed on 19<sup>th</sup> July 2010 when it was scheduled for hearing of the Plaintiff's application dated 14<sup>th</sup> May 2010. He however avers that the Plaintiff has not demonstrated the efforts he made towards addressing the issue. According to him, the Plaintiff's letter complaining about the missing file was written one day prior to the hearing of his application dated 14<sup>th</sup> July 2010. The Defendant contends that his advocates had on 20<sup>th</sup> July 2010 written a letter complaining about the loss of the file and a copy of the said letter was annexed as "SNW 2".

According to the Defendant, it is the duty of every party to fix down their matters for hearing and as such, the Plaintiff could not expect his advocates to fix his application for hearing. It is the Defendant's contention that the Plaintiff was served with a hearing notice dated 30<sup>th</sup> July 2010 through registered mail as evidenced by a copy of a forwarding letter dated 19<sup>th</sup> October 2010, hearing notice dated 30<sup>th</sup> July 2010 and a certificate of posting.

The Defendant contends that the Plaintiff is guilty of inordinate delay and further, that he never took any active steps to set aside the dismissal orders until 18 months had lapsed evidencing his loss of interest in the suit. It is the Defendant's case that the continued subsistence of the suit amount to a clog in the judicial system which prejudices him as the Plaintiff is not keen on prosecuting the same. The Defendant contends that the inactivity on the part of the Plaintiff in setting aside the dismissal orders is inordinate and inexcusable.

The application was canvassed by way of written submissions where the Plaintiff reiterated the facts as set out in the supporting affidavit and averred that on 30<sup>th</sup> July 2010, the Defendant's advocate took an ex-parte hearing date without serving him with the relevant hearing notice. The Plaintiff submitted that prior to 30<sup>th</sup> July 2010, the court file had gone missing since 16<sup>th</sup> July 2010 and that when his applications dated 14<sup>th</sup> May 2010 were slated for hearing on 19<sup>th</sup> July 2010, they were not listed for hearing. It is the Plaintiff's submission that delay in prosecuting this suit was not deliberate and that it was in the interest of justice that the suit herein be reinstated for hearing on merits. Lastly, the Plaintiff submitted that the Defendant would not suffer any prejudice were the court to allow the orders sought.

The Defendant in submissions dated 15<sup>th</sup> August 2014 reiterated the facts as set out in his replying affidavit and submitted that the Plaintiff was guilty of inordinate delay since despite the dismissal of the suit on 15<sup>th</sup> December 2010, the Plaintiff did not present a suitable motion for reinstatement until after the lapse of 18 months. Counsel argued that the explanation for delay that the court file went missing lacks sufficient proof as there is no indication from the Deputy registrar that the file was lost or misplaced. The Defendant submitted that the court file was readily available at the registry since he was able to fix his application dated 14<sup>th</sup> July 2010 for hearing on 21<sup>st</sup> October 2010.

Counsel submitted that the Plaintiff was guilty of laches and had demonstrated lack of interest in the suit filed and that the application before the court was an abuse of the court process. Reference was made to the grounds on the face of the Defendant's application dated 14<sup>th</sup> July 2010 and it was submitted that despite the application having been duly served upon the Plaintiff, the same was not opposed and hence the ruling delivered on 15<sup>th</sup> December 2010 allowing the application to strike out the suit.

Counsel contended that the Defendant was highly prejudiced by the Plaintiff's conduct in handling the suit which borders on serious lapses and negligence which should not be entertained by the Court. It is the Defendant's submission that the overriding objective of the Court will not come to the aid of a party who is guilty of laches and inexcusable conduct and reliance was placed on the case of **Ceres Estate Ltd vs. Kieran Day & 4 others(2013)eKLR** where the court took into account the inordinate delays in

prosecuting the suit and the misconduct by the Plaintiff and declined to reinstate the suit which had been dismissed for want of prosecution.

**Determination**

The issue for determination is whether the Plaintiff has demonstrated a reasonable cause to warrant reinstatement of his suit. I have perused the court record and noted that on 1<sup>st</sup> July 2010, the court directed that applications dated 14<sup>th</sup> May 2010 and 2<sup>nd</sup> March 2010 be heard on 19<sup>th</sup> July 2010. The Plaintiff contends that owing to the missing court file, the suit was not listed for hearing as scheduled. This averment was conceded by the Defendant in his replying affidavit.

The Plaintiff also contended that on 30<sup>th</sup> July 2010, the Defendant's advocate took an ex-parte hearing date for hearing of the Defendant's motion dated 14<sup>th</sup> July 2010. This allegation was not controverted and there is no evidence to show that the Plaintiff had been invited for fixing of a mutually convenient date and that in his absence, an ex parte date was fixed.

The Defendant demonstrated that a hearing notice dated 30<sup>th</sup> July 2010 was sent to the Plaintiff by registered post. The Plaintiff admitted to having received the letter dated 19<sup>th</sup> October 2010 forwarding the hearing notice on 27<sup>th</sup> October 2010, a day before the motion was slated for hearing. The Plaintiff stated that he had a different matter scheduled for hearing on 28<sup>th</sup> October 2010 and he exhibited a letter dated 27<sup>th</sup> October 2010 addressed to the Deputy Registrar where he stated that he received the hearing notice under protest and requested to be invited for fixing of a convenient date.

The Defendant has maintained that the suit herein was not dismissed for want of prosecution but that it was struck out for being incurably defective, frivolous and amounting to abuse of the court process. In the ruling delivered on 15<sup>th</sup> December 2010, the Court noted that when the application came for hearing, no indication was shown whatsoever as to the Plaintiff's interest in prosecuting the application.

I am satisfied with the reasons advanced by the Plaintiff for his failure to attend Court on 28<sup>th</sup> October 2010 when the Defendant's application dated 14<sup>th</sup> July 2010 seeking to dismiss his suit proceeded *ex parte*. The court record also shows that the Plaintiff has previously, fairly attended court consistently. Considering that the subject matter of this suit consists property whose sale is disputed, substantive justice demands that the suit herein be reinstated for hearing on merits. In furtherance of the overriding objective where the courts are enjoined to render substantive justice as provided for under Sections 1A, 1B and 3A, of the Civil Procedure Act Cap 21 Laws of Kenya the Court will exercise its discretion to reinstate the suit so that the same is heard and determined on merit. The parties should move with speed to comply with Order 11 of the Civil Procedure Rules to facilitate expeditious hearing of the suit. The Plaintiff is directed to take steps to set the suit herein for hearing within 60 days from the date of this ruling failing which the suit against Defendant shall stand dismissed. Costs of this application are awarded to the Defendant in any event.

Orders accordingly.

Ruling dated, signed and delivered this...**17TH**.....day of.....**JULY**.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Plaintiff

..... For the Defendant