



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 3 OF 2014

CHARLES KIARA WAIGWA.....PLAINTIFF

VERSUS

MOHAMMED MAHMOUD SHAMBE

FAITH MAHMOUD AHMED.....DEFENDANTS

RULING

1. By this Notice of Motion application dated 18th September 2019, Charles Kiara Waigwa prays for an order that this Honourable Court be pleased to review the order issued herein on 11th April 2018 dismissing this suit for want of prosecution and to instead reinstate the same for hearing.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds: -

i) That the Plaintiff's suit was never determined to its finality as the same was dismissed for want of prosecution despite the fact that on the material date there was an Advocate in Court representing the Plaintiff;

ii) That prior to the dismissal of the suit, the Plaintiff's son by the name Hilary Manegene Kiara who was pursuing the matter in liaison with the Plaintiff's Advocates was killed by Al-Shabaab militants on 5th September 2017 which eventually led to a communication breakdown with the Advocates.

iii) That the application has been made in good faith and in the interest of justice.

3. The application is opposed. In a Replying Affidavit sworn by the 1st Defendant and filed herein on 30th October 2019, he avers that the allegations that the Plaintiff lost touch with his Advocate is outrageous and inexcusable since the Plaintiff had filed the suit three years earlier and had failed to take steps to prosecute the same.

4. The 1st Defendant further avers that following the disposal of the Plaintiff's suit, the 2nd Defendant who was then the registered proprietor proceeded to dispose of the same to a third party who has since taken possession of the suit property.

5. I have perused and considered the Plaintiff's application and the response thereto by the Defendants. I have also taken into consideration the oral submissions made before me by the Learned Advocates for the parties.

6. This suit was filed on 23rd January 2014. By an application dated the same day filed contemporaneously with the suit, the Plaintiff sought orders of injunction against the Defendants. On 27th February 2014, the said application was allowed with the consent of the parties. From the record, nothing else happened on the file until some two years later when this Court issued a Notice to the parties to show cause why it would not be dismissed for want of prosecution.

7. On 1st July, 2016 when the matter came up, the Plaintiff explained that he had been trying to fix the matter for pre-trial and blamed the Defendants for the failure to do so. Having heard the explanation, the Honourable Angote J then seized of the matter granted the parties 60 days within which to proceed for pre-trial otherwise the matter would stand dismissed.

8. Those days lapsed but the matter eventually proceeded for pre-trial on 31st October 2016. As it turned out, the Defendants had by then not filed a Statement of Defence. Subsequently on 26th January 2017, the Defendants filed an application seeking to be allowed to file their

Defence out of time. That application was allowed on 10th April 2017 by the consent of the parties upon which the parties were given time to proceed a fresh for pre-trial. The matter was eventually certified ready for hearing on 14th August 2017.

9. On 24th January 2018, the Defendants proceeded to the Registry and fixed the matter for hearing on 11th April 2018. On the said date however the Plaintiff was not in Court and his Advocate applied for an adjournment on the ground that there was a document they required from the Lands Office. That request was declined and the Plaintiff's suit was later on that day dismissed for want of prosecution.

10. By this present application, the Plaintiff contends that he was unaware of the date for hearing as his son one Hilary Manegene Kiara who was pursuing the matter in liason with his Advocates was killed by terrorists a few months before the hearing date and he had therefore lost touch with his Advocates on record. In support of that application, he has attached a Certificate of Death in evidence that his son died on 5th September 2017.

11. As was stated in *Ivita –vs- Kyumbu (1984) KLR 441*: -

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered.”

12. Having looked at the record, it is clear to me that both parties had contributed to the considerable delay in the prosecution of this suit. In his supporting Affidavit to the application, the Plaintiff avers that he resides in Hindi Magogoni in Lamu County and that he depended on his son in all matters including finance to track down the case and be able to travel.

13. I have considered the reasons given for the failure to attend Court on the hearing date and the delay in filing this application and I do not think that the same were just made up by the Plaintiff. The reasons given sound plausible taking into consideration the circumstances of the Plaintiff as deposed in the Supporting Affidavit.

14. That being the case, I am persuaded that I should give the Plaintiff a chance to canvass his case as I think the prejudice suffered by the Defendants can be compensated in damages.

15. In the premises, I allow the Plaintiff's application, set aside the orders issued by this Court on 11th April 2018 and thereby reinstate this suit for hearing on merit.

16. The Plaintiff shall however pay the Defendants thrown away costs which I hereby assess at Kshs 30,000/- within 30 days from today. In default, the Plaintiff's application shall stand dismissed with costs.

Dated, signed and delivered at Malindi this 25th day of September, 2020.

J.O. OLOLA

JUDGE