



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 137 OF 2009**

**ISAAC MANZA KITELA.....PLAINTIFF/APPLICANT**

**VERSUS**

**BEATRICE MUTIO KITELA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FESTUS MUSYOKA KITELA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Notice of Motion dated 10<sup>th</sup> March, 2020, the Plaintiff prayed for the following orders:

***a. That this Honourable Court be pleased to set aside the Orders made on 29<sup>th</sup> September, 2017 dismissing the Plaintiff's suit and reinstate it so that the Plaintiff can prosecute his case on merits.***

***b. That costs of this Application be in the cause.***

2. The Application is premised on the Affidavit of the Plaintiff who has deponed that this suit was dismissed on 29<sup>th</sup> September, 2017 and that the dismissal was occasioned by his failure to furnish his former advocate with proper instructions because he had been hospitalized between the year 2017 until 2019.

3. The Plaintiff deponed that his former advocates tried to reach him but to no avail; that it is only fair and just that an Advocate be furnished with instructions during the prosecution of his client's case and that the suit was dismissed due to no fault of his advocate but as a result of his illness.

4. In response, the 2<sup>nd</sup> Defendant deponed that the Application is an afterthought; that the Plaintiff filed this suit on 7<sup>th</sup> May, 2009 and never took any steps to prosecute it and that the Plaintiff is guilty of laches as there has been inordinate delay in bringing the Application.

5. The Defendant deponed that the Plaintiff has only availed the hospital documents for the year 2017; that there is no evidence to show where the Plaintiff was since 2009 to 2020 and that the Application should be dismissed.

6. The record shows that on 7<sup>th</sup> May, 2009, the Plaintiff commenced this suit by filing a Plaint of the same date. The Defendant then filed a Defence on 29<sup>th</sup> June, 2009.

7. On 11<sup>th</sup> November, 2014, the parties' advocates informed the court that they had complied with Order 11 of the Civil Procedure Rules. The court then fixed the matter for hearing on 19<sup>th</sup> January, 2015.

8. On 19<sup>th</sup> January, 2015, the court was informed that the 1<sup>st</sup> Defendant had passed on. Since that date, the Plaintiff never fixed the matter for mention or hearing, until 29<sup>th</sup> September, 2019 when the court, on its own Motion, dismissed the suit for want of prosecution.

9. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

***"2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

10. The Plaintiff has not denied that his advocate was served with the Notice to show cause why the suit should not be dismissed for want of prosecution. Indeed, according to the Plaintiff, he is the one who failed to give his advocate instructions because he was ill.

11. The Discharge Summary annexed on the Plaintiff's Affidavit shows that he was admitted at Radiant Group of Hospitals on 6<sup>th</sup> January, 2017 and discharged on 14<sup>th</sup> January, 2017. The Plaintiff was therefore in hospital as an inpatient for around ten (10) days only.

12. This court has not been furnished with any evidence to show that between the year 2015 and 2017, the Plaintiff was sick to the extent that he was incapable of furnishing his advocate with instructions.

13. That being so, it is my finding that the Plaintiff's Application dated 10<sup>th</sup> March, 2010 is unmeritorious. The Application is dismissed with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O.A. ANGOTE**

**JUDGE**