



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 810 OF 2016**

**(FORMERLY HCCC NO. 143 OF 2012)**

**DRUSILA KEMUNTO NYAMWANGE.....PLAINTIFF/APPLICANT**

**VERSUS**

**EVANS N.MAGETO.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**RICHARD OCHAKO OKUMU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MUNICIPAL COUNCIL OF KISII.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**Introduction and Background**

1. By a Notice of Motion dated 24<sup>th</sup> October 2019 the plaintiff/Applicant filed an application seeking the following orders:

1. Spent

2. That the Honourable court be pleased to order a temporary discharge, stay of execution and/or set aside the order of dismissal of this case dated 30.3.2017 together with all consequential orders pending the hearing and determination of this application.

3. The Honourable court be pleased to reinstate the Plaintiff/Applicant's case which was dismissed on 30.3.2017 for non-attendance and the same be fixed for hearing being a land case so that it can be determined on merit.

4. That the costs of this application be provided for.

2. The grounds upon which the application is premised are stated on the face of the application and the applicant's supporting affidavit sworn on 24<sup>th</sup> October 2019 as well as the Further Affidavit sworn on the 16<sup>th</sup> June 2020.

3. In the supporting affidavit she depones that the matter was fixed for a Notice to Show Cause why the suit should not be dismissed for want of prosecution on 30.3.2017. She depones that the Notice to Show Cause was neither served on her nor her advocate and the failure to attend court was therefore not deliberate. She further depones that she has been in and out of hospital as she has been suffering from diabetes and high blood pressure since 2016.

4. She asserts that she has a strong case with real chances of success as she had initially established a prima facie case and obtained an order of injunction restraining the defendants from trespassing on her land.

5. In support of her prayer for stay of execution she depones that the Respondents have already taxed their Bill of Costs and she is apprehensive that they may execute any time. She adds that if the order of dismissal is not set aside the application shall be rendered nugatory and she stands to suffer loss of her hard earned property.

6. In her further affidavit the applicant denies that her advocate was aware of the dismissal of the suit for want of prosecution as the defendants' advocate never informed him of the same. She urges the court to disregard procedural technicalities and proceed to hear the case and decide the real issues in question as provided by the law. She states that is keen to have the matter determined on merit in accordance with article 50 of the Constitution of Kenya which provides that every person is entitled to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. She avers that the defendant will not be prejudiced if the application is

allowed.

7. The 1<sup>st</sup> and 3<sup>rd</sup> defendants opposed the application through their Grounds of Opposition dated 21<sup>st</sup> November 2019 and the Replying Affidavit of Thomas Nsomu Osugo Mageto sworn on the 24<sup>th</sup> February 2020. He depones that he holds a Power of Attorney donated by his brother Evans Mageto (1<sup>st</sup> Defendant) who resides in the United States of America.

8. He goes on to state that by a Notice of Motion dated 12<sup>th</sup> April 2013, the 1<sup>st</sup> defendant sought to discharge, vary or set aside the order of interim injunction issued by the court on 22<sup>nd</sup> May 2012. He also sought that his Defence and Counterclaim filed out of time be deemed as duly filed and that his application for injunction dated 23<sup>rd</sup> April 2012 be heard on merit. On 29<sup>th</sup> May 2014, the said application was dismissed with costs to the plaintiff. The 1<sup>st</sup> defendant thereafter appealed against the dismissal but when the Appeal came up for hearing on 19<sup>th</sup> April 2017 the same was withdrawn on the grounds that it had been overtaken by events since the substantive suit upon which it was based had been dismissed for want of prosecution.

9. He wonders why the applicant chose to instruct her advocate to defend the appeal but not to apply for reinstatement of the suit herein. He avers that he will be prejudiced if the suit is revived as he cannot revive the appeal at the Court of Appeal. He avers that the plaintiff is guilty of laches and that the application is merely an afterthought intended to obstruct or delay the execution process for costs awarded to the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

10. The application was prosecuted by way of written submissions and both parties filed their submissions which I have considered.

### Issues for Determination

11. The main issues for determination are :

1. Whether the order of dismissal of the suit ought to be set aside
2. Whether the suit ought to be reinstated for hearing and if so, on what terms?
3. Who should bear the costs of this application?

### Analysis and Determination

12. In order for the court to be able to exercise its discretion to set aside the order of dismissal the applicant must demonstrate that there is sufficient cause as to why she failed to attend court for the hearing of the Notice to Show cause why the suit should not be dismissed for want of prosecution.

13. The term "sufficient cause" was analyzed by the High Court in the case of **Wachira Karani v Bildad Wachira [2016] eKLR** where the court referred to the definition espoused by the Supreme Court of India in the case of **Parimal vs Veena** where it was observed that:-

*"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fides on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

The court further stated that:

*"The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."*

14. In the instant suit the applicant has stated that she failed to attend court as neither herself nor her advocate were served with the Notice to Show Cause why the suit should not be dismissed. She has further explained that she has been ailing since 2016 and she has attached two copies of medical reports to demonstrate that she has been attending hospital on diverse dates.

15. I have also perused the file and I have not come across an affidavit of Service with respect to the Notice to Show Cause which came up for hearing on 30.3.2017. This lends credence to the applicant's assertion that she was not served. Granted that there was some delay in filing this application, I am persuaded that this may have been occasioned by the applicant's illness. The above reasons constitute sufficient cause.

16. Consequently, I am inclined to exercise my discretion in the applicant's favour. In so doing I am guided by Article 50 of the Constitution of Kenya which entitles every person to a fair hearing. Furthermore, I am guided by the case of **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**, where the court stated as follows:

*“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.*

17. The upshot is that the application has merit and I hereby grant it and set aside the order of dismissal dated 30.3.2017 and reinstate the suit for hearing on merit. However, the applicant shall pay thrown away costs of Kshs. 10,000 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within 30 days. The costs of this application shall be in the cause.

**Dated, signed and delivered at Kisii this 5<sup>th</sup> day of November 2020.**

**J.M ONYANGO**

**JUDGE**