



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 56 OF 2016

ZIPPORAH JEPKEMBOI KORIR.....1ST PLAINTIFF

ANDREW ARAP ROTICH.....2ND PLAINTIFF

VERSUS

MINISTRY OF EDUCATION.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

ELISHA BUSIENEL.....3RD DEFENDANT

COUNTY GOVERNMENT OF UASIN GISHU.....4TH DEFENDANT

BELION CONTRACTORS.....5TH DEFENDANT

RIFT VALLEY TECHNICAL TRAINING INSTITUTE.....6TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 16TH MARCH, 2020 UNDER CERTIFICATE OF URGENCY DATED 30TH JUNE, 2020 AND FILED ON 2ND JULY, 2020]

1. The Plaintiffs seek vide the Notice of Motion detailed above for setting aside of the Order made on the 11th March, 2020 dismissing their suit, and that their suit be reinstated and set down for hearing. They also pray for costs. The application is based on the ten **(10)** grounds on its face and is supported by the affidavits sworn by **Elijah Momanyi Mogona Advocate** and **Zipporah Jepkemboi Korir**, the 1st Plaintiff, on the 16th March, 2020. That it is the Plaintiff's case their suit was dismissed after they and their Counsel failed to attend court on the 11th March, 2020. That the failure to attend was because Counsel had failed to diarize the matter and to notify the Plaintiffs of the hearing date.

2. The application is opposed by the 3rd Defendant through the eight **(8)** grounds of opposition dated the 23rd September, 2020. The 1st and 2nd Defendants also opposed the application through their grounds of opposition dated the 20th July, 2020. That it is their case that the hearing date of 11th March, 2020 had been fixed by consent on the 24th September, 2019 in the presence of 1st Plaintiff. That the application has been filed after inordinate and unreasonable delay of over four **(4)** months and is therefore not deserving.

3. The learned Counsel for the 3rd Defendant, Plaintiffs, 1st and 2nd Defendants and the 6th Defendant filed their written submissions dated 12th November 2020, 3rd August 2020, 17th November 2020 and 17th November, 2020 respectively.

4. The following are the issues for the Court's determination:

(a) Whether the Plaintiffs have made a reasonable case for their suit dismissal order issued on 11th March, 2020 to be set aside and suit reinstated for hearing.

(b) Who pays the costs?

5. The court has after considering the grounds on the Motion, affidavit evidence, grounds of opposition, written submissions and superior courts' decisions cited thereon come to the following determinations;

(a) That the record confirms that the hearing date of 11th March, 2020 was fixed on the 24th September, 2019 in the presence of the Plaintiff, and her Counsel **Mr. Momanyi**. That also present was Mr. **Wabwire** for 1st and 2nd Defendants, M/s Khandambi for 5th & 6th Defendants. That the matter had been set for hearing on that date but Mr. Momanyi applied for adjournment for reasons that he was yet to get some relevant documents from **Eldoret High Court Succession Cause No. 2 of 1970**. That though the other two Counsel opposed the application, the Court granted it and marked it as the last one for the reason of not getting the said documents.

(b) That come the 11th March 2020, the record shows the Plaintiffs and their advocate were absent. **M/s Khandambi** for the 6th Defendant and **Mr. Mitei** for the 5th defendant, **M/s Ojiambo** for the 3rd Defendant and **Mr. Wabwire** for the 1st and 2nd Defendants were present and upon their oral application, the Plaintiff's suit was dismissed with costs for non-attendance and want of prosecution. That the Court further directed that the 1st and 2nd Defendant's counterclaim do proceed for hearing on the 24th September, 2020. That the Plaintiff then filed the current application on the 2nd July, 2020 which is after about three (3) months, three (3) weeks from the date of the dismissal order. That the Notice of Motion was mentioned on 20th July, 2020 when directions on filing and exchanging replies and submissions were made.

(c) That the Superior courts' decisions referred to by the Counsel in their submissions are clear that what amounts to inordinate and unreasonable delay depends on the circumstances of each cases. That though the Plaintiff's Counsel allege that he had failed to diarize the date of 11th March, 2020 fixed in the presence of himself and the Plaintiff on the 24th September, 2019, there is no annexure of the relevant diary or copy of the diary to the affidavit from which the Court would have confirmed that allegation. That further, there is no explanation tendered why the 1st Plaintiff who has not disputed having been in court on the 24th September, 2019 when the hearing date of 11th March, 2020 was fixed did not attend court. That the Plaintiffs have further not tendered an explanation why their application dated 16th March, 2020 was not filed until the 2nd July 2020 which is a period of over three (3) months, two (2) weeks. That as the Court has a duty to do justice to all parties before it, the court is of the view that the Plaintiffs' failure to come to court for hearing on the 11th March, 2020 has not been explained and the delay in filing their application is unexcusable. That the cases of **Rajesh Rugham Vs Fifty Investments Ltd & Another [2005] eKLR**, and **Eliud Mukhisa Nalinya & Another Vs Joseph Wanjala Fulafu & Another [2019] eKLR**, among others cited by the learned Counsel in their submissions are relevant on the position that inaction by counsel and party does not suffice in explaining delay.

(d) That the Plaintiffs are the ones who commenced these proceedings in 2016, but have not shown diligence in prosecuting their case. That as justice delayed is justice denied, the Court finds no merit in their application. That as costs follow, the event under **Section 27 of the Civil Procedure Act**, the Plaintiffs will pay the costs of the application.

6. That flowing from the foregoing findings, the Plaintiffs' Notice of Motion dated the 16th March, 2020 under Certificate of Urgency dated 30th June, 2020 and filed on 2nd July, 2020 is without merit and is dismissed with costs. It is so ordered.

Delivered virtually and dated at Eldoret this 16th day of December, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Counsel: Mr. Momanyi for the Plaintiff.

Mr. Kuria for 1st and 2nd Defendants.

M/s Khandambi for 6th Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.