



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 535 OF 2015

CHARLES SIGU OTIENO.....PLAINTIFF/APPLICANT

VERSUS

AMOS OTIENO ADUOL.....1ST DEFENDANT/RESPONDENT

CAROLYNE AKOTH ODHIAMBO.....2ND DEFENDANT/RESPONDENT

ALEX NAYKOKO.....3RD DEFENDANT/RESPONDENT

COUNTY COUNCIL OF SIAYA.....4TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

The Plaintiff filed a Notice of Motion dated 1st November seeking to rescind and/or set aside the order of the court dismissing the suit made on 9th May 2017 and to reinstate the suit for hearing on merit.

The application is based on the affidavit of the Plaintiff dated 1st November 2019. The Plaintiff avers that he had initially instructed the firm of M/s Olel, Ingutiah & Company Advocates to act on his behalf in this matter. That he visited the firm sometime in May 2019 to enquire the position of the case, but his advocates seemed not be aware of what the position was, prompting the Plaintiff to visit the ELC registry. That the Plaintiff discovered from the court file that a notice to show cause why the suit should not be dismissed was sent to the firm of advocates which received it on 10th April 2017. That the Plaintiff went back to the said advocates with the information and they told him that they would take the necessary steps to have the matter reinstated. That the Plaintiff was surprised to discover that by October 2019 nothing had been done towards the reinstatement of the suit.

The Plaintiff avers that he has now decided to engage another firm to pursue the reinstatement and final determination of the suit, as he has taken a loan from Cooperative Bank of Kenya using the title to the suit parcel which has accrued to about Kshs 1.2 million. That the Plaintiff stands to suffer irreparable loss and damage should the suit not be reinstated and heard on merit as the Defendants continue to do business on the plot.

1st Respondent's Reply

The 1st Respondent filed a replying affidavit in opposition to the application dated 26th November 2019. The 1st Respondent averred that after consolidation and transfer of the suits which the Plaintiff had initially filed, the Plaintiff took no steps to fix the matter for hearing and nearly all the dated were taken by the Respondents' advocates. That it was 2 years since the suit was dismissed and over 8 years of inactivity.

The 1st Respondent averred that the matter was duly fixed for Notice to Show Cause on 9th May 2017 and upon the Plaintiff failing to show cause why the suit should not be dismissed for want of prosecution, the same was dismissed. That the application was without merit, incompetent and ought to be struck out.

WHETHER ORDERS SOUGHT ARE MERITED

Plaintiff is being economical with the truth by averring that by October 2019 he was still relying on the firm of Olel, Ingutiah & Company Advocates to prosecute his case. It is clear from the documents filed that the Plaintiff's current Advocates, Mung'ao Rachier & Co Advocates came on record for the Plaintiff on 5th May 2017, four days before the Plaintiff was to appear to show cause why the suit should not be dismissed.

Further, on the appointed date of 9th May 2017, the Plaintiff's current Advocates appeared and an explanation given for the delay in prosecuting the case since August 2011. The court was not satisfied with the explanation and accordingly dismissed the suit.

The order of the judge, who arrived at his decision after hearing the matter on its merits, renders this court *functus officio* as far as this application is concerned as it involves the decision of a judge of concurrent jurisdiction. Any attempt to consider reinstating the suit would amount to an appeal or review of the judge's decision. The proper cause of action for the aggrieved Plaintiff would have been to appeal the decision to dismiss the suit. The application is therefore dismissed with costs.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE