



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 84 OF 2010

ISAAC WEPUKHULUPLAINTIFF

VERSUS

ELIZABETH SIMIYU WALUNYWA.....DEFENDANT

RULING

1. The application dated **23/12/2019** and filed in court on the same date has been brought under **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Act** and **Order 45 Rules 1** and **2** of the **Civil Procedure Rules, Article 159** of the **Constitution of Kenya** and **Section 3** and **19** of the **Environment and Land Court Act**. The plaintiff seeks the following orders:-

(a) That the order made by the court on the 18/1/2018 dismissing the plaintiff's suit for want of prosecution be reviewed, varied and or set aside.

(b) Costs be in the cause.

2. The application is supported by the affidavits sworn by the plaintiff on **23/11/2019**. The grounds at the foot of the application upon which the said application is made are that the plaintiff's advocate then on record was served with a notice to show cause under **Order 17 Rule 2(1)** of the **Civil Procedure Rules** but he declined to receive the same and did not communicate to the plaintiff; that the advocate was aware of the proceedings but failed to communicate the fact the applicant and that he later withdrew from acting for plaintiff without notice; that this being a land matter it is in the interest of justice that the plaintiff be accorded an opportunity to present his case; that the dismissal of the suit was erroneous and the orders made ought to be reviewed, varied or set aside. The supporting affidavit largely reiterates the same matters set out in the grounds above.

3. On **14/7/2020** the plaintiff filed an application seeking the orders that this court be pleased to give further directions as to the *inter partes* hearing of the application dated **23/12/2019**. By a ruling delivered on **13/10/2020**, the court allowed the plaintiff to have the application dated **23/12/2019** be determined on the merits and ordered that it be set down for hearing. The court directed that the hearing of the application be by way of written submissions.

4. The application is opposed. The respondent filed a replying affidavit of its advocate, Peter Kiarie Ndarwa on **30/7/2020**. The gist of that affidavit is that the application has not merit. It is deponed that a prior notice of intention to dismiss the suit was served upon the both counsel and that by **7/2/2019** when the applicant's advocate filed an application to cease acting the suit had already been dismissed. Further it is stated that the notice of taxation that allegedly made the plaintiff aware of the dismissal was served on the plaintiff in **March, 2019** yet the application was filed on **23/12/2019** and the delay has not been validly and reasonably explained. The respondent cited **Article 159 (2) (b)** and **Section 1A** of the **Civil Procedure Act** and **Section 3(i)** of the **Environment and Land Court Act** and submitted that those provisions mandate the court to ensure that justice shall not be delayed. It is further submitted that the court accorded the applicant an opportunity to participate in the trial and present his case and the advocate cannot be blamed for the failure of the applicant to be vigilant. Counsel submitted that it is apparent from the application that from **2017** the applicant has never consulted his then advocate.

5. The defendant filed her written submissions on **28/10/2020**. The plaintiff filed his submissions after the defendant on **5/11/2020**.

6. I have considered the application, the response and the submissions. It is clear that the only issue that arises in this application is whether the court should set aside orders made on **18/1/2018** dismissing the plaintiff's suit for want of prosecution.

7. In his submissions the applicant reiterated the grounds in the application cited the cases of **Charles Murachia Onsorigo and Another -vs- Philip Onyango Okindo & 3 Others [2015] eKLR** and **Edney Adaka Ismail -vs- Equity Bank Ltd [2014] eKLR** and argued that the application be granted. The main pillar of his argument is that the applicant's erstwhile advocate withdrew from the matter unprocedurally without informing the applicant of the suit withdrawal and so the applicant was not aware of it. He cited **Order 9 Rule 13 of the Civil Procedure Rules** requiring a withdrawing up advocate to serve the chamber summons to leave upon all parties and his clients which was allegedly not done in the instant case. He further submitted that the applicant's erstwhile advocate "*received a notice to show cause to attend*

court on 18/1/2018 but declined to receive the same and never informed the client/applicant.” He also relied on **Section 3(i) of the Environment and Land Court Act No. 12 of 2012** which gives overriding objective of the Act. On those grounds it is urged that the prayers sought be granted.

8. After having anxiously considered the application, I find that the suit herein was filed in **2010** in the High Court at Kitale and subsequently transferred to this court upon inception. After the defendant’s preliminary objection was dismissed on **17/2/2016** the plaintiff appears to have strangely relaxed his pursuit of the suit. Before that determination the matter appears to have come up only four times between **2010** and **2016**.

9. In the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013] eKLR* the Court of Appeal observed as follows:

“This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

10. The instant suit came up for a notice to show cause on **18/1/2018**. Nevertheless the applicant was not in court to defend the notice to show cause hence the dismissal.

11. The applicant’s main ground that his erstwhile counsel failed him is probable. That counsel is not involved in this application to either denounce or verify the applicant’s averments. On this court’s part, in not condoning improper conduct on the part of counsel, it finds that failure of counsel to attend court for the notice to show cause without having withdrawn from acting in the matter is a grievous thing that brings litigants to the ungainly position of having to beg for the indulgence of the court at times. However the applicant in the instant case himself is not entirely free from blame for as pointed out by the defendant’s counsel he appears to have taken inordinately long to call on his advocate to verify the position of his matter both before and after the dismissal with the effect that even the instant application was filed after a long delay. The dismissal of the suit was consequently not on the merits but even in such cases courts have been at times been unsympathetic to applicants guilty of serious omissions.

12. Nonetheless, the question that this court must address which has a bearing on the application at hand is whether the failure of communication to the client by the advocate did occasion him prejudice, and if the applicant’s own omissions in consulting his counsel regularly as pointed out by the respondent are fatal to his application.

13. As stated before the applicant’s erstwhile counsel is not here to answer to his alleged misdeeds and this court only has the applicant’s word, and having hindsight into the colossal number of matters of similar nature in which advocates have been said to have failed their clients, this court must not only apportion some blame upon the applicant but must also allow a margin of doubt as to whether the allegations against his advocate may be holding some element of truth, for it has been the case in previous litigation that courts have indulged litigants over the sins of their counsel; the ready examples of such instances are the often-cited decisions in **Philip Keiptoo Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492**, **Joseph Mweri Igweta -vs- Mukira M’Ethare & Attorney General 2002 [eKLR]**, **Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR** and **Sheikh T/A Hasa Hauliers v Highway Carriers Ltd [1988] eKLR**.

14. What is clear is that the notice to show cause appears on the face of it to have been served upon the applicant’s then counsel and the court, in dealing with the notice to show cause, appears to have been so convinced. After failing to attend the NTSC the same counsel was served with the taxation notice and the bill of costs in the matter on **6/2/2019** and his immediate response was to lodge an application seeking leave to cease acting the next day on **7/2/2019**, which he purported to serve on the applicant through registered post on **24/4/2019**, almost two months later. A copy of the certificate of posting was attached to the counsel’s affidavit of service in respect of the application.

15. Subsequently after the counsel’s withdrawal, the applicant was served directly on his person, the notice of taxation and bill of costs on **4/12/2019** while the instant application was filed on **23/12/2019**. The chronology of events set out hereinabove lends credence to the applicant’s allegation that his erstwhile counsel failed him in his hour of need and this court is therefore inclined to exercise its discretion in his favour. Consequently the application dated **6/2/2019** is hereby granted as prayed in **prayers No. (i) and (ii)** thereof. This suit shall be mentioned on the **16th December 2020** for the fixing of a hearing date.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 1st day of December, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.