



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU**

**ELC. NO. 513 OF 2015**

**JAMES ABOK ABONYO .....1<sup>ST</sup> PLAINTIFF**

**SHEM AMBOK OBIENE.....2<sup>ND</sup> PLAINTIFF**

**WILFRIDA ACHUAL OGADHO.....3<sup>RD</sup> PLAINTIFF**

**SALINA OSENG AWASI.....4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**MAGDALINE WERE ALOO.....1<sup>ST</sup> DEFENDANT**

**LEONARD ALFRED MUGANDA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. James Abok Abonyo and 13 Others, the Plaintiffs seeks vide the Notice of Motion dated the 23<sup>rd</sup> November, 2017, to have the court review and or set aside the order made on the 22<sup>nd</sup> March 2017 dismissing their suit for want of prosecution. They also seek for costs to be provided for. The application is based on the twelve (12) grounds on its face marked (a) to (l) and supported by the affidavit of David Parapawa Masake, advocate, sworn on the 23<sup>rd</sup> November, 2017.

2. The application is opposed by the defendants through the six (6) grounds of opposition dated the 1<sup>st</sup> December, 2017.

3. The application came up for hearing on the 10<sup>th</sup> April, 2018 when the learned counsel for the parties agreed to file and exchange written submissions. The written submission dated the 10<sup>th</sup> April, 2018 and 13<sup>th</sup> April, 2018 were filed by the counsel for the plaintiffs and defendants respectively.

4. The following are the issues for determination by the court:-

**a. Whether the plaintiffs have given reasonable grounds or explanation why no steps to prosecute their case had been taken for more than one year.**

**b. Whether notice to show cause why the suit should not be dismissed for lack of prosecution had been served on the counsel on record for the plaintiffs.**

**c. Whether the notice of motion dated the 23<sup>rd</sup> November, 2017 is res judicata in view of the order of 22<sup>nd</sup> June, 2017 dismissing the application dated the 3<sup>rd</sup> April, 2017.**

**d. Whether the Learned Counsel involved in the application are on record for the parties in this suit.**

**e. Who pays the costs.**

5. The court has carefully considered the grounds on the notice of motion; grounds of opposition, affidavit evidence, written submissions, the record and come to the following conclusions:

a) That the record shows that this suit was commenced by James Abok Abonyo, Shem Ombok Obiero, Wilfrida Achual Ogadho and Salina Oseng Awasi as plaintiffs, against Magdalina Aloo Were and Leonard Alfred Muganda as defendants, through the originating

summons dated the 2<sup>nd</sup> April, 2012 through Ms. Otieno, Yogo, Ojuro & Company Advocates. The suit was registered as Kisumu H.C.C.C No. 63 of 2012. That filed contemporaneously with the originating summons is the notice of motion of even date that was on the 4<sup>th</sup> April, 2012 certified as urgent and fixed for hearing on the 26<sup>th</sup> April, 2012. That on that date the court heard Mr. Ojuro and Lore for Kowino advocates for the plaintiffs and defendants respectively, and ordered that status quo obtaining by the time of filing of the suit be maintained. The court also granted leave to the parties to file their affidavits and fixed the hearing of the application to the 24<sup>th</sup> October, 2012. The record of the 24<sup>th</sup> October, 2012 shows that Mr. Otieno and Kowino, advocates for the plaintiffs and defendants respectively were present and after their brief submissions, the court took out the matter and directed parties to take dates at the registry. That there was no other court appearance until the 22<sup>nd</sup> March, 2017 when the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** dated the 5<sup>th</sup> December, 2016 came up for hearing. The record shows that Mr. Onsongo for the defendants was present and prayed for the plaintiffs' suit to be dismissed with costs which prayer was granted.

b) That the notice of motion dated 3<sup>rd</sup> April, 2017 that was dismissed for non-attendance by the plaintiffs and or their advocates on the 22<sup>nd</sup> June, 2017 and the notice of motion dated the 23<sup>rd</sup> November, 2017, which is subject matter of this ruling were both seeking the same prayer, that is reviewing and or setting aside the orders made on the 22<sup>nd</sup> March, 2017 dismissing the plaintiffs suit for want of prosecution. The two notices of motions were filed through Ms. Kasamani and Company Advocates for the plaintiffs. That the court has perused the court record and has not traced any formal or legal document upon which Ms. Kasamani & Company advocates were appointed to come on record for the four (4) named plaintiffs or any of them in this suit. That the only document traced on the record is annexure 'MAW – 4' to the Replying affidavit of Magdalina Were Aloo sworn on the 24<sup>th</sup> April, 2012. The annexure is the 'plaintiffs list of witnesses' in Kisumu H.C.C.C No. 70 of 2012, dated the 16<sup>th</sup> April, 2012 and filed through Ms. Kasamani & Company Advocates for the plaintiffs. The document shows that the suit has fourteen (14) plaintiffs and three (3) defendants unlike this suit that has four (4) plaintiffs and two (2) defendants. That James Abok Abongo is the only plaintiff appearing in both Kisumu H.C.C.C No. 63 and 70 of 2012. That Magdalina Were Aloo and Leonard Alfred Muganda are also appearing as the 1<sup>st</sup> and 2<sup>nd</sup> defendants in both suits. That the front cover of this Court record shows clearly that this file, Kisumu ELC No. 513 of 2015, was formerly H.C.C.C No. 63 of 2012. That as the firm of Ms. Kasamani & Company Advocates is not the counsel on record for the plaintiffs in this case, as there is no notice filed under **Order 9 of the Civil Procedure Rules**, the application dated the 23<sup>rd</sup> November, 2017 is improperly before the court. That further, the counsel on record for the plaintiffs, that is Otieno, Yogo Ojuro & Company Advocates, have not formally withdrawn or been changed in accordance with the provisions of **Order 9 of Civil Procedure Rules**, and remains the advocates on record for the Plaintiffs.

c) That the notice under **Order 17 (2) of Civil Procedure Rules** that was heard and granted on the 22<sup>nd</sup> March, 2017 is clearly shown to have been addressed to Mr. Kowino & Company Advocates and Otieno, Yogo & Company Advocates. That Ms. Kowino & Company Advocates is the firm that entered appearance for the defendants vide the memo dated the 24<sup>th</sup> April, 2012 and through whom the replying affidavit sworn by Magdaline Were Aloo, sworn on the 24<sup>th</sup> April, 2012 was drawn and filed. That the plaintiffs and defendants in this suit, which was formally Kisumu HCCC No. 63 of 2012, are represented by Ms. Otieno, Yogo, Ojuro & Company Advocates and Kowino & Company Advocates respectively, until such a time that they formally and legally withdraw and or are changed.

d) That the notices of motion dated the 3<sup>rd</sup> April, 2017 that was dismissed for non-attendance on the 22<sup>nd</sup> June, 2017 and the one dated the 23<sup>rd</sup> November, 2017 indicates clearly that they are **"To be served upon Onsongo & Company Advocates"**. That the grounds of opposition dated 6<sup>th</sup> April, 2017 and 1<sup>st</sup> December, 2017 in response to the notices of motion dated 3<sup>rd</sup> April, 2017 and 23<sup>rd</sup> November, 2017 respectively, were filed through Mr. Onsongo & Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That it is also noted the Mr. Onsongo Advocate is the one who attended the hearing on the 22<sup>nd</sup> March 2017 of the notice under **Order 17 Rule 2 of Civil Procedure Rules**, when the suit was dismissed for want of prosecution. That as Mr. Onsongo is not formally and legally on record for the defendants or any of them in this suit, and as he did not indicate that he was holding brief for Ms. Kowino & Company Advocates for the defendants herein when he appeared before the court on the 22<sup>nd</sup> March, 2017, he was without authority and or capacity to appear and address the court for the defendants. That as both counsel on record for the parties herein have not moved the court to challenge the order of the 22<sup>nd</sup> March, 2017, the same remains in force and is valid notwithstanding Mr. Onsongo's participation in the proceedings of that day.

e) That from the foregoing it is apparent that Ms. Kasamani & Company and M/s. Onsongo & Company advocates appear for the plaintiffs and defendants respectively in Kisumu HCCC No. 70 of 2012. That as the pleading in that suit have not been availed, the court is not in a position to know how the issues in that suit relates to this case. That there is also no order consolidating that suit with the instant one.

f) That in view of the foregoing, the court finds and hold that the notice of motion dated the 23<sup>rd</sup> November, 2017, filed in this suit through Ms. Kasamani & Company, is filed in the wrong court record (file) and should be struck out.

6. That in view of the findings above, the Notice of Motion dated the 23<sup>rd</sup> November, 2017 is hereby struck out.

Order accordingly.

**S. M. KIBUNJA**

**ENVIRONMENT & LAND - JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> OF JANUARY 2019.**

In presence of;

Plaintiffs        Absent

Defendants        Absent

Counsel         Mr. Kowinoh for the Plaintiff

                         Mr. Onsongo for the Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**