



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 208 OF 2017 (FORMELY HCCC NO. 54 OF 2003)

JANE KAVINGUHA KIJUSA.....PLAINTIFF

VERSUS

**SHEILA KAGEHA (SUBSTITUTED FOR AGGREY ALUGAYA KIJUSA
(DECEASED)).....1ST DEFENDANT**

SHAJANAND CONSTRUCTION CO. LTD.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. Jane Kavinguha Kijusa, the Plaintiff, seeks for staying, recalling, setting aside of the order of 27th July 2016 dismissing the suit and reinstating the same for hearing and determination. The application is based on the eight (8) grounds marked (a) to (h) on its face and supported by affidavit of Nelson Misoga, described as an advocate awaiting admission to Roll, and currently attached to the firm of advocate on record for the Plaintiff, sworn on a date that is not indicated.

2. The application is opposed by Shajanand Construction Co. Ltd, the 2nd Defendant through the replying affidavit sworn by Chandrakant Chahbnacha, the managing director, sworn on the 20th September 2017.

3. That Counsel for the Plaintiff filed their submission dated the 17th April 2018, while Counsel for the 2nd Defendant filed theirs dated the 7th June 2018.

4. The issues for the Court's determination are as follows;

a) Whether the Plaintiff has shown reasonable cause why no steps aimed at prosecuting this case had not been taken for more than one year by the time the dismissal order was made

b) Who pays the costs.

5. The Court has carefully considered the grounds on the application, the affidavit evidence, Counsel's submission and come to the following determinations;

a) That going by the contents of the letters dated the 22nd January 2015, 11th April 2016 and 18th May 2016, copies of which are annexed to the supporting affidavit and marked "NM-1", "NM-3" and "NM-4", and whose contents have not been challenged by any of the Defendants, the parties

were exploring an out of court settlement between January 2015 and May 2016. That even though the court was not in the picture, as the correspondence were neither copied to the Deputy Registrar nor the matter mentioned in Court, that fact cannot be ignored in determining whether the Plaintiff had reasonable grounds for not taking any steps towards prosecuting the case in court.

b) That the Plaintiff Counsel's contention that the notice issued by the court under **Order 17 Rule 2 of Civil Procedure Rules**, and dated the 14th July 2016, which came for hearing, on the 27th July 2016 was addressed to a Postal address unknown to Counsel has not been disputed. The court has perused the record and noted that while the Counsel correct address is given in all documents as P.O. BOX 296- 50310 Vihiga, the notice was addressed to P.O. BOX 269 Vihiga. That obviously, if the service was done through postage, then the notice went to the wrong address and there is no confirmation that Counsel for the Plaintiff, and indeed the Plaintiff, received it. That accordingly, the order dismissing the suit was made without giving the Plaintiff an opportunity to show cause. That in view of the finding in (a) above, had the Plaintiff received the notice and presented the facts now availed through the supporting affidavit, there is a high probability that the dismissal order would not have been made.

c) That for reasons shown above and considering that the Counsel for the Plaintiff wrote letters dated 31st May 2017 seeking for a mention on 14th June 2017 at the registry to fix a hearing date, the court finds the plaintiff has shown reasonable cause and their application has merit.

6. That having found merit in the Plaintiff's notice of motion dated the 19th June 2017, the court orders as follows;

a) That the order dated the 27th July 2016, dismissing this suit for want of prosecution, be and is hereby reviewed and set aside.

b) That the suit be and is hereby reinstated for hearing and determination.

c) That the costs be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Amule for Musiega for Plaintiff.

Mr. Ojuro for Odeny for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE