



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 3440 OF 1995

CHARLES ODHIAMBO AKAL.....1ST PLAINTIFF

LINET ANYANGO ODHIAMBO.....2ND PLAINTIFF

VERSUS

CAXTON CHEGE MUIGAI.....1ST DEFENDANT

JOB MOGENI OBANDA.....2ND DEFENDANT

NAIROBI CITY COUNCIL.....3RD DEFENDANT

RULING

This suit was partly heard by Lenaola J. (as he then was). On 30th October, 2009, directions were given by Rawal J. (as she then was) that the hearing of the suit should proceed from where it had reached before Lenaola J. As at the time the hearing of the suit was adjourned by Lenaola J. on 25th November, 2003, the plaintiffs had given evidence and had been cross-examined and re-examined. On 2nd November, 2011, the plaintiffs' previous advocate told the court that the plaintiffs intended to call one witness before closing their case.

The suit was not listed for further hearing until 23rd November, 2015 when it was dismissed for want of prosecution. The last time the suit came up in court before its dismissal was on 25th January, 2012 when it was mentioned for fixing a hearing date. On that date, it was stood over generally and the parties directed to fix the same for further hearing at the registry. By the time the suit was dismissed, it had remained dormant for over 3 years.

What is now before me is the plaintiffs' application which was brought by way of Notice of Motion dated 28th September, 2015 seeking the setting aside of the order for the dismissal of the suit that was made on 23rd February 2015 and the reinstatement of the suit for hearing on merit. The application was brought on the grounds that the suit was part heard and that the plaintiffs had already given evidence as at the time the suit was dismissed. The plaintiffs averred that the advocate who was handling the suit on their behalf at the material time lost interest in legal practice generally and in the suit herein without notifying them.

The Plaintiffs averred that the mistake of their previous advocate should not be visited upon them as they had no notice that the suit was scheduled for dismissal. The plaintiffs averred that they came to know of the dismissal of the suit when their tenant on the property the subject of the suit informed them that he had been asked by the 1st defendant to vacate the property. They averred that after they received this information, they tried unsuccessfully to reach their previous advocate to obtain the latest information on this suit. The plaintiffs averred that it was until their advocates on record perused the court file that they came learn that the suit had been dismissed on 23rd February, 2015. The plaintiffs averred that it would serve the interest of justice and fairness if they were granted their day in court. The plaintiffs averred further that the defendants would not suffer any prejudice if the application was allowed.

The application was opposed by the 1st defendant through a replying affidavit sworn on 21st January, 2016. The 1st defendant contended that as at the time the suit was dismissed, the plaintiffs had lost interest in the prosecution of the suit. The 1st defendant averred that the plaintiffs had failed to explain why it took them 4 years to find out the progress of their case. The 1st defendant averred that he had taken possession of the suit property and rented it out to a tenant and as such the status quo prior to the dismissal of the suit could not be reverted to.

The application came up for hearing on 24th July, 2018 when Mr. Onyango appeared for the plaintiffs while Mr. Njenga appeared for the 1st defendant. There was no appearance for the 2nd and 3rd defendants. In his submission in support of the application, Mr. Onyango relied entirely on the plaintiffs' affidavit in support of the application. Mr. Onyango added that when the suit was dismissed, the plaintiffs' former advocate was under suspension. He urged the court to allow the application.

In his submission in reply, Mr. Njenga submitted that the court's power to reinstate a suit dismissed for want of prosecution is discretionary. He submitted that the discretion must be exercised judiciously. Mr. Njenga submitted that the plaintiffs had not placed before the court sufficient reason to warrant the reinstatement of the suit. He submitted that the plaintiffs had placed all the blame for the dismissal of the suit upon their previous advocate as if they had no duty to follow up on the progress of their case. He submitted that a case belongs to a litigant and not to his advocate and as such a court cannot set aside an order for the dismissal of a suit solely on the ground that an advocate had failed to prosecute the suit. In support of this submission, Mr. Njenga cited the case of Savings and Loans v Susan Wanjiru Muriithi, HCCC No. 397 of 2002. Mr. Njenga submitted that the fact that the suit was part heard was inconsequential because even a part heard case can be dismissed. He urged the court to dismiss the application.

I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit in reply filed by the 1st defendant and the submissions of counsel. As correctly submitted by the 1st defendant, the power to reinstate a suit dismissed for want of prosecution is discretionary. It is not disputed that as at the time the suit was dismissed, it had remained dormant for over 3 years. I am in agreement with the 1st defendant that a part from blaming their former advocate for inaction, the plaintiffs have not given reasonable explanation why no action was taken with a view to setting down the suit for further hearing.

I am in agreement with the submission by the 1st defendant's advocate that this suit belonged to the plaintiffs and as such they had a duty to follow up on the progress of the same. The alleged inactivity on the part of their former advocate is therefore not a sufficient reason to set aside the order dismissing this suit for want of prosecution. The plaintiffs' failure to actively follow up on the progress of their case with their former advocate was a sign of lack of interest in the case. This being a court of equity, it cannot aid the indolent.

Although I am not impressed with the reasons given by the plaintiffs for their failure to prosecute the suit leading to its dismissal, I am inclined to exercise my discretion in their favour because of two reasons. First, I have noted that when the suit was dismissed, the plaintiffs had already given evidence and they were only to call one additional witness before closing their case. Secondly, I have noted that the 1st defendant had filed a counter-claim against the plaintiffs. The 1st defendant's counter-claim was not dismissed when the suit was dismissed for want of prosecution. What this means is that the 1st defendant will still have to prosecute his counter-claim. In the circumstances, no prejudice would be occasioned to the 1st defendant that cannot be atoned in costs if the suit is reinstated for further hearing together with his counter-claim. I have considered the 1st defendant's concern that the reinstatement of the suit would return the parties to the status quo prior to the dismissal of the suit. This concern is valid. In view of the conduct of the plaintiffs, I would not interfere with the status quo prevailing as of the date hereof as relates to the possession of the suit property. The 3rd defendant shall however remain restrained from releasing to the 1st defendant or to any other person the title for the suit property namely, House No. 450/4/B Umoja II pending for the hearing and conclusion of the suit.

In conclusion, I hereby allow the Plaintiffs' application dated 28th September, 2015 in terms of prayer 3 thereof. The status of the interlocutory orders that were in force when the suit was dismissed shall be as stated herein earlier. The 1st defendant shall have the costs of the application assessed at Kshs.10,000/- payable forthwith.

Delivered and Dated at Nairobi this 7th day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiffs

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Roselyne-Court Assistant