REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.27'B' 0F 2017

DICK MAINA GITHAIGA...PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL CHAMBER OF COMMERCE.........1ST DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.......................... 2ND DEFENDANT/RESPONDENT

RULING

This is a determination of the ***Notice of Motion*** application dated ***18th January 2018,*** brought by the Plaintiff/Applicant under ***Order 12 Rule 7*** and ***Order 51*** of the **Civil Procedure Rules, Section 3A** of the ***Civil Procedure Act*** and all the enabling provisions of law.

The Applicant has sought for orders that the court be pleased to ***review*** and ***set aside*** the ***Orders*** granted on ***11th December 2017,*** and all other consequential orders and reinstate the Plaintiff/Applicant's suit and that costs of the application be provided for.

It is premised on the grounds stated on the face of the application. These grounds are:-

> **a. That the suit herein was dismissed on 11th December 2017 for Want of Prosecution after hearing of Notice to Show Cause dated 31st October 2017.**
>
> **b. That on 11th December 2017, the advocate for the Plaintiff/Applicant failed to appear in court because he had a personal engagement. However there was a Counsel holding his brief but the court proceeded and dismissed the suit for Want of Prosecution.**
>
> **c. Further that the mistake and/or inaction of the advocate should not be visited on him who is an innocent client.**
>
> **d. That it is fair, just and in the interest of justice that the present application be allowed.**

The application is also supported by the ***affidavit*** of the Plaintiff/Applicant, ***Dick Maina Githaiga,*** who averred that he is still interested in pursuing his claim against the Defendant/Respondent and that the dismissal of the suit is prejudicial to his claim and he therefore urged the Court to reinstate the suit and that he be given an opportunity to be heard. Further that the application was made timeously without undue delay and the reinstatement of the suit shall not prejudice the Defendants/Respondents at all.

The application is opposed by the 1st Defendant/Respondent and ***Edward Tenga***, a ***Director*** of 1st Defendant/Respondent swore a ***Replying Affidavit*** on ***19th March 2018***, and averred that the court granted the Applicant several opportunities to ***Show Cause*** why the suit should not be dismissed for ***Want of Prosecution***, but the Plaintiff/Applicant failed to show such ***Cause*** to the satisfaction of the court.

That the suit herein was filed in ***2013*** at ***Kerugoya Environment and Land Court,*** and has remained unprosecuted since then. The Plaintiff is guilty of lachs having failed to prosecute the suit for a period of 4 years. Therefore the application does not meet the threshold for grant of the orders sought. He also averred that this application is a blatant waste of court's precious time and that attempt should be disregarded by the court. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and renders itself as follows;

The application is anchored under ***Order 12 Rule 7*** of the ***Civil Procedure Rules*** which provides as follows:-

> **"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

Further, the application is brought under ***Section 3A*** of the ***Civil Procedure Act*** which grants the court inherent powers to make such orders that are necessary for the end of justice and also to prevent abuse of the court process.

It is evident from the court record that the Plaintiff/Applicant filed this suit on ***7th November 2013,*** at ***Kerugoya Environment and Land Court***. Simultaneously, the Plaintiff/Applicant filed a ***Notice of Motion*** application even dated for injunctive orders. The said application was canvassed and ***dismissed*** by the court on **27th November 2015.**

Further, from the court record, no action was taken by the Plaintiff/Applicant after the ***Ruling*** was delivered. The matter was later transferred to this Court after the inception of the court in the ***year 2017.***

Even after the transfer, the Plaintiff/Applicant did not take any action and the court on its own motion issued a ***Notice to Show Cause*** as provided by ***Order 17 Rule 2(1)*** of the ***Civil Procedure Rules*** which provides:-

> **"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."**

The ***Notice to Show Cause*** was fixed for hearing on ***31/10/2017***, wherein the advocate for the Plaintiff/Applicant failed to appear in court and sent an advocate to hold his brief on allegation that he had other matters in ***Nyeri***. The ***Notice to Show Cause*** was adjourned to ***11th December 2017***, when again the said advocate for the Plaintiff/Applicant and the Plaintiff/Applicant did not appear in court. The Counsel sought for adjournment so that he could appear personally and submit orally.

The Counsel for the 1st Defendant/Respondent opposed the said application for adjournment and sought for the suit to be dismissed for Want of Prosecution. The Court found and held that the Plaintiff/Applicant had been given a last chance to appear in court on ***31st October 2017***. Further without a proper explanation coming from the Plaintiff/applicant, the ***suit was dismissed for Want of Prosecution***.

It is on the above background that the Plaintiff/Applicant has brought the instant application.

Is the application merited?

There is no doubt that the court on its own motion issued a ***Notice to Show Cause*** under ***Order 17 Rule 2(1)*** which Notice to Show Cause was received by the parties herein. There is no doubt that the suit was indeed dismissed on ***11th December 2017*** for Want of Prosecution.

The application is brought under **Order 12 Rule 7** which orders are granted at the discretion of the court. However, the said discretion must be exercised judicially.

It is not in doubt that the suit herein was filed in the ***year 2013,*** and after the ***Ruling*** on interlocutory application was delivered on ***27th November 2015***, the Plaintiff/Applicant did not take any step to have the matter set down for hearing. There was therefore ***inordinate, inexcusable*** delay on the apart of the Plaintiff. It is trite that ***Section 1A & 1B*** of the ***Civil Procedure Act*** provides for expeditious disposal of the matters before the court. The Plaintiff/Applicant did not give any plausible explanation as to why he took so long to prosecute this matter.

Further, ***Article 159*** of the ***Constitution 2010*** provides that ***Justice shall not be delayed***. The Plaintiff/applicant has not lived upto the spirit of ***Article 159,*** of the ***Constitution 2010***, as he delayed the expeditious disposal of the matter. Though the Plaintiff/Applicant alleged that it was his advocate who delayed in setting the matter down for hearing, it is clear that the case in court belongs to parties and they have a duty to ensure their matters progress to logical conclusion. See the case of **Mwangi S. Kaimenyi…Vs… Attorney General & Another (2014) eKLR**, where the Court held that:-

> **" It was the duty of the Plaintiff/Applicant to take steps to progress their case since they are the ones who dragged the Defendant to court."**

Equally in this case, the Plaintiff/Applicant had a duty to take the necessary step to progress his case. Further, in the case ***of J. G. Builders Vs…Plan International (2015) eKLR***, the Court held that:-

> **"Whereas it would constitute valid excuse for the Defendant to claim that she had been let down by the former advocate, failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not an advocate. A litigant has a duty to pursue the prosecution of his/her case. The court cannot set aside dismissal of a suit on a sole ground of a mistake by the Counsel of the litigant on account of such advocate failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case".**

The Plaintiff/Applicant herein also had a duty to check with his advocate on the progress of his case. The fact that there was a Judicial Review application pending in ***Milimani Environment and Land Court*** was not a reason to delay the setting of the matter down for hearing.

Having now carefully considered the ***Notice of Motion*** dated ***18th January 2018***, the **Court finds that no sufficient reasons have been given to warrant this Court to set aside its Orders of 11th December 2017 and reinstate the suit for hearing**. The Court finds ***the necessary order herein, as provided by Section 3A of the Civil Procedure Act, is to disallow the instant application which is an abuse of the court process.***

Consequently, the said **Notice of Motion** application dated ***18th January 2018***, is **hereby dismissed entirely with costs to the 1st Defendant/Respondent.**

It is so ordered.

Dated, Signed and **Delivered** at ***Thika*** this ***29th day*** of ***March 2019***.

L. GACHERU

JUDGE

29/3/2019

In the presence of

No appearance for Plaintiff/Applicant

Mr. Mugo holding brief for Mr. Munawa for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the above stated advocate and absence of the Plaintiff/Applicant.

L. GACHERU

JUDGE

29/3/2019