



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 325 OF 2013**

**JUANITA AHDIAMBO OTTIENO (Suing on behalf of the  
estate of Solomon Ochieng Oyoko – (deceased).....PLAINTIFF**

**VERSUS**

**MARTIN OUMA OKUMU.....1<sup>ST</sup> DEFENDANT**

**BEATRICE SIJENYI AYODO.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Juanita Adhiambo Otieno, suing on behalf of the estate of Solomon Ochieng Oyoko, deceased, seeks vide notice of motion dated the 10<sup>th</sup> April 2018, for the orders made on the 24<sup>th</sup> January 2018, dismissing the Plaintiff's suit and all other consequential orders thereto, to be set aside and the suit reinstated. The Plaintiff also prays for cost. The application is based on the three grounds on its face summarized as follows:

- a) That under **Article 159 of the Constitution, Sections 1A and 2A of the Civil Procedure Act**, it would be fair, expedient and in the best interest of Justice to reinstate the suit.
- b) That the Plaintiff was out of the country between 2015 and 2016 causing the lapse of time to give further instructions.
- c) That the Plaintiff has an arguable case.

2. The application is supported by the affidavit of the Plaintiff sworn on the 9<sup>th</sup> April 2018, in which she among others depones as follows;

- a) That the Defendants' application dated the 13<sup>th</sup> December 2016, seeking to dismiss her suit was served on the 19<sup>th</sup> December 2016, and the suit dismissed for want of prosecution on the 24<sup>th</sup> January 2018.
- b) That between 7<sup>th</sup> May 2015 to 13<sup>th</sup> June 2015, she was in the United States of America, and between 5<sup>th</sup> September 2015 to the 15<sup>th</sup> November 2016, she was in Denmark.
- c) That the application has been filed timely and should be granted to enable the suit to be heard in full and determined.

3. The application is opposed by the 1<sup>st</sup> Defendant through his replying affidavit sworn on the 24<sup>th</sup> July 2018, who among others depones as follows;

- a) That the prayers sought cannot be granted under the provisions of the law cited in the application.
- b) That the Plaintiff has not given reasonable explanation on the delay in prosecuting her case.
- c) That his advocate filed the application dated the 13<sup>th</sup> December 2016 on the 19<sup>th</sup> December 2016 seeking to have the Plaintiff's suit dismissed.
- d) That the application was heard and allowed on the 24<sup>th</sup> January 2018 when the Plaintiff's suit was dismissed for want of

prosecution under **Order 21 Rule 8 (2) of the Civil Procedure Rule 2010**, with costs to the 1<sup>st</sup> Defendant.

e) That due to the lapse of time, fading memories, and the difficult in tracing witnesses as some have died, reinstating the suit will be prejudicial to him.

f) That he has been in continuous occupation of the land in dispute for more than 15 years, thereby acquiring ownership through prescription.

g) That the Plaintiff had been given the opportunity to account for her inaction for that prolonged period but did not do so.

h) That the application is incompetent and an abuse of the court's process and should be dismissed with costs.

4. The application is also opposed by the Hon. Attorney General, the 3<sup>rd</sup> Defendant, through the grounds of opposition dated the 21<sup>st</sup> November 2018, summarized as follows;

a) **The application is frivolous and unmeritorious.**

b) **That the Plaintiff is one of the three persons appointed to administer the estate of the deceased, and has failed to meet the threshold for the court to exercise its discretion in her favour.**

5. The application came up for hearing on the 15<sup>th</sup> January 2019 when counsel for the Plaintiff and 3<sup>rd</sup> Defendant adopted their filed supporting affidavit and grounds of opposition respectively. The Counsel for 1<sup>st</sup> Defendant made their oral submissions pointing out that the application has not laid out a case for reinstatement of the suit. He pointed out that though the suit was filed in 2013, the Plaintiff has not explained her inaction between that year, and 2015 when she travelled abroad. That the Plaintiff has not explained why she is yet to serve the 2<sup>nd</sup> Defendant, Beatrice Sijenyi Ayodo, with the suit papers, six (6) years after filing the suit. That after the suit was dismissed on the 24<sup>th</sup> January 2018, the application to set aside and reinstate it was not filed until after about ninety (90) days and no explanation has been tendered to explain the delay. That the issues raised in the replying affidavit, like the death of some witnesses, has not been contested and reinstating the suit will prejudice the 1<sup>st</sup> Defendant.

6. The following are the issues for the Court's determination;

a) **Whether the Plaintiff has presented reasonable explanation as to why no steps were taken to prosecute this suit for more than twelve (12) months by the time the suit was dismissed.**

b) **Who pays the costs of the application.**

7. The Court has carefully considered the grounds on the motion, affidavit evidence, grounds of opposition, submissions by Counsel for the 1<sup>st</sup> Defendant, the record and come to the following findings;

a) That this suit was commenced through the plaint dated the 12<sup>th</sup> November 2013, and filed on the 20<sup>th</sup> November 2013.

b) That summons to enter appearances (**Civil 1B**) were issued on the 21<sup>st</sup> November 2013.

c) That the Hon. Attorney General, the 3<sup>rd</sup> Defendant, filed two memorandum of appearance dated the 11<sup>th</sup> December 2013 and 24<sup>th</sup> February 2015, while Martin Ouma Okumu, the 1<sup>st</sup> Defendant, filed theirs dated the 28<sup>th</sup> February 2015 through their respective Counsel. The 1<sup>st</sup> Defendant then filed his statement of defence dated 20<sup>th</sup> March 2015 and the 3<sup>rd</sup> Defendant file theirs dated 1<sup>st</sup> April 2015.

d) That todate there is no evidence that the Plaintiff has served the summons to enter appearance upon Beatrice Sijenyi Ayodo, the 2<sup>nd</sup> Defendant. There is no affidavit of service upon 2<sup>nd</sup> Defendant that has been filed. That since 21<sup>st</sup> November 2013, when the summons to Enter Appearance was issued to the 24<sup>th</sup> January 2018, when the suit was dismissed for want of prosecution, over four (4) years had lapsed without any application to reissue the summons as required under **Order 5 Rule 2 (2) of Civil Procedure Rules** being made. That accordingly, the suit against the 2<sup>nd</sup> Defendant was ripe for dismissal pursuant to **Order 5 Rule 2 (7) of the Civil Procedure Rules** on or about the 22<sup>nd</sup> November 2015. The sub-rule provides as follows;

**“Where no application has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of twenty- four months from the issue of the original summons.”**

That indeed, the suit against the 2<sup>nd</sup> Defendant was dismissed as seen at paragraph (e) of the ruling of the 24<sup>th</sup> January 2018.

e) That the 1<sup>st</sup> Defendant filed and served their notice of motion dated the 13<sup>th</sup> December 2016 seeking for the Plaintiff's suit to be dismissed with cost for want of prosecution. The application was served upon Counsel for the Plaintiff who filed their replying affidavit sworn by Terry Aduol Ngire, Advocate, on the 12<sup>th</sup> October 2017. The application was heard on the 16<sup>th</sup> October 2017 when Mr. Njoga and M/s Ngire, the learned Counsel for the 1<sup>st</sup> Defendant and Plaintiff, made their oral submissions. The Court then fixed the ruling for the 24<sup>th</sup> January 2018. The record shows that the ruling was delivered in the presence of Counsel for the 1<sup>st</sup> and

3<sup>rd</sup> defendants only. That in the ruling of 24<sup>th</sup> January 2018, the 1<sup>st</sup> Defendant's application was granted and the Plaintiff's suit, commenced vide the plaint dated 12<sup>th</sup> November 2013, dismissed for want of prosecution with costs to the 1<sup>st</sup> Defendant.

f) That the 1<sup>st</sup> Defendant's application had been brought under **Order 17 Rule 2 (3) of Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**. The Plaintiff's application which is subject matter of this ruling has been brought under **Section 1A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and Article 159 (d) of the Constitution**. That the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have in their replying affidavit and grounds of opposition respectively, questioned the competency or legal basis of the application, which appear not to have been responded to by the Plaintiff, either through a supplementary/further affidavit or submissions. That **Order 51 Rule 1 of the Civil Procedure Rules** only provides the procedure through which applications should be initiated. That **Order 12** of Civil Procedure Rules provides for **"Hearing and Consequence of Non-Attendance"** as shown at the heading, and **Rule 7** thereof states as follows;

**"7. 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."**

That as the order of 24<sup>th</sup> January 2018 dismissing the suit for want of prosecution was not issued for reason of the Plaintiff and or her counsel failing to attend the Court, **Order 12 Rule 7 of the Civil Procedure Rules** has no relevance to the application by the Plaintiff. The dismissal order was issued pursuant to the 1<sup>st</sup> Defendant's application which was heard on merit with both the Plaintiff and 1<sup>st</sup> Defendant represented by Counsel.

g) That further to (f) above, **Section 1A of Civil Procedure Act** provides the overriding objective of the Act and Rules which **"is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."** The Section obligates the Court to **"seek to give effect to the overriding objective"** when exercising its powers under the Act or the interpretation of any of its provisions. The Section at **Sub-Section (3)** provides as follows;

**"(3) A party to civil proceedings or an advocate for such a party, is under a duty to assist the Court to further the overriding objective of the Act and to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court."**

That the long duration the Plaintiff, from the time the suit was filed, without taking any steps to prosecute the suit goes contrary to the duty placed by the law upon the Plaintiff and her Counsel to assist the Court to expeditiously and at an affordable costs, in terms of money and time, to resolve the dispute. That the provision of **Section 1A of Civil Procedure Act** do not appear to support the Plaintiff, who was found in the ruling of 24<sup>th</sup> January 2018 to have failed to take steps to prosecute her case for a period of more than twelve (12) months.

h) That in view of the findings in (f) and (g) above, the Plaintiff should have considered to file an appeal against the Court's ruling/order of 24<sup>th</sup> January 2018, if she was dissatisfied. The application before this court is not an appeal, and in any case the appeal should have been preferred before the Court of Appeal. That the Plaintiff could have moved this Court under **Order 45 of the Civil Procedure Rules**, seeking to review the ruling/order of 24<sup>th</sup> January 2018. That as the application before this court is not one under **Order 45 of the Civil Procedure Rules**, and as the Court cannot grant what has not been sought for through the pleadings filed, then the Court agrees with the 1<sup>st</sup> defendant that the prayers sought in the motion dated 10<sup>th</sup> April 2018 cannot be issued under the provisions of the law cited and relied upon by the Plaintiff.

i) That the motion has also cited **"Article 159 (d) of the Constitution of Kenya 2010"**. That the proper reference should read **Article 159 (2) (d)**, which provides that **"justice shall be administered without undue regard to procedural technicalities,..."**. That as the Counsel for the Plaintiff did not offer any submissions which could possibly have shed light on how that Sub-Article is of relevant to the Plaintiff's application, the Court is unable to see how it could assist the Plaintiff in having the Court exercise its discretion in her favour for reasons of the findings above.

8. That for reasons set out above, the Plaintiff's notice of motion dated the 10<sup>th</sup> April 2018 is found to be without merit, and is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MARCH 2019**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Mr. Ojuang for Lumumba & Lumumba

Advocates for the Plaintiff and

Mr. Orengo for Ouma Njoga for

1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**