



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT GARISSA**

**ELC CASE NO. 62 OF 2017**

**MONZE KIROTO.....APPELLANT**

**VERSUS**

**DAVID MUSYOKI KILONZO.....RESPONDENT**

**RULING**

**A. INTRODUCTION**

The applicant filed the Notice of Motion Application dated 4<sup>th</sup> October, 2018 and filed on even date seeking for Orders;

- 1. THAT** the Honourable Court be pleased to certify this matter as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
- 2. THAT** this Honourable Court be pleased to stay its orders made on 25<sup>th</sup> September, 2018 pending the hearing and determination of the Application.
- 3. THAT** this Honourable Court be pleased to review and/or set aside orders of 25<sup>th</sup> September, 2018 dismissing the main suit for want of prosecution, and any consequential orders thereto.
- 4. THAT** the Honourable Court be pleased to reinstate the suit dated 18<sup>th</sup> September, 2017 for determination on merit.
- 5. THAT** costs be provided for;

**The** Respondent in response to the Application filed the Replying Affidavit dated 21<sup>st</sup> November, 2018 and filed on 22<sup>nd</sup> November, 2018.

**B. BACKGROUND**

**APPLICANTS CASE**

The Plaintiff/ Applicant filed the Instant suit seeking the reinstatement of the suit after the court dismissed it for Want of Prosecution on 25<sup>th</sup> September, 2018 when the same came up for hearing.

The plaintiff had filed an application on 24<sup>th</sup> September, 2018 a day to the hearing slated for 25<sup>th</sup> September, 2018 in which they sought the orders that the matter be transferred to the Magistrate's court at Kyuso. This they allege was after the Chief Justice gazetted the Senior Principal Magistrate's court to deal with Land and Environment matters.

It is their case that the Plaintiff herein failed to attend to the hearing of the matter because she was unwell and had been advised to take a bed rest.

In sum they argue that the non -attendance on the date of hearing was not ill -conceived and was excusable.

They deny the Defendant/ Respondent allegation that the suit was dismissed for non-production of evidence.

### **C. RESPONDENT'S CASE**

The Respondent oppose the Application arguing that the same lacks merit for the reasons that both parties attended a pre-trial for the matter on 26<sup>th</sup> July, 2018 where both complied with the requirements of Order 11, implying that there was an agreement that the Court had the jurisdiction to handle the matter and that it was on that basis that parties fixed the matter for hearing on 25<sup>th</sup> September, 2018.

In addition, they argue that the application filed on 24<sup>th</sup> November, 2018 was an afterthought meant to derail the hearing of the matter slated for 25<sup>th</sup> September, 2018. They argue that the issue of jurisdiction and transfer of the matter should have been raised at the earliest opportunity being during the Confirmation for hearing.

Further, the respondent argues that the allegation by the applicant that she was sick on the date for the hearing were raised in the instant application, and that the court was not informed of the same during the hearing date, thus the same is an afterthought.

Furthermore, they argue that the Applicant has never been keen to Prosecute his case because he enjoys interim orders and that granting the sought orders would prejudice him.

In sum the Respondents prays that the application be dismissed with costs as it lacks merit.

### **SUBMISSIONS.**

The Applicants filed their submissions dated 25<sup>th</sup> January, 2019 and filed on 28<sup>th</sup> January, 2019 reiterating their grounds in support of the application are meritorious. On this they rely on Order 12 Rule 7 of The Civil Procedure Rules, 2010 and Section 1 A and 3A of The Civil Procedure Act.

It is their argument at the time of filing the suit this court's had the jurisdiction to determine the matter as the magistrate's court at Kyuso did not have the jurisdiction to determine Land and Environment matters.

Pursuant to the Court of Appeal decision in Law Society of Kenya **Nairobi Branch -vs- Malindi Law Society & 6 others (2017) eKLR** the magistrate's court were granted powers to handle land matters, and in view of this developments and filed their applications on 24<sup>th</sup> September, seeking to transfer the matter to the magistrate's court at Kyuso.

Further, they argue that the decision and directions to file the Application seeking to transfer the matter was informed by the Applicants old age and frail health.

Furthermore, they argue that the Applicant failed to attend the hearing on 25<sup>th</sup> September, 2018 because she was unwell and was advised to seek a bed rest.

They deny the allegation by the Respondent that the matter was dismissed for lack of evidence.

In sum they argue that the application failure to attend the hearing of the matter was not ill conceived and is excusable.

### **ISSUES ARISING**

#### **Whether the Application for reinstatement is merited;**

The applicant seeks through the instant application to have this Court reinstate her suit which was dismissed by this Court for want of Prosecution. The applicant argues that on the day of hearing she was absent in court because she was unwell, frail and old and therefore unable to proceed with the matter, and that she had filed an application to have the matter transferred to Kyuso Senior Resident Magistrate Court where she would be able to prosecute the matter as the said Courts has since acquired jurisdiction to adjudicate on land matters.

It is clear from the Court record that the applicant prior to the dismissal of the matter on 25<sup>th</sup> September, 2018 has been enjoying interim orders, and that on 26<sup>th</sup> July, 2018 both parties attended the Pre-trial conference when the matter was fixed for hearing on 25<sup>th</sup> September, 2018.

On 25<sup>th</sup> September, 2018 when the matter came up for hearing, Advocate Holding brief for the Plaintiff informed the Court that they had filed an application on 24<sup>th</sup> September, 2018 seeking to have the matter transferred to Khuso Law Courts, which Court has since acquired Jurisdiction. The application seeking adjournment in view of the said application was opposed by the defendant Advocate, wherein the Court declined the sought adjournment and fixed the matter for hearing at 10.30 am on 25<sup>th</sup> September, 2018.

When the matter came up for hearing at 10.30 am, only the defendant's Advocate was present in Court and the court was implored to dismiss the matter and this Court consequently dismissed the suit for want of prosecution

Counsel for the applicant has contended that sufficient cause has been shown as to why the suit should be reinstated. They argue that the Plaintiff is aged as she is 70 years old and was sick on 25<sup>th</sup> September, 2018 when the matter was fixed for hearing. In that same spirit, he

also pointed out that they filed an application on 24<sup>th</sup> September, 2018 seeking to transfer the matter to kyuso Law Courts as the Senior Resident Magistrate there has Jurisdiction adjudicate the matter, which Jurisdiction lacked initially.

However, from the record, the issue of sickness of the Plaintiff on 25<sup>th</sup> September, 2018 when the matter came for hearing was never raised at trial. If anything, at the time, what counsel Holding Brief contended then was that the Plaintiff had filed an Application dated 24<sup>th</sup> September, 2018 seeking to have the matter transferred to Kyuso Magistrate Court which has since acquired Jurisdiction to handle the matter. As stated, no mention was ever made of the sickness and the age of the plaintiff making it difficult for her to attend the matter. That argument in my opinion therefore does not hold any water and in my view it cannot rescue this suit.

The Court of Appeal in **Charo Thali Ngala v Republic & 4 others [2018] eKLR** noted in this regard that:-

**“17] ...that there is no law or procedure that precluded the Judge from applying the provisions of Order 17 rule 2 to dismiss judicial review proceedings for want of prosecution and the appellant failed to give justifiable reasons for their indolence in prosecuting the suit, we cannot say the Judge was wrong in the way he exercised his discretion. Consequently, we find no merit in this appeal which is hereby dismissed with costs to the 5<sup>th</sup> respondent.”**

Consequently, this Court finds that the applicant has failed to give a justifiable reason explaining their indolence in prosecuting their case. The reasons proffered amounts to an afterthought; their conduct can be interpreted to imply a party who is keen on delaying the expeditious determination of the matter.

### **ENDING**

It is conclusive to this court that the Plaintiff and her advocate have not been interested in prosecuting the suit since it was filed in the year 2017, this is in view of the urgency in which they approached the Court and the fact that they have been enjoying interim orders. The reason advanced by the Plaintiff is not plausible at all, and therefore this court is not convinced with the grounds in support of this application and dismisses the same with costs. It is so ordered.

**Read and delivered in the Open Court this 25<sup>th</sup> day of March, 2019.**

.....

**E. C Cherono (Mr.)**

### **ELC JUDGE**

#### **In the presence of:**

1. Applicant/Advocate: Absent
2. Respondent Advocate: Absent
3. Amina Mohamed: Court clerk present.