



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 86 OF 2012**

**NASIBI AORE.....PLAINTIFF**

**VERSUS**

**JANE ANYONA OMUTSANI.....DEFENDANT**

**RULING**

1. By an application dated **26/2/2019**, the plaintiff seeks reinstatement of this suit which was dismissed on **26/10/2016** for want of prosecution and upon reinstatement this matter be consolidated with **Kitale ELC No. 86 of 2012 (O.S)** between the plaintiff and the defendant and directions be taken as to the manner of disposal of the two suits.
2. The grounds are that the applicant had at the onset filed proceedings seeking a declaration that the defendant holds title number **Kitale Municipality Block 17 Bidii/32** in trust; that provoked by the filing of this suit the defendant went ahead and filed another suit in **Kitale ELC No. 86 of 2012** whereby she sought for a determination as to whether the same title number **Kitale Municipality Block 17 Bidii/32** was jointly acquired during the marriage and whether she holds the title in trust for the plaintiff; that the suit was dismissed for non-attendance after counsel their acting on behalf of Walter Wanyonyi Advocate was apparently served but failed to appear in court; that as at that time the applicant was unwell and had at the same time lost touch with Milimo Muthomi & Co. Advocates who had withdrawn from acting in a related matter without effecting service; that while in court on **14/2/2019** it came to knowledge of counsel on record that this suit had been dismissed; that no prejudice shall be suffered for the reason that the prayers sought will enable the court determine the right of the parties with utmost finality, and that as at the time of dismissal directions were yet to be taken so to proceed to hearing.
3. The application is supported by affidavit of the plaintiff sworn on **26/2/2019**.
4. The defendant is opposed to the plaintiff's application by filing grounds of opposition filed on **13/3/2019** on the basis that the relief sought in this suit can, if merited, be granted in **Kitale ELC No. 86 of 2012**, which is still pending between the parties herein; that there is no sufficient reason for reinstating this suit as the plaintiff admits that he was duly served with the hearing notice; that if the plaintiff was indeed unwell on the day this matter came for hearing, his advocates should have attended court to inform the court as such that the application has been brought after inordinate delay and that this court cannot aid the indolent.
5. It is impossible to consider the instant application without considering the ruling that was issued by this court in **Kitale ELC No. 86 of 2012 (O.S)** in which an order setting aside judgment has already been made. This is not to state that this court is fettered by the order it made therein in any way to a particular determination of the instant application.
6. However it is worth of note that the subject matter is the same and the two suits are between the same parties.
7. The main ground for setting aside judgment herein is that the case was dismissed prematurely while it was not yet ripe for hearing as directions had not been taken as required under order 36 of the civil procedure rules. I have already dealt with this ground in the ruling delivered in **Kitale ELC No. 86 of 2012 (O.S)**, where it formed a ground for the setting aside of judgment.
8. In this instance I think it may not form as good a ground as in that case as it was the duty of the applicant to move the court appropriately at all times, he being a party in the matter, and the court is bound by the provisions of the civil procedure rules to dismiss a matter for want of prosecution provided it finds that there are good grounds for so doing.
9. Since there is already other litigation pending on the same matter, I find that little or no inconvenience would be added to the plaintiff by the reinstatement of this suit.
10. The applicant also relies on the ground that the mistake of his previous counsel, who never communicated with him regarding the matter pending in court. This is an appropriate ground for setting aside in certain instances, and after having perused the record, in this particular

case, it is proper.

11. In the end I find that the application dated **26/2/2019** has merit and I allow the same and reinstate this suit for hearing on its merits and further order that this matter be consolidated with **Kitale ELC No. 86 of 2012 (O.S)**, and that this file be the lead file.

**Dated, signed and delivered at Kitale on this 29<sup>th</sup> day of April, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**29/4/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for Plaintiff

Mr. Wanyonyi for Defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**29/4/2019**