



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 364 OF 2015 (FORMERLY HCC NO. 10 OF 2005

JOSEPH OCHERE SASO.....PLAINTIFF

VERSUS

MICHAEL ODOTTE..... 1ST DEFENDANT

MICHAEL ODHIAMBO.....2ND DEFENDANT

RULING

1. Joseph Onchere Saso, the Plaintiff, vide the motion dated the 13th June 2017 seeks for stay of proceedings and execution, review of the dismissal order of 18th April 2017, reinstatement of the suit and costs. The application is based on the ten (10) grounds on its face marked (a) to (j) summarized as follows;

- a) That the delay was caused by the death of the 2nd Defendant and the failure of Counsel to substitute him.
- b) That the Plaintiff's advocates visited the registry severally to fix the case for hearing but the file could not be traced as it had been allocated a new reference number without notifying Counsel.
- c) That the dismissal order will prejudice the Plaintiff and violates his right to be heard in a fair trial.
- d) That the delay was not intentional or deliberate and reinstatement of the suit will not prejudice the Defendants.

2. The application is supported by the affidavits of the Plaintiff sworn on the 26th May 2017 and 23.8.2017 in which he among others deposes as follows;

- a) That the delay was occasioned by the death of the 2nd Defendant in 2015.
- b) That he learnt of the dismissal of his case on the 19th April 2017 when he went to his advocates chambers.
- c) That his advocates informed him that they had been served with the short notice but the Judge declined to give them more time to consult him.
- d) That the case had been given a new number without notifying the Counsel. That the matter was to be mentioned on the 4th October 2016 to fix a hearing date but the date was not fixed as the registry was being reorganized. That his advocates had filed a further list of documents on the 17th September 2013.
- e) That the Defendant has now filed a bill of costs for taxation.

3. The application is opposed by Michael Odotte, the 1st Defendant, through five (5) grounds of opposition dated the 29th June 2017 summarized as follows;

- a) The application is misconceived, incompetent, defective and under the wrong provisions of the law.
- b) The application cannot be granted as it is unprocedurally drawn in breach of the relevant rules and is hence an abuse of the process of the court and law.

4. The application is also opposed by Michael Odhiambo, the 2nd Defendant, through the replying affidavit sworn by Rayola Ochieng Olel, Advocate on the 26th July 2017, among others deponing to the following;

- a) That the application is misconceived, unsustainable in law, without merit and should be struck out.
- b) That the Plaintiff filed the suit on 7th February 2004 and has not shown interest to prosecute it and no reasonable and justifiable explanation has been presented to warrant the court to exercise its discretion in favour of the Plaintiff.
- c) That the suit against the 2nd Defendant has abated as he died over two years back.
- d) That there has been unreasonable delay in prosecuting the case, which delay goes contrary to the overriding objective set out in the Civil Procedure Act and Rules, of attaining timely disposal of proceedings before the Court, by facilitating expeditious resolution of disputes.

5. The application came up for hearing on the 26th February 2018 when Counsel for the parties agreed to file and exchange written submissions. The learned Counsel for the 1st Defendant, Plaintiff and 2nd Defendant filed their submissions dated the 5th March 2018, 19th March 2018 and 26th April 2018 respectively. The submissions are summarized as follows;

A) 1ST DEFENDANT'S SUBMISSIONS:

- a) That all Counsel for the parties were served with the notice under Order 17 Rule 2 of Civil Procedure Rules and heard on the 29th March 2017 before the dismissal order for want of prosecution was issued.
- b) That the application dated the 13th June 2017 seeks for review of orders of 18th April 2017 while there was no court proceedings on that date and further the requirement under Order 45 of Civil Procedure Rules have not been established.
- c) The Learned Counsel referred to the case of Stephen Gathua Kamau vs Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR where the Court held that unless a party demonstrates that their application falls within the confines of Order 45 of Civil Procedure Rules, then the application shall not be granted.

(B) PLAINTIFF'S SUBMISSIONS:

- a) That the dismissal order violates the Plaintiff's right to be heard under Articles 50 (1) and 159 (2) of the Constitution.
- b) That Order 12 Rule 7 of the Civil Procedure Rule allows the Court to set aside or vary the dismissal order. That Article 159 of the Constitution and the overriding objective demands of the Court to do substantive justice unless for very good cause.
- c) The Learned Counsel referred to the High Court decision in John Nahashon Mwangi vs Kenya Financial Bank Ltd (In liquidation) 2015 eKLR where an order to dismiss a suit was set aside and the suit reinstated and asked the court do likewise.

(C) 2ND DEFENDANT'S SUBMISSIONS:

- a) That the 2nd Defendant died in 2015 and the suit against him has abated.
- b) That the Plaintiff has not presented any new issues or important evidence sufficient for the Court to exercise its discretion in their favour as required under Order 45 Rule 1 of Civil Procedure Rules. The Learned Counsel referred to the High Court decision in Kipkorir vs Langat & another (No. 2) (2008) 3 KLR, page 593 paragraphs 1 to 5 where the court held that the new evidence must be so distinct in character so as to warrant the review order to issue.
- c) That there is no decree or order attached to the application that the Plaintiff is aggrieved by as required by Section 80 of the Civil Procedure Act. The Learned Counsel referred to the High Court decision in Belgo Holdigns Ltd vs Robert Kotch Otachi & Another [2009] eKLR where Lessit J, cited with approval the decision of Nyarangi J, as he then was, in Bernard Githi suing on behalf of Mutothini Rarmers Company vs Kilioto Farmers Ltd (Nairobi H.C.C. No. 32 of 1974 to the effect that there has to be an order or decree drawn and attached to the application for review.

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

- a) Whether the Plaintiff has presented a reasonable explanation for the delay in prosecuting this suit for more than twelve (12) months by the time the dismissal order was made.
- b) Whether the application is defective and an abuse of the Court's process.
- c) Whether the Plaintiff has established the existence of new and important matter or evidence to warrant review.

d) Who pays the costs of this application.

7. The Court has after carefully considering the grounds on the motion, grounds of opposition, affidavit evidence by the Plaintiff and Counsel for the 2nd Defendant, and the record, come to the following findings;

a) That this suit was commenced through the plaint dated 7th February 2004 and filed in Court on the 8th February 2005 under receipt No. 0153465 of the same date. The suit was filed contemporaneously with Chamber Summons of even date seeking for temporary injunction, which was granted on the 25th February 2005 *ex parte*. That an amended plaint dated the 6th December 2005 was then filed. The Defendants entered appearance and filed their defence dated the 14th April 2005. The 2nd Defendant filed a separate statement of defence and counterclaim dated the 2nd February 2009 and the 1st defendant filed an amended statement of defence dated 23rd February 2009. The Plaintiff filed a reply to the defence and defence to the 2nd Defendant counterclaim dated 15th February 2009.

b) That by the time the Court issued the Notice to show cause dated 9th March 2017 under **Order 17 Rule 2 of the Civil Procedure Rules**, the last action towards prosecuting the suit was on the 11th June 2015, when one James from Mwamu & Co. Advocates for the Plaintiff, fixed the suit for hearing on the 25th November 2015. That however, there is no evidence whether the hearing notices were served on the Counsel for the defendants, or any record of any proceedings taking place on the date fixed for hearing. That accordingly, by the time the notice was issued, a period of about one year nine months had lapsed from the date of the last step being taken.

c) That the notice dated the 9th March 2017 required the Counsel for the parties to come to court for its hearing on the 29th March 2017. The record shows that all the Counsel for the parties were represented, and after being heard the court dismissed the suit with costs for want of prosecution. That the order of dismissal for want of prosecution in this case was made on the 29th March 2017 and not the 18th April 2017.

d) That as the Plaintiff's notice of motion and the affidavit in support sworn on the 24th May 2017 and 18th January 2018 seeks for review of the court's order of 18th April 2017 which does not exist, then the court finds the order sought cannot issue on a non-existing dismissal order, and the application is therefore defective and an abuse of the courts process.

e) That whereas the Court agrees with Counsel for Plaintiff that the Court has jurisdiction to review, set aside and reinstate dismissed suits in appropriate cases, the court finds that the Plaintiff has failed to establish that this is one such case for the following reasons;

- **That whereas the learned Counsel for the Plaintiff had informed the court on the 29th March 2017 that the family of the Plaintiff had in August 2016 notified them that the Plaintiff had passed on, and that the Counsel was waiting for documentary evidence of death, the Plaintiff appears to be alive as he has sworn the supporting and further affidavit in support of the application dated 13th June 2017.**
- **That the suit was filed as H.C.C No. 10 of 2005 and later the reference was changed to ELC No. 364 of 2015. The Court has noted that was the reference quoted in the notice dated 9th March 2017 and no Counsel complained of the change of the reference as the cause of the delay during the hearing of 29th March 2017.**
- **That further, there is no documentary evidence availed to suggest that the Plaintiff's Counsel had written to the court registry or Deputy Registrar to complain or enquire why the file was not availed to them on any single day that they wanted to take some step. That indeed there is no evidence to suggest that the file had ever gone missing.**
- **That the death of the 2nd Defendant was not given as a cause of the delay on the 29th March 2017 or any other date until the filing of the current application. That as the 2nd Defendant's Counsel has now confirmed that his client passed on in 2015, then the suit against him stood abated at the expiry of one year from the date of death under Order 24 Rule 4 (3) of Civil Procedure Rules.**
- **That no application has been filed to revive the abated suit by the Plaintiff as contemplated under Order 24 Rule 7 (2) of the Civil Procedure Rules. The Plaintiff cannot sit back and wait for the 2nd Defendant's Counsel or family to take steps to substitute the deceased. That likewise the 2nd Defendant's Counterclaim has also abated for the same reasons that no application was made to substitute him within one year from the date of his death.**

f) That whereas the Plaintiff, and indeed all parties in this suit have a right to be heard in their cause under **Article 50 (1) of The Constitution** and that **Article 159 (2) (d) of the said Constitution** obligates the Court to administer justice without undue regard to procedural technicalities, the Court takes note that all the parties herein have been represented by Counsel who are legal practitioners from the time of filing their pleadings. That the parties must have been advised by their respective Counsel that **Sub-article 2 (b) of Article 159 of the Constitution** obligates the Court to ensure "**Justice shall not be delayed**" while **Sections 1A and 1B of Civil Procedure Act Chapter 21 of Laws of Kenya** requires parties in Civil Proceedings, and their advocates, to assist the Court to further its overriding objective which is "**to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes**" before the court. And the Court is itself obligated to ensure just determination of the proceedings, efficient disposal of the matters before it at a costs affordable by the parties, and efficient use of available judicial and administrative resources among others. That the Plaintiff and his Counsel do not appear to have been diligent in ensuring that they took steps to prosecute the suit without undue delay, thereby delaying justice to the Plaintiff and the Defendants.

g) That as submitted by Counsel for the 2nd Defendant, the Plaintiff did not annex and attach the order sought to be reviewed to their application. That had they done so, they would probably had noted that the order they sought to review or set aside was made on the

29th March 2017 and not on the 18th April 2017.

8. That for the reasons set out above, the Plaintiff's motion dated the 13th June 2017 is without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Kimanga for Mwamu for plaintiff

Mr. Otuoma for Olel for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE