



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 58 OF 2015**

**TOBIAS OCHIENG ODHIAMBO.....PLAINTIFF**

**VERSUS**

**MARTIN MARAJI OBARE.....DEFENDANT**

**RULING**

1. The Plaintiff vide the motion dated the 24<sup>th</sup> October 2018, seeks for the setting aside of the order of 19<sup>th</sup> December 2017 dismissing the suit and all consequential orders; reinstatement of the suit and costs. The application is based on the six (6) grounds on its face and supported by the affidavits of Samuel Michael Onyango and Alex N. Singanache Advocates sworn on the 24<sup>th</sup> October 2018. The Plaintiff's case is that the Counsel who attended the court on the 19<sup>th</sup> December 2017 for the hearing of the notice to show cause had been unable to contact their client to be given the explanations to present to the court. That as the Plaintiff has the desire to prosecute the case, the same should be reinstated.

2. The application is opposed by the Defendant through the replying affidavit sworn by Nicholas Odera Sumba Advocate on the 14<sup>th</sup> January 2019. The Defendant's case is that the application is frivolous and an abuse of the court's process as the options availed to the Plaintiff was to seek for review under **Order 45 of the Civil Procedure Rules** or file an appeal as the court had heard them before issuing the order being challenged.

3. The application came up for hearing on the 11<sup>th</sup> June 2019 when Mr. Onyango and Mr. Okoth for the Plaintiff and Defendant respectively made their oral submissions. The Plaintiff's Counsel submitted that the suit should be reinstated to afford the Plaintiff opportunity explain why no steps had been taken to prosecute the suit for the period in question. That the Defendant had made an offer for out of court settlement in 2015 and if the suit is reinstated the Defendant will consider accepting it. The Counsel for the Defendant faulted the Plaintiff's Counsel for claiming that they were looking for their client to give them the explanation to present to the court during the hearing of the notice to show cause. The Counsel submitted that once the Counsel accepted to file this suit for their client, they are presumed to have full instructions to take steps to prosecute it on behalf of their client. The Counsel further submitted that there had been inordinate delay in filing this application.

4. The following are the issues for the court's determinations;

**a) Whether the application is an abuse of the court's processes.**

**b) Whether the Plaintiff has presented reasonable explanation why no steps were taken for more than twelve (12) months to prosecute the case.**

**c) Who pays the costs.**

5. The Court has carefully considered the grounds on the application, the affidavit evidence, oral submissions by both Counsel, the record and come to the following findings;

**a)** That by the time the notice to show cause dated 11<sup>th</sup> September 2017, for hearing on the 19<sup>th</sup> December 2017 was issued, the last step taken towards prosecuting the suit was on the 12<sup>th</sup> May 2015 when Counsel for the Plaintiff fixed the suit for 13<sup>th</sup> October 2015. The order signed by the Deputy Registrar on 13<sup>th</sup> May 2015 indicates that hearing notice was to issue but there is no evidence to confirm whether the Defendant's Counsel was ever served. That the period between the 12<sup>th</sup> May 2015 to the 11<sup>th</sup> September 2017 amounts to about two (2) years four (4) months without any further steps being taken to prosecute the suit. That the court therefore finds that the notice to show cause was regularly issued in accordance with **Order 17 Rule 2 of Civil Procedure Rules**.

b) That the proceedings of 19<sup>th</sup> December 2017 when the notice to show cause was heard, shows that Mr. Singahachi Advocate for the Plaintiff was present and that he informed the Court that the parties had been negotiating before the Defendant pulled out later. That further the Counsel is the one who failed to fix the matter for hearing. That the court found no reasonable explanation for the delay had been tendered and proceeded to dismiss the suit for want of prosecution. That the Plaintiff's options if dissatisfied with the order was to move the court under **Order 45 of the Civil Procedure Rules** for review upon for example, discovering new and important evidence, or move to the Appeals Court.

c) That the motion dated the 24<sup>th</sup> September 2018 and the affidavit in support plus the submissions by Counsel do not disclose any reasonable explanation for the over two (2) years delay without any steps being taken. That further nothing was tendered before the court to confirm that the parties were negotiating and or when the negotiations failed.

d) That the application was filed on the 25<sup>th</sup> October 2018, while the order it seeks to challenge was issued or made on the 19<sup>th</sup> December 2017, which shows a lapsed period of over eleven (11) months in between. That amounts to inordinate delay as Counsel for the Plaintiff was in court when the order was made.

6. That for reasons set out above, the court finds no merit in the motion dated the 24<sup>th</sup> October 2018, and filed on the 25<sup>th</sup> October 2018. That the application is therefore dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2019

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Mr. Baganda for Simba for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**