



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 324 OF 2015

MAXWEL OTIENO ODONGO.....PLAINTIFF

VERSUS

COROMANDELE INVESTMENT LIMITED...1ST DEFENDANT

EDWARD MUIRU MWANGI.....2ND DEFENDANT

RICHARD ODONGO RAMBAGA.....3RD DEFENDANT

KEN AGEN ENTERPRISES.....4TH DEFENDANT

REGISTRAR OF LANDS KISUMU.....5TH DEFENDANT

RULING

1. The Plaintiff moved the court through the notice of motion dated 29th November 2018 seeking “to reinstate this suit that was dismissed on the 29th October 2018 and the same be fixed for hearing of the main suit”. The application is premised on the eight (8) grounds on its face and supported by the affidavit sworn by Maxwell Otieno Odongo on the 29th November 2018. That it is the Plaintiff’s case that the suit had been set for mention on the 28th November 2018 before being fixed for hearing before the service week Judge on the 28th October 2018. That though the plaintiff’s advocate chambers were served with the hearing notice for 28th October 2018, the clerk did not bring it to the attention of the advocate due to the prior mention date. That the failure to attend court by both the Plaintiff and his advocate was due to error that occurred at the advocate’s firm and the Plaintiff should not be punished for it.

2. The application is opposed by the 1st Defendant through their “*grounds of objection*” dated the 14th February 2019 summarized as follows;

a) That though the matter had a mention of 28th November 2018 to fix a hearing date, the Deputy Registrar issued and served mention notices on the 5th September 2018 for parties/Counsel to attend court on the 26th September 2018, to take hearing dates before the service weeks of 29th October to 9th November 2018 but the Plaintiff failed to attend.

b) That the matter was fixed for hearing on Monday the 29th October 2018 and on that date the Plaintiff and his Counsel were absent and upon oral application by Counsel for the Defendants, the suit was dismissed for want of prosecution by Lady Justice M. A. Odeny, the service week Judge sitting at Kisumu.

c) That the Plaintiff should not be allowed to use the excuse of “*clerical error*” and “*confusion*” to thwart the Decree holders/Defendants right to enjoy the fruits of their judgment. The Counsel referred to the decision of Majanja J. in Republic vs John Clerk of Webuye County Council & Another H.C.C.C No. 448 of 2006.

d) That the two dates should not have confused the Plaintiff as all he was required to do was attend court and confirm the status. That the court cannot undertake the Plaintiff’s role and or duty of representation and diligence and that equity will always aid the vigilant and not the indolent. The Counsel referred to the decision of Gikonyo J, in In Fran Investments Ltd vs G4S security Services Ltd [2015] eKLR.

e) That the application is premised on Section 3B of the Civil Procedure Act that does not exist and the application is hence incompetent.

f) That the 1st Defendant will suffer irreparable loss if the application is allowed as the construction site has been at

“standstill” for more than four years with the Plaintiff showing lack of interest to prosecute the case.

3. The application is also opposed by the Attorney General for the 5th Defendant through the two (2) grounds of opposition dated the 14th February 2019, that the Plaintiff has come to court with unclean hands; and that the application is an abuse of the court process, is misconceived and only meant to defeat justice.

4. The application came up for hearing on the 14th February 2019 when Mr. Nyanga, Mr. Wasua and M/s Langat for the Plaintiff, 1st and 5th Defendants respectively made their oral submissions for and against the application. The submissions are as summarized below;

A: PLAINTIFF’S COUNSEL’S SUBMISSIONS:

a) That the application seeks for the dismissal order to be set aside and the suit reinstated. That the suit had on the 13th May 2018 been placed for mention on the 28th November 2018 before the Judge for fixing a hearing date. That later, the suit was fixed for hearing on the 29th October 2018 before the service week Judge but dismissed for non-attendance after both the Plaintiff and his Counsel failed to attend court due to the mix up of dates by the advocate’s clerk who assumed there was a confusion.

b) That the advocate never notified the Plaintiff of the hearing date of 29th October 2108 and has not been indolent.

c) That the application was filed without delay and as there is no order of injunction issued, no party will be prejudiced if the application is granted.

d) That the Plaintiff is not disputing having been served with the mention notice of 26th October 2018, but rather stating that the clerk did not diarize the matter.

B: 1ST DEFENDANT’S COUNSEL SUBMISSIONS:

a) That the fact that the mention and hearing notices bear the receiving stamps of Counsel for the Plaintiff is confirmation that the Counsel was aware of their contents.

b) That the 1st Defendant, unlike the Plaintiff has been attending court and the Plaintiff’s conduct shows that he is in court to buy time.

c) That the Court’s decree was served on the 5th November 2018 and the fact that the Plaintiff did not take action immediately shows that the application is an afterthought and if granted will deny the 1st defendant right to enjoy the fruits of the decree.

d) That the Plaintiff’s application is meant to act like an appeal after the time of moving to the Court of Appeal lapsed. The court should not assist the Plaintiff to reap from his own indolence and the application should be dismissed with costs.

5TH DEFENDANT’S COUNSEL’S SUBMISSIONS:

a) That parties had been served with notices to attend before the Deputy Registrar on the 26th September 2018 to confirm whether the suit should be heard during the coming service week. That the Plaintiff failed to attend.

b) That the suit was then fixed for hearing on the 29th October 2018 and Plaintiff’s Counsel served with hearing notice. That the Plaintiff and his Counsel again failed to attend.

c) That the assumptions or presumptions of the Plaintiff’s advocate’s clerk cannot be reason enough to setting aside of the dismissal order.

d) That the parties had complied with Order 11 of Civil Procedure Rules and that is why the suit was fixed for hearing on the 29th October 2018 and dismissed for non-attendance of the Plaintiff and the application should be dismissed with costs.

5. The following are the issues for the court’s determinations;

a) Whether the Plaintiff has tendered reasonable explanation on his failure to attend court on the hearing date.

b) Who pays the costs of the application

6. The Court has carefully considered the grounds on the application, the affidavit evidence, grounds of objection and oral submissions by three Counsel and come to the following findings;

a) That the Plaintiff’s motion invokes “Section 1A, 1B, 3A, 3B of the Civil Procedure Act, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules.” That as properly pointed out by the 1st defendant Counsel in their “*Grounds of objection*,” there is no

Section 3B in the Civil Procedure Act Chapter 21 of Laws of Kenya. That the reference of **Section 3B** in the application is expunged and the Court will continue to consider the application with the remaining provisions.

b) The record of the proceedings of the 29th October 2018 confirms that the suit was “**dismissed for want of prosecution with costs to the defendants**” after the Plaintiff and his Counsel failed to attend court, though served. The learned Counsel for the Plaintiff and the Defendant have in the application, supporting affidavit and oral submissions confirmed that the court had served them with the mention notice dated the 5th September 2018 requiring parties to attend court on the 26th September 2018 “**for purposes of confirming the hearing during Environment & Land Court – Kisumu, Service week from 29th November 2018**”. The explanation offered by Counsel for the Plaintiff for their non-attendance, that his clerk took the notice as an error from the registry or confusion for reasons that the matter had a mention of 28th November 2018 does not sound reasonable in view of the fact that all advocates practicing from Kisumu town, and the Plaintiff’s Counsel is one of them, must have known of the Court’s service week, which had been organized with full knowledge of the Law Society of Kenya, Kisumu branch leadership. That secondly, even assuming the mention date could have been taken as issued in error or confusion, which was unlikely, the hearing date for 29th October 2018 was served and received by the Plaintiff’s Counsel on the 18th October 2018. That there is no explanation tendered to the Court why the Plaintiff’s Counsel and or his agents failed to visit the Court registry upon receiving the mention or hearing notice to find out whether indeed they were issued in error or through confusion. That for the learned Counsel for the Plaintiff to simply explain his inaction by saying that his clerk decided the notices were issued through clerical error or confusion without referring the matter to him, and without Counsel seeking for explanation from the said unnamed clerk is a gross abdication of his duty to the court contrary to **Section 1A (3) of the Civil Procedure Act, Chapter 21 of Laws of Kenya** that enjoins parties and their advocates in Civil proceedings to assist the court to further the overriding objective of the Act by participating “**in the processes of the court and to comply with the decisions and orders of the court.**”

c) That the application dated the 29th November 2018 was filed about one month after the orders subject matter of the motion were issued, and not after three (3) months as alleged by the 1st Defendant at paragraph 9 of their “**Grounds of Objection.**” That period do not amount to inordinate delay considering the decree was issued on the 5th November 2018.

d) That what is applied for in the motion dated the 29th November 2018 is for the court to “**be pleased to reinstate this suit that was dismissed on the 29th October 2018 and the same be fixed for hearing of the main suit**” and costs to be provided for. That **Order 12 Rule 7 of Civil Procedure Rules** which deals for “**setting aside judgment or dismissal**” [See the margin note) provides 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 the judgment referred to in the rule is one entered upon the Defendant(s) failing to attend court under **Rule 2 (a)**, and the dismissal order is entered under **Rule 3 (1)**, where the Plaintiff (s) fails to attend. That the Plaintiff has not sought for setting aside or varying the dismissal order for want of prosecution issued on 29th October 2018. That what the Plaintiff seeks is for reinstatement of the suit and fixing a hearing date for the main suit and costs. That the learned Counsel attempt to seek for setting aside of the dismissal order in his oral submissions cannot be a substitute of what the law and rules require to be in the application. The Counsel’s attempt to introduce the prayer for setting aside from the bar cannot cure the defect in the application. That as the court cannot reinstate the suit without first setting aside the order that dismissed it on the 29th October 2018, then the motion is incompetent and an abuse of the Court’s process.

7. That for reasons set out above, the Plaintiff’s motion dated the 29th November 2018, and filed on the 30th November 2018, is found to be without merit and is dismissed with costs to the 1st and 5th Defendants.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel M/s Willy for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE