



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 34 OF 2018

(FORMERLY HCC NO. 9 OF 2018)

DANSON NJOGU KIBICHO.....PLAINTIFF

VERSUS

KATHENYA MWENDA.....DEFENDANT

RULING

1. By a notice of motion dated 25th September 2018 brought under **Order 45 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Plaintiff sought the following reliefs;

- a) *That this Honourable Court be pleased to set aside/or review its orders made on 17th September 2018.*
- b) *The Applicant be granted leave to reopen the civil case herein and the case do proceed to hearing.*
- c) *That costs of this Application be in the cause.*

2. The said application was based on the grounds set out on the face of the notice of motion. It was supported by the Plaintiff's own affidavit sworn on 25th September 2018. The reason for the application for reinstatement of the suit was that it was dismissed by the court for want of prosecution on 17th September 2018.

3. Although the Plaintiff contends that his suit was dismissed on account of non-attendance by his advocate on 17th September 2018 the record shows that the Plaintiff was present in person and that the court called upon him to explain his failure to prosecute the suit for several years. The explanation rendered was recorded but the court was not satisfied that it was a good or legitimate explanation. Consequently, the Plaintiff's suit was dismissed for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**.

4. The Defendant filed a replying affidavit sworn on 11th February 2019 in opposition to the said application. It was contended that the Plaintiff had not been diligent in the prosecution of the suit which was filed 20 years ago. It was further pointed out that the suit was dismissed for want of prosecution after the Plaintiff had failed to prosecute it for about seven years after the default judgement in his favour was set aside.

5. When the said application was listed for hearing on 13th February 2019, the parties agreed to canvass it through written submissions. The record shows that the Plaintiff filed his submissions on 26th March 2019 whereas the Defendant filed his on 22nd March 2019.

6. The court has considered the Plaintiff's said application, the Defendant's replying affidavit in opposition thereto as well as the written submissions on record. The court is of the view that the only issue for consideration is whether the Plaintiff has made out a case for setting aside of the dismissal order made on 17th September 2018.

7. There is no doubt that the court has jurisdiction, in appropriate cases, to review and set aside dismissal orders where a suit has been dismissed for want of prosecution under **Order 17 of the Civil Procedure Rules**. The aggrieved party must, however, show sufficient cause for the court to exercise its discretion in his favour. The Plaintiff's explanation that he could not prosecute the suit since 2011 because of the Defendant's repeated failure to attend court cannot be a good reason. The Plaintiff was at liberty to proceed with the suit in the absence of the Defendant as long as the Defendant was duly served with the requisite notices.

8. The court is unable to find any good reason to review or set aside its dismissal order made on 17th September 2018. The Plaintiff is still unable to account for the lengthy delay in the prosecution of the suit. The court is therefore unable to exercise discretion in his favour in the circumstances of the suit.

9. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 25th September 2018 and consequently, the same is hereby dismissed with costs to the Defendant.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of JUNE, 2019.

Ms Maina holding brief for Mr. A.P. Kariithi for the Plaintiff and Mr. Yusuf holding brief for Mr. Nyabati for the defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

13.06.19