



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.303 OF 2013

WASHINGTON AGAI OBAT (suing as the administrator of the estate of

JOHN GWARA ACHOLA.....PLAINTIFF

VERSUS

JOSEPH MAGEKA.....1ST DEFENDANT

LAND REGISTRAR KISUMU.....2ND DEFENDANT

RULING

1. Through the notice of motion dated the 2nd May 2018, the Plaintiff seeks for stay of proceedings and execution; review of the decision of 7th November 2017 dismissing the suit for want of prosecution, reinstatement of the suit for hearing and determination; and setting aside of the order that the Plaintiff pay costs of the suit. The application is based on the nine (9) grounds marked (a) to (i) on its face summarized as follows;

- a) That the dismissal order was erroneous as the Plaintiff was suffering from a serious medical condition that prevented him from visiting his advocate's chambers to give further instructions.**
- b) That the Plaintiff had been using a school address and never received the letters sent by his advocates.**
- c) That the dismissal order violates the Plaintiff's right to be heard, fair trial and is prejudicial to him**
- d) That the Plaintiff has been ready to prosecute his case and the delay was not intentional or intended to obstruct or delay the course of justice.**
- e) That the reinstatement of the suit will not cause prejudice to the Defendants.**

The application is supported by the undated affidavit sworn by the Plaintiff and another by Michael Otula sworn on the 2nd May 2018.

2. The application is opposed by the 1st Defendant through the five (5) grounds of opposition dated the 8th May 2018 summarized as follows;

- a) That the application is misconceived, incompetent, incurably defective and an abuse of the process of the court and law.**
- b) That the application is brought under the wrong provisions of the law and in breach of the relevant rules.**
- c) That the orders sought in the application cannot be granted.**

3. The motion came up for hearing on the 22nd October 2018 and Counsel for the 1st Defendant informed the Court that they had filed their written submissions dated the 16th August 2018. The Counsel for the Plaintiff confirmed having been served with the submissions and undertook to file theirs in 14 days. The Counsel for the 2nd Defendant informed the court that they will not be filing any replies or submissions. The Counsel for the Plaintiff subsequently filed their submissions dated the 23rd January 2019 on the 7th February 2019.

4. The following are the issues for the determination of the court;

a) **Whether the Plaintiff has presented reasonable explanation for the delay in prosecuting the suit that led to the dismissal of the case for want of prosecution.**

b) **Who pays the costs of the application.**

5. The Court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, written submissions by learned Counsel and come to the following findings;

a) That this suit was commenced through the plaint dated and filed on 4th November 2013 seeking for permanent injunction; transfer of the suit land from 1st defendant to the Plaintiff, costs and interest. The Plaintiff's claim is opposed by the 1st Defendant through his statement of defence dated and filed on the 25th November 2013.

b) That vide the consent of counsel for the Plaintiff and 1st Defendant of the 27th May 2015, the Plaintiff motion dated 30th May 2014, and filed on the 2nd July 2014 seeking for leave to amend paragraphs 5 and 10 of the plaint dated 4th November 2013 was granted with costs to the Defendants. That however no amended plaint had been attached and none has been filed to date.

c) That when this suit was filed on 4th November 2013, it was given reference "Land and Environment Case No. 303 of 2013", which reference it has retained to date as confirmed by the documents filed in respect of this application. That the submission by the learned Counsel for the Plaintiff that **"the delay was also occasioned by a mix up in the Environment and Land Court Registry having decided to allocate most of the case new numbers"**, cannot be near the truth as the reference number in this matter never changed.

d) That the record shows that there was no step taken in this matter by any party after the 27th May 2015 when the leave to amend the plaint was granted, to the 14th July 2017 when the court issued the notice to show cause under **Order 17 Rule 2 of the Civil Procedure Rules** for hearing on the 7th November 2017. That it is clear from the face of the copy of the notice in the file that M/s Mwamu & Co. Advocate for the Plaintiff received service of the notice on the 31st July 2017, while M/s Onsongo & Company Advocate for the 1st defendant were served on the 23rd August 2017. The record also shows that on the 7th November 2017, Mr. Mwamu for the Plaintiff and Mr. Awino for Onsongo for 1st defendant were present, and made their submissions before the court dismissed the suit for want of prosecution. That the following is what Counsel for the Plaintiff stated in his submissions;

"Mr. Mwamu,

On 27th May 2015 we were allowed to amend the plaint. Thereafter the Plaintiff died. I have written to the family severally to take over the case. Last week one Joseph, a grandson to the Plaintiff indicated that he was in the process of filing for grant. We therefore pray for time to have the plaintiff substituted and plaint amended. We pray for a mention date."

"Mr. Awino....."

"Mr. Mwamu, We concede no action has been taken since 2015, but for the reasons given, we pray that we be given more time to substitute the Plaintiff and amend the pleadings."

That it is surprising, but welcome to note that the Plaintiff who was reportedly dead by the time the notice to show cause was heard on the 7th November 2017, has now come back to life and swore the undated supporting affidavit to this application. That at least the Counsel for the Plaintiff should have ensured a reasonable explanation was tendered to the court on the source of the death rumours.

e) That what is clear from the Counsel's submissions of 7th November 2017 and the depositions in the supporting affidavits to the application is the fact that there was a breakdown of communication between the Plaintiff and his Counsel. That the length of the period of breakdown was not disclosed by Counsel and his client but the two cannot blame the court or the Defendants for the breakdown. That in this era of mobile and digital communication, the Plaintiff and his Counsel had only themselves to blame for relying on an unnamed school's postal address as the medium of their communication without employing any of the other available and convenient alternatives. That in any case, the address the plaintiff used in his verifying affidavit sworn on 4th November 2013 of **"P.O. BOX 679 KISUMU"** is the same one in the undated supporting affidavit filed on 7th May 2018 with this application. That the contents of paragraph 16 of the said undated supporting affidavit that **"I have decided to use a new postal address, that is my uncle's postal address which is now active....."**, is not only confusing but probably untrue.

f) That the Plaintiff's right to be heard, and to be accorded a fair trial, does not mean that the Defendants are not entitled to similar rights. That the parties in a suit and their advocates have a duty under **Section 1A of the Civil Procedure Act Chapter 21 of Laws of Kenya** to assist the court further or attain the overriding objective to facilitate the just, expeditious, proportionate and affordable resolutions of the disputes before it. That when the Plaintiff fails in his duty to ensure that his advocate has all the instructions required to prosecute his case, and such a case is dismissed for want of prosecution in accordance with the law, the Plaintiff cannot turn around and claim the order was erroneous or contravened his right to fair hearing or to be heard. That the Plaintiff should instead seek the Court's discretion by presenting reasonable explanation on why no steps were taken from May 2015 to July 2017 when the notice under **Order 17 Rule 2 of Civil Procedure Rules** was issued. That would have included disclosing the details of the school and address he had allegedly given, his advocate, and possibly medical report covering the same period. That the letter dated 17th April 2018 by one Bernard Odhiambo Odhong of Wema Health Care – Kenya only covers **"the month of September 2017 upto"** the date of the letter. The letter does not give the medical status of the Plaintiff from May 2015 to July 2017 and does not

amount to a reasonable explanation for the delay.

g) That the delays in taking steps to prosecute the suit inevitably leads to increased costs of litigation to the parties, additional and unnecessary backlog of cases in courts, and inefficient use of public resources. That in view of the provisions of **Article 159 (2) (b) of the Constitution 2010** on the principle that “Justice shall not be delayed”, it is time for the parties who approach the courts for resolutions of their disputes to always bear in mind their legal obligation to assist the courts further the overriding objective and to be vigilant and not indolent. That the Plaintiff herein has not been vigilant as he should have done more, by having more frequent contacts with his advocates instead of waiting for periods of over two years.

h) That the fact that the Plaintiff did not file an amended plaint after getting the leave on 27th May 2105, to the time the show cause notice of 14th July 2017 was issued, depicts a plaintiff who has lost interest with the suit commenced years ago. That after the suit was dismissed for want of prosecution on the 7th November 2017, the 1st defendant filed their Bill of costs dated the 24th November 2017 and the notice of Taxation dated 1st December 2017 was issued. The Counsel for the 1st Defendant and Plaintiff filed their written submissions on the bill of costs dated the 13th April 2018 and 22nd March 2018 respectively. The record shows that the Deputy Registrar taxed the bill of costs on the 16th May 2018 and gave 30 days stay of execution. That it is clear from the foregoing that the notice of motion was filed on 7th May 2018, just a few days to the date fixed for the Deputy Registrar’s ruling on taxation. That the Plaintiff had known from 18th March 2018 that his suit had been dismissed for want of prosecution but did not file the application to challenge the order until 7th May 2018. That delay was inordinate and the application can only be an afterthought to further delay the finalization of this matter. That any further delay will only prejudice the Defendants who the Plaintiff brought to court through the suit and then failed to prosecute the case expeditiously.

6. That flowing from the foregoing, the Court finds no merit in the Plaintiff’s application dated 2nd May 2018 and filed on the 7th May 2018. That the application is therefore dismissed with costs to the 1st Defendant.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Maua for Mwamu for Plaintiff

Mr. Onsongo for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE