



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 125 OF 2014

DAVID SIKUKU KONES.....PLAINTIFF

VERSUS

BASHIR TOWET CHEMASWET.....1ST DEFENDANT

VINCENT WASMA KIRUNYI.....2ND DEFENDANT

RULING

1. The suit herein was filed on **30/7/2014**. Interlocutory proceedings for an order of interim injunction were concluded on **18/1/2016**. From that to date to **7/2/2019** this suit never proceeded to hearing but was adjourned a number of times. The events preceding **7/2/2019** are that on **13/6/2017** the suit was fixed for hearing at the instance of the plaintiff's counsel. On the date taken, that is, **13/11/2017**, it never proceeded for the reason that counsel for the defendant wished to study a power of attorney that had been served upon him by the plaintiff's counsel. The court, after hearing the parties, set down the suit for hearing on **16/4/2018**. The record does not show what happened on that date but the suit was placed before the court on **20/4/2018** when it gave it the hearing date of **17/9/2018**. On the latter date the plaintiff's counsel appeared and stated that the hearing date was taken *ex-parte* and sought another date for the reason that he had not served the 1st defendant. The court ordered the matter to be mentioned on **1/10/2018**. On that date the court gave the matter the hearing date of **7/2/2019**. Come **9.00 am** on **7/2/2019** both the plaintiff's counsel and the defendant's counsel and their clients were absent, and the court placed the file aside till **11.10. a.m.** By the latter hour both parties and their counsel had not arrived. This court ordered that the matter be mentioned on **25/2/2019** for the parties to show why the suit should not be dismissed for want of prosecution and that the Deputy Registrar should serve the mention notice. On **25/2/2019** Mr. Okile for the 2nd defendant appeared. There was no appearance for the plaintiff and the court dismissed the suit for want of prosecution hence giving rise to the instant application.

2. The application is dated **2/4/2019** and it seeks that the orders made by this court on **25/2/2019** dismissing the suit for want of prosecution be reviewed varied and or set aside and upon granting that prayer this court be pleased to fix the matter for hearing on priority and in any event before the **12th April, 2019**.

3. The applicant's grounds are that the plaintiff's advocate then on record was not served with a Notice To Show Cause under **Order 17 Rule 2(1)** of the Civil Procedure Rules, 2010; that the notice that was issued by the Deputy Registrar dated **22/3/2019** was served upon Mr. Okile, Advocate appearing for the defendant on **25/2/2019** the same day the suit was dismissed; that it was not practically possible to serve the advocate on record for the plaintiff the same day as he is based in Eldoret; that Mr. Okile never informed the court of the non-service on the plaintiff and the 1st defendant on record and that dismissal of the suit was erroneous and the orders made ought to be reviewed, varied or set aside in the interest of justice.

4. A replying affidavit was filed by Patrick Okile, Advocate for the 2nd defendant. In opposition to the application, he deposed that the plaintiff's suit was properly dismissed by this court on its own motion as it had taken too long to prosecute and there has to an end to litigation and that if the applicant feels offended by his advocates on record he has the option of suing for damages for professional negligence.

5. The plaintiff filed submissions on **22/5/2019**. The defendants did not file any submissions.

6. I have considered the application and the response including the submissions of the plaintiff. I have noted that the plaintiff's affidavit has annexures which show that he has an employment contract abroad and that by the time the dismissal order was made he was not within the jurisdiction of the court. That may explain why the plaintiff was not in court as at the date of the hearing. He further states that he had asked his erstwhile counsel to fix the matter for hearing in April, 2019 as that was the time he was due to be released by his employer but his counsel failed to inform him of any hearing date that the court had given. He only learnt of the dismissal of the suit after the dismissal order had been made and he was not aware of the notice to show cause. Further his advocate informed him that no notice was served upon his erstwhile advocate. He deposes that the principles of natural justice were violated for the reason that Mr. Okile an officer of the court who

had a duty of assisting the court with proper information so as to achieve the overriding objective of the court of an efficient just and fair mechanism of dispute resolution failed to oppose the notice to show cause which was served on the very day that the suit was dismissed for want of prosecution.

7. I have examined the court record and I find that there is a notice of dismissal dated **22/2/2019** which on the face of it shows that Mr. Okile, advocate received it on **25/2/2019**, but it does not show whether Mandere Nyandoro, advocates who represented the plaintiff at the time had received it.

8. In the circumstances outlined above I will accord the plaintiff a benefit of doubt. It has not been established that he received the notice to show cause. Besides I have noted that the fact that he was not within the country as at the date of notice to show cause militated against his attending court.

9. I therefore exercise by discretion and grant the application dated **2/4/2019** in terms of **prayer No. (1)**. As the proposed hearing mentioned in prayer No. 2 has already passed this matter will be fixed for hearing by consent of the parties in open court preferably on the date of this ruling.

Dated, signed and delivered at Kitale on this 31st day of July, 2019.

MWANGI NJOROGE

JUDGE

31/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

N/A for Applicant

N/A for Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

31/7/2019