



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 632 OF 2015

(FORMERLY HCC. NO. 11 OF 2011)

JOHN OKUMU ODULLA.....PLAINTIFF

VERSUS

JOHN OWUOR OSORE.....DEFENDANT

RULING

1. The Plaintiff filed the notice of motion dated 20th October 2017 seeking for the setting aside of the order of 20th March 2017 dismissing the suit for non-attendance, and/or want of prosecution. The Plaintiff also seeks for the suit to be reinstated and costs. The application is based on the nine (9) grounds on its face marked (a) to (i) and supported by the affidavit of Maurice Carlos Ouma, Advocate sworn on the 20th October 2019. The Plaintiff's case is that the Counsel did not attend the court on the date the suit was dismissed because he was not aware of the matter coming up on that date. That the Plaintiff should not be punished for the mistakes of Counsel.

2. The application is opposed by the Defendant through the replying affidavit sworn by Patrick Ochieng, Advocate on the 14th December 2017. The Defendant's case is that the court served the advocates for the parties with the notice to show cause why the suit should not be dismissed for want of prosecution that came up for hearing on 20th March 2017. That the Plaintiff did not attend court to show cause, and the suit was dismissed. That the application was filed after four (4) months and therefore, there has been inordinate delay.

3. The application came up for hearing on the 27th February 2018 when Counsel agreed to file and exchange written submissions. The learned Counsel for the Plaintiff and Defendant filed their submissions dated the 21st May 2019 and 19th June 2019 respectively.

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

a) Whether the Plaintiff has established reasonable cause why the order of 20th March 2017 should be set aside and suit reinstated.

b) Who pays the costs.

5. The Court has carefully considered the grounds on the motion, affidavit evidence, written submissions, the record and come to the following findings;

a) That this suit was filed on the 17th February 2011, through the plaint dated the 25th February 2011. That the plaint was filed contemporaneously with the motion of even date seeking for injunctive order. That the Defendant entered appearance vide the memo dated the 9th March 2011, and filed their defence dated the 28th February 2017 on the 7th March 2017, after their motion dated 8th November 2011 was allowed on the 26th November 2011.

b) That the record shows that the parties reported that they were negotiating during the Court appearances of 9th December 2014 and 25th March 2015. That however there was no step taken by the parties towards prosecuting this suit from 25th March 2015 to the 7th March 2017 when the Defendant filed their defence, verifying affidavit, list of witnesses, statement and documents.

c) That by the date the Defendant was filing the statement of defence and other processes, the court had already issued the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules**, dated the 24th November 2016 for hearing on the 20th March 2017. That the copy of the notice in the record shows that it was received by M/s Odhiambo Ouma & Co. Advocates on the 28th February

2017. That there is no explanation tendered why Counsel did not inform the plaintiff and ensure representation on the date set.

d) That on the 20th March 2017, the Defendant's Counsel was present, and moved the court to have the suit dismissed with costs without disclosing that they had filed the defence on the 7th March 2017, among other documents. That act or fact of filing court processes on the 7th March 2017 amounted to a step in prosecuting the case, albeit coming after about two (2) years from the last court appearance of the 25th March 2015.

e) That in view of the finding in (d) above, the court is of the view that the Plaintiff deserves to be given one last chance or opportunity to prosecute his case. That however, the Plaintiff will pay thrown away costs assessed at Kshs. 20,000/= to the Defendants within 30 (thirty) days, and in default the setting aside and reinstating of the suit order lapses.

6. That flowing from the foregoing, the court allows the Plaintiff's motion dated 20th October 2017 in the following terms;

a) That the order dismissing the suit for want of prosecution of 20th March 2017 be and is hereby set aside, and the suit reinstated, on condition that the Plaintiff pays the Defendant throw away costs assessed at Kshs. 20,000/= (Twenty thousands) only in 30 days.

b) That should the Plaintiff fail to comply with the condition in (a) above, the setting aside and reinstatement of suit order therein to lapse automatically.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Mr. Anyumba for Ouma for Plaintiff

Mr. Sala Ochieng for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE