



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 198 OF 2014

CHURCH OF GOD IN EAST AFRICA.....APPLICANT

- VERSUS -

FREDRICK MAENGWE MATARA

EMMANUEL OTIANGALA

BOAZ OTANGA

NEWTON ANUNDA

DEBORA OMUKOKO

ROSE NABUTO

JARED OTENYI

JOSEPHINE OYARO

JANE AMUKOA..... RESPONDENTS

RULING

1. Before me for determination is a motion on notice dated 20/7/2018 and filed on 1/8/2018. It is expressed to be brought under Sections 1A, 1B, 3A of the Civil Procedure Act and order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010. It is also further anchored on Articles 47 and 50 of the Constitution of Kenya and Section 4 of the Fair Administrative Action Act No. 4 of 2015. The Applicant – **THE REGISTERED TRUSTEES CHURCH OF GOD IN EAST AFRICA** – is the Plaintiff in the suit and is seeking the following orders in this application:

1. That the order made on 25/7/2017 by this honourable court dismissing the suit herein be set aside and the suit herein be reinstated for hearing and determination.

2. That costs of this application be provided for.

2. The Respondents – **FREDRICK MAEGWE MATARA, EMMANUEL OTIANGALA, BOAZ OTANGA, NEWTON ANUNDA, DEBORA OMUKOKO, ROSE NABUTO, JARED OTENYI, JOSEPHINE OYARO and JANE AMUKOA** – are 1st to 9th Defendants in the suit respectively and had earlier on made an application (dated 26/5/2017) seeking, *inter alia*, dismissal of this suit for want of prosecution. That application was allowed on 25/7/2017 for reasons that the Applicant had not responded to the application and had failed to turn up in court on that day despite being served.

3. The application herein now is a contestation of the order that allowed the earlier application and is hinged on grounds, *inter alia*, that the earlier application had not been served on the Applicant's advocate on record but on a different one and that the Applicant was denied a chance to be heard.

4. The Applicant's story is that his former advocates Osabwa Sandy's & Co. Advocate, came on record for it on 5/2/2015 but it became clear at some point that they were not taking action in this matter. The Applicant therefore instructed its current legal team, Mutunyi, Mbiyu & Co. Advocates, on 9/11/2017. The team asked for a mention date vide a letter dated 6/11/2017 and when no such date was forthcoming, another letter dated 3/4/2018 making a similar request followed. Then a mention date of 9/5/2018 was taken later.
5. But the Applicant's counsel, a Mr. Mbiyu, is said to have visited the court on 7/6/2018 and discovered that the matter had earlier on been dismissed for want of prosecution. That came as a shocker to the Applicant. Upon enquiries however, a realisation came that the former advocates had failed to advise and/or inform about the application for dismissal. According to the Applicant, its former advocates were not served. The process server was faulted for allegedly serving at Vihiga while the former advocates were based at Majengo Township. He was faulted further for serving another firm, Mbichiri & Co. Advocates, that was not on record for the Applicant.
6. Issue was taken too with the details appearing on the affidavit of the process server, with the Applicant pointing out that the process server indicates having received instructions on 1/1/2017 to serve application dated 26/5/2017, which was long before the application was drawn up. The Applicant asked that the application herein be allowed as the earlier application was either improperly served or not served at all.
7. The Respondents opposed the application vide a replying affidavit dated 20/8/2018 filed in court on 6/9/2018. This application itself was said to have been filed belatedly, having come about one year after the dismissal of the earlier application. And at the time of the dismissal, it is M/S Osambwa Sandy's & Co. Advocates, not the current ones, that represented the Applicant. Osambwa's firm was said to have been duly served with the application that was allowed with the hearing date endorsed. It is that firm that advised service on Mbichiri & Co. Advocates, a firm that, according to them, had been instructed by the Applicant.
8. The Respondents also averred that the Applicant has no defence to the application that was allowed, having not filed a draft response to it with this application. It was pointed out that the matter had been adjourned several times at the instance of the Plaintiff and that from 30/3/2016 to July 2017, no action was taken to move the matter forward.
9. The application was canvassed by way of written submissions. The submissions of the Applicant were filed on 15/10/2018. The Applicant reiterated the substance of the application, and sought to persuade the court to accept it as true. In particular, it was submitted that the Applicant was condemned unheard contrary to articles 47 and 50 of the Constitution and Section 4 of the Fair Administrative Action Act, No 4 of 2015. To add weight, the cases of **Ibrahim Athman Said Vs Ibrahim Abdilla Abdulla and Another: [2014] eKLR** and **Gold Lida Limited Vs NIC Bank Limited & 2 others [2018] eKLR** were cited. The court was asked to exercise its discretion in favour of the Applicant and allow the application.
10. The Respondents' submissions were filed on 9/10/2018. It was pointed out that the orders sought to be set aside were made on 27/7/2017 while the application challenging them now was filed on 1/8/2018, which is over one year later. The Applicant was said to be guilty of inordinate delay. It was further pointed out that the application that was allowed was filed because for over a period of one year, the Applicant had made no effort to act on the matter. This was said to be a clear demonstration of lack of interest in the matter.
11. The Respondents then shifted focus to the present application and submitted that the Applicant has no good defence to the earlier application as no draft response to the earlier application was availed. It was further explained that it is the Applicant's former advocates who were on record at the time the contested service was effected and it is the former advocates who directed the process server to Mbichiri & Co. Advocates. The former advocates were said to have been duly served. In sum, the Applicant was said to be guilty of inordinate delay, failed to make a reply with a triable issue in the earlier application, didn't act diligently concerning both the earlier and present application, and failed to pay adjournment costs ordered to be paid. The court was asked to dismiss the application.
12. I have considered the application, the response made, and the rival submissions. I have also had a look at the application that was allowed earlier and the suit generally.
13. Looking at the records, it is plain to me that for over a period of one year, the Applicant didn't take any action to move this matter forward. Before the earlier application was filed on 7/6/2017 the matter had been last in court on 30/3/2016. It is clear to me that the application was served but the Applicant didn't respond to it. It is clear to me too that on the date the earlier application was allowed, the Applicant herein had been served but failed to appear in court.
14. The Applicant would have us believe that there was no service. The service referred to is shown to have been effected on the Applicant's former advocates who, upon duly being served, referred the process server to yet another firm of advocates. If you are telling a story to a court of law, tell it well. If you tell it the way you would relate it in a market place, you will fail. The Applicant says there was no service. Reason? Because of what the process server said in his affidavit of service, which, *inter alia*, stated that service was at Vihiga instead of Majengo town where, according to the Applicant, the offices of the former advocates are situated. It was wrong too, said the Applicant, for the process server to serve another firm of advocates – Mbichiri & Co. Advocates – which had no instructions to receive service. Besides, the Applicant continued, the process server didn't disclose who advised him to serve that other firm.
15. That's a good story; indeed good. Except that when you are telling it to a court of law, the court would tell you not to tell it in a speculative or conjectural manner. The former firm of advocates is one the Applicant had dealt with before. It would have been necessary to bring confirmation from that firm showing it was not served. The court expected an affidavit or other written confirmation showing that there was no service. Instead of doing this however, the Applicant chose to hypothesize and presume. This is not enough in my view. Credibility in a court of law is always based on a higher standard. It may be useful to point out here that the affidavit of service by the process server is clear that the firm then on record was duly served and that it is that firm that referred the process server to the other firm said not to have instructions.
16. The Applicant also took issue with the fact that the affidavit of service shows the process server as having received instructions on 1/1/2017 long before the date when the earlier application was drawn up, which was 26/5/2017. He then proceeded to serve it on the same day (1/1/2017) at both Vihiga and Nairobi. Had the Applicant bothered to pay attention to the date, it would have realised that it was the first

day of the New Year (2017) and obviously a holiday. It would have become apparent that no offices are usually open for business on that day and therefore the date mentioned is most likely an error. Besides, the date shown on the served documents is 3/6/2017, and not 1/1/2017 mentioned in the affidavit of service. The court is comfortable treating the date of 1/1/2017 as an error of little or no consequence.

17. The Respondents made a pertinent observation which this court concurs with. And the observation was that the Applicant seems to have no response (they called it defence) to the earlier application that was allowed. The Applicant is seeking to set aside an order arising from that application. If that order is set aside, the end result is that the suit will no longer stand dismissed and the application itself would be heard afresh.

18. At the time of filing this application, the Applicant should have filed a draft response. It is the substance of that draft response that would have informed the court whether or not to exercise its discretion in the Applicant's favour. Failure to file such response was a crucial and critical omission and it does not help the Applicant's cause.

19. I made a remark too that I have looked at the suit. The record does not speak in favour of the Applicant. There is little or no enthusiasm in the manner the Applicant has conducted itself. And this is so whether one is looking at the recorded trend of events relating to the time when the Applicant's former advocates were on record or even now when the current legal team is handling the matter. I may, as an example, mention a few instances relating to the current advocates on record. By letters dated 6/11/2017 and 3/4/2018, they are shown to have written to court asking for a date of mention to take directions in the matter. One such date – 9/5/2018 – was given on 10/4/2018 after one Anjela Geoffrey asked for it at the court registry. On that date of mention – 9/5/2018 – however, despite having served the Defendant's counsel to appear, it is the Defendant's counsel, and not the Applicant's counsel, who appeared.

20. Much earlier – on 13/11/2017 to be specific – the same Anjela is shown to have gone to the registry and taken the date of 30/1/2018. On that date, the matter was called up in open court and neither the Applicant nor its counsel was present. The court had to direct that another date be taken at Court Registry. It is apparent to me that the current firm of advocates would want to make it appear that they are doing much for the Applicant. But the record so far shows that they are not doing better than the former firm of advocates. Anyone would doubt whether they are more helpful to the Applicant.

21. This matter was filed way back in 2012. It is now 2019. The Applicant has clearly engaged in blameworthy conduct relating to making the matter ready for hearing. And when the Respondents decide to take action to bring to an end to an otherwise dormant suit, the Applicant now plays the victim and alleges denial of the right of hearing. Nobody has denied the Applicant that right. The doors were shut right on its face by the due process of law. The law abhorred the Applicant's inaction and dismissal was meant to tell it that enough is enough. The Applicant has only itself to blame. Litigation must come to an end, Period!

22. Given all this, it's clear that the Applicant has not demonstrated the merits of its application. That application is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Busia this 25th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

3rd Respondent: Absent

4th Respondent: Absent

5th Respondent: Absent

6th Respondent: Absent

7th Respondent: Absent

8th Respondent: Absent

9th Respondent: Absent

Counsel for the Applicant: Absent

Counsel for the Respondents: Present

Court Assistant: Nelson Odame