



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.189 OF 2015

1. JULIUS OJWANG OBONDE

2. PAUL ODIDO.....PLAINTIFFS

-VERSUS-

1. ABDUL HAKIM ABEID

2. DIRECTOR OF PUBLIC PROSECUTIONS

3. CHIEF MAGISTRATE COURT

4. SOUD HAFITH RASHID

5. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By a Notice of Motion dated 26th November 2018 the Claimants/Applicants moved this court under Sections 1A and 1B of the Civil Procedure Act, Order 12 of the Civil Procedure Rules and Sections 3, 13 and 18 of the Environment and Land Act seeking the following orders:

1. That this Honourable Court be pleased to certify this Application urgent and on its own motion, reinstate the claim dated 18th August, 2015 and which was dismissed on 22nd February 2018;

2. That this Honourable Court be pleased to reinstate the claim dated 18th August 2015;

3. That this Honourable Court be pleased to give directions on the hearing of the claim upon its reinstatement;

4. That finds (sic) that the title deed issued to the 1st Respondent is invalid and hence null and void; and

5. That cost be in the cause.

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of Paul Odipo sworn on 26th November, 2018. It is the Applicants case that they filed this claim on 26th August 2015 and it was dismissed on 22nd February, 2018 for want of prosecution. The Applicants aver that they were charged before Mombasa Chief Magistrate's Court in Criminal Case No.1446 of 2015 on 28th July 2015 with an offence of malicious damage to property and they filed this case to stop their prosecution but were unsuccessful. That they put more attention to the criminal case and have now found contradicting documents filed by the 4th Respondent. The Applicants have attached copies of documents including a General Power of Attorney, copy of title deed, sale agreement as well as copy of probate and Administration Cause No. 94 of 1964. That the 1st Applicant purchased the suit land from one Mohamed Soud. The Applicants aver that it will be in the interest of justice that the claim be reinstated and heard on merit to give justice to the parties.

3. In opposing the Motion the 1st Respondent filed a replying affidavit sworn on 11th February 2019 in which he avers that the Applicants do not deserve the orders prayed for because the Applicants did not bother to set down the suit for hearing for more than two years; that they were not interested in prosecuting the suit even after they were served with notice to show cause why the suit should not be dismissed for

want of prosecution; that the Applicants have not given sufficient grounds for the delay in prosecuting the matter and no explanation has been given for non-attendance in court on 22/2/2018 when the suit was dismissed.

4. I have considered the Application. The suit was filed on 18th August 2015. The record shows that from 24th November 2015 to 22nd February 2018 no action was taken in the matter. Pursuant to a notice to show cause under 17 Rule 2, which was duly served by the court, the suit was dismissed by the court on 22nd February 2018. The Applicants have now applied for the suit to be reinstated. The appropriate test in the exercise of discretion to reinstate the suit is the same as the one applicable in deciding whether to dismiss or spare a suit. The court has the discretion to excuse any delay which is not contumelious and inexcusable; one which has been explained to the satisfaction of the court and it causes no substantial prejudice to fair trial of the case or to one party or other or both.

5. I have perused the affidavit in support of the Application. The evidence annexed to the supporting affidavit clearly demonstrated the Applicants' eagerness to pursue the matter. However, the Applicants have not explained the reasons as to why they never took action in the matter for over two years from 24th November 2015 up to 22nd February 2018 when the suit was dismissed. Further, the Applicants have not given any explanation for their failure to attend court on 22nd February 2018 when the suit was dismissed. In addition, no explanation has been given why it took the Applicants over nine months to bring the present Application. The Applicants never took action in the matter from 24th November 2015 to 22nd February 2018, failed to appear for the notice to show cause why the suit should not be dismissed and the delay of nine months between the dismissal and the filing of this Application has not been explained. What is more startling is that the Applicants and their counsel were not present on 19th ===== arch 2019 to prosecute the Application. When the chain of events and the realities in the file are taken together, it is clear that the Applicants have not been keen to prosecute their case. In my view, no explanation or reasonable explanation has been given by the Applicants to warrant the exercise of this court's discretion in their favour.

6. The upshot is that I find that the Application is devoid of merit. Consequently, the Notice of Motion dated 26th November, 2018 is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wafula holding brief for Karina for 1st Defendant

No appearance Plaintiffs

Nguyo for 2nd, 3rd and 5th defendants

No appearance for 4th defendant

Yumna Court Assistant

C.K. YANO

JUDGE