



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC NO. 108 OF 2013

MOSES OGUTU.....PLAINTIFF

-VERSUS-

JOHNSTONE OTIENO OLONDO.....1ST DEFENDANT

RONALD OMOLLO OLONDO.....2ND DEFENDANT

LOICE AKINYI ONYANO.....3RD DEFENDANT

DESTINY RECONCILIATION CHURCH.....4TH DEFENDANT

RULING

1. The Plaintiff seeks vide the Motion dated 2nd August, 2018 to have the order of 22nd November, 2017 dismissing the suit for non-attendance to be set aside and the suit reinstated. The Plaintiff relies on the six (6) grounds on its face and his supporting affidavit sworn on the 2nd August, 2018.

2. The application is opposed by 1st to 3rd Defendants through the replying affidavit sworn by the 2nd defendant on the 13th February, 2019.

3. The application was heard on the 20th February, 2019 when the plaintiff and Mr. Odongo, leaned counsel for the 1st to 3rd Defendants made their oral submissions.

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

a. Whether the Plaintiff has presented reasonable cause for not taking steps to prosecute the suit for over twelve months.

b. Who pays the costs of the application.

5. The court has carefully considered the grounds on the application, the supporting and replying affidavits, the oral submissions for and against the application and come to the following findings;

a. That the suit was commenced by the Plaintiff against the four named Defendants though the plaint dated the 25th April, 2013 filed through M/s Otieno, Yogo, Ojuro & Company Advocates. That the firms of M/s Nyanga & Company Advocates and M/s Odongo Awino & Company Advocates filed the memorandum of appearance dated the 27th May, 2013 and 30th May, 2013 respectively for the 1st to 3rd Defendants. That M/s Odongo Awino & Co. Advocates then filed the statement of defence for the 1st to 3rd Defendants dated the 13th June, 2013 and M/s Otieno, Yogo, Ojuro & Co. Advocates filed a reply to the 1st to 3rd Defendants statement of defence on the 26th June, 2013.

b. That M/s M. A. Ochanji-Opendo & Co. Advocates filed their Notice of change of Advocates for the plaintiff dated the 30th October, 2014 but appear not to have taken any further steps towards prosecuting this case.

c. That further, there is nothing on record to confirm whether the 4th Defendant has even been served with the summons to enter appearance todate though the proceedings of 17th September, 2014 and 8th December, 2014 indicates that it has been served and has not entered appearance.

d. That the court acted pursuant to **Order 17 Rule 2 of Civil Procedure Rules** and served the Notice to show cause why the suit

should not be dismissed dated the 12th July, 2017. The copy of the notice in the file shows that it was duly received and stamped by the two firms of advocates on record for the plaintiff and 1st to 3rd defendants on the 29th September, 2017. That the notice was for hearing on the 22nd November, 2017. That the counsel had about seven (7) weeks' notice from the date of service to the hearing date.

e. That before the notice to show cause dated the 12th July, 2017 was issued, the last action taken towards prosecuting the case was on the 31st March, 2015 when one Linus of Ochanji Advocates for plaintiff fixed the suit for hearing on the 8th October, 2015. That come the 8th October, 2015 none of the parties or their advocates attended the court, and the matter was stood over generally and the plaintiff ordered to pay the court adjournment fees which appear not to have been paid to date. That on the date set for the notice only counsel for the 1st to 3rd Defendants was represented and the suit was dismissed for want of prosecution with costs to the defendants.

f. The plaintiff then filed the Notice to act in person dated the 2nd August, 2018 and the motion, subject matter of this ruling. That the plaintiff main grounds and deposition in support of the application are that his counsel on record did not notify him of the notice and had not taken any steps to prosecute the suit. That the 1st to 3rd Defendants response is that the suit belongs to the parties and the plaintiff has not availed any evidence of the steps he had taken to engage his advocates to take steps to prosecute the case. That while the plaintiff may be right that it is his legal representative that failed him by not initiating the steps towards prosecuting the case, and not notifying him of the date for notice to show cause, and possibly he may have recourse against his counsel, the court is of the view that now that he is in person and has shown interest and readiness to prosecute his case, he deserves to be given an opportunity. That the 1st to 3rd Defendants are however entitled to some thrown away costs which the court assesses at Kshs.10,000 (Ten Thousands only).

6. That from the foregoing the court finds merit in the Plaintiff's motion dated the 2nd August, 2018 and orders as follows:-

a. That the court's order of 22nd November, 2017 dismissing the suit for want of prosecution is hereby set aside, and the suit reinstated for hearing on condition that the plaintiff pays the 1st to 3rd Defendants thrown away costs of Kshs.10,000 (Ten Thousands Only) in 30 (thirty) days from today, and in default the setting aside and reinstating orders automatically lapses.

b. Parties do comply with Order 11 of Civil Procedure Rules in 30 (thirty) days and attend the pre-conference before the Deputy Registrar on the date to be fixed today.

Orders accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 17TH DAY OF JULY, 2019.

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Orengo for Odongo for 1st to 3rd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE