



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 19 OF 2014

WILFRED OKAL ONGONG'PLAINTIFF

VERSUS

SAMUEL RAE.....DEFENDANT

AND

JOEL OMINO AKOMO.....THIRD PARTY

RULING

1. Wilfred Okal Ongong' hereinafter referred to as the applicant has preferred before me an application dated 11th October 2017. The applicant prays that the suit herein be reinstated on such terms that are just in view of the circumstances. The application is based on facts that:-

- a) That the suit herein was dismissed for non-attendance on 05.10.16 due to no fault on the part of the applicant.
- b) That at the time of the aforesaid dismissal the suit herein and an application to cease acting by counsel for the third party dated 06.07.16 were both slated for hearing on 05.10.16.
- c) That due to the nature of the third party application and honest belief that the application would take precedence over the main suit, the applicant on counsel's advice failed to attend court on 05.10.16 and unfortunately counsel was held up in a different court.
- d) That it was not possible to establish the position of this matter previously as the file could not be located at the court registry until recently.
- e) That this application has been made timeously and in good faith and in the interest of justice.
- f) That the Respondents will not be prejudiced by the grant of the orders sought as thrown away costs would be compensated.
- g) That it is only just and fair that the suit herein be reinstated as enough the dispute relates to a family land and is fairly emotive.

2. In the supporting affidavit, the applicant depones that the suit was scheduled for hearing on 5/10/2016. His advocate did not attend hearing due to the fact that he thought the application to cease acting filed by the third parties advocate would be heard first.

3. He claims to have been before Hon Mr Justice Majanja and therefore did not attend this court. He informed his client not to attend court due to the application to cease acting by Third Party. At one time, the court file could not be found in the registry. At one time, the law firm misplaced the plaintiff's file.

4. The defendant opposes the application on grounds that the application has been filed after lapse of more than one year and that the applicant is guilty of laches.

5. The suit was heard in 2010 and therefore should be dismissed.

6. I have considered the application, grounds of opposition, submissions on record and do find that failure to attend court was caused by the plaintiff's counsel who apart from failing to attend court, informed the plaintiff not to attend court.

7. I do find that the plaintiff's counsel made a mistake by concluding that the third party's counsel's application to cease acting would be heard and therefore decided not to attend court. Moreover, counsel has no authority to advise his client not to attend court. However, mistake of counsel should not deny a party the seat of justice.

8. On delay, I do find that the suit was dismissed on 5/10/2016. The letter by Moses J. Orengo was filed on 29/9/2017, the application to set aside the order of dismissal was made on 11/10/2017 thus 12 days after the letter and slightly more than one year after dismissal of the suit.

9. I do find that the delay in filing the application is explained in the fact that the plaintiff's counsel became aware of the dismissal on the 29/9/2017 and the application was filed 12 days thereafter. The allegation that the file was at one was lost has not been challenged. Moreover, the defendant can be compensated in terms of costs.

10. I do grant the orders sought to enable the plaintiff access the seat of justice. I do award thrown away costs to the defendant/Respondent assessed at Kshs. 20,000, to be paid within 30 days failure of which the application stands dismissed.

Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2019.

In the presence of:

Plaintiff N/A

Defendant N/A

Counsel Moses Orengo for defendant

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE