



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC NO. 263 OF 2013

**JACKOB NYAKWA OJWANG (Suing as the legal
representative of the Estate of the late**

AUGUSTINE OJWANG OKUT.....PLAINTIFF/APPLICANT

-VERSUS-

ALFRED OREMO OKOLA.....DEFENDANT/RESPONDENT

RULING

1. The Motion dated 8th August, 2018 seeks for the court to review, set aside, and or vacate the orders issued on the 12th February, 2018 for dismissal of the suit for non-attendance, and the suit be reinstated for hearing and determination. The application is based on four (4) grounds on its face and supported by the affidavit of Gerald O. Kimanga Advocate sworn on the 8th August, 2018, among others deponing that he was not served with the dismissal notice as alleged on the 8th February, 2018 and hence did not know that he was required to come to court on the 12th February, 2018. The application is also supported by the further affidavit sworn by Jakob Nyakwa Ojwang, the plaintiff, on the 25th February, 2019 among others deponing that if the defendant is indeed dead, the suit can still be maintained against his estate.
2. The application is opposed by the defendant though the four (4) grounds of opposition dated 11th October, 2018 that the suit is incapable of being reinstated; that the defendant passed on the 28th February, 2013 as per certificate of death No. 0045660; among others.
3. The learned counsel for the plaintiff and defendant filed the written submissions dated the 25th February, 2019 and 26th June, 2019 respectively.
4. The issues for determination by the court are as follows:
 - a. Whether the notice to show cause was served upon counsel on record for the plaintiff.
 - b. What order to issue
 - c. Who pays the costs.
5. The court has considered the grounds on the motion and of opposition; supporting and further affidavitS; the pleadings, submissions and record; and come to the following findings;
 - a. That the suit was commenced by the plaintiff in person through the plaint dated the 25th September, 2013 and filed on the 14th April, 2014 against Alfred Oremo Okola. That the plaintiff has indicated his postal address as P. O. Box 959 Kisumu in all documents filed by himself, including the amended plaint dated 3rd September, 2014.
 - b. That M/s Kirenga & Company Advocates filed notice of appointment of advocate dated the 21st January, 2015 for the defendant, while Ms. Kimanga & Company Advocates filed their notice of appointment of advocate dated the 11th February, 2019.
 - c. That the Notice to show cause under **Order 17 Rule 2** of Civil Procedure Rules dated the 25th January, 2018 that was coming up for hearing on the 12th February, 2018 when the suit was dismissed for want of prosecution was addressed to the plaintiff and defendant in person and not to their counsel on record. That though the notice was correctly addressed to the Postal address provided by the plaintiff and posted through the mail registry, the failure to serve, counsel on record is sufficient ground for the order made on the 12th February, 2018 to be set aside, now that the plaintiff has moved the court.

d. That the defendant who allegedly died on the 15th February, 2013 before this suit was filed has a counsel on record. That as the plaintiff has disputed the said death, the matter will be left at that for the parties to move the court as appropriate.

6. That flowing from the foregoing, the court allows the plaintiff's Motion dated the 8th August, 2018 in terms of prayer 1 and 2 with costs in the cause.

It is so ordered.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 5TH DAY OF SEPTEMBER, 2019.

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE