



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC NO. 15 OF 2013

FREE PENTECOSTAL FELLOWSHIP IN KENYA REGISTERED TRUSTEES

(Suing for an on behalf of Free Pentecostal Fellowship in Kenya)...PLAINTIFF

-VERSUS-

MACEDONIA RESORT CLUB LIMITED.....1ST DEFENDANT

HON. KENNEDY ODHIAMBO NYAGUDI.....2ND DEFENDANT

RULING

1. The Plaintiff vide the Motion dated the 20th June, 2018, seeks to have the court order of 12th March, 2018 set aside, suit reinstated for hearing and costs to be provided for. The application is based on the six (6) grounds on its face and supported by the affidavit of Gideon Solonka Kilakoi Advocate, sworn on the 20th June, 2018. The plaintiff's case is that the notice to show cause that was heard on the 12th March, 2018 was not received by the plaintiff until the 6th June, 2018. That the matter had earlier been referred by the parties to the National Land Commission. That they appeared before the Commission at CITAM Kisumu on the 9th and 10th November, 2016 and were awaiting a determination.

2. The application is opposed by the defendants though the replying affidavit sworn by Geoffrey O. Oluoch Advocate on the 11th October, 2018.

3. The learned counsel for the plaintiff and the defendants filed their written submissions dated the 5th December, 2018 and 26th February, 2019 respectively.

4. The issues for the court's determinations are as follows:

*a. Whether plaintiff's counsel was served with the notice under **Order 17 Rule 2** of Civil Procedure Rules coming up for the hearing on the 12th March, 2018.*

b. Whether the plaintiff has presented reasonable explanation for the failure in taking steps to prosecute the suit for more than one year.

c. Who pays the costs.

5. The court has carefully considered the grounds on the motion, affidavit evidence, written submissions, the record and come to the following conclusions;

*a. That the notice under **Order 17 Rule 2** of Civil Procedure Rules dated the 26th February, 2018 for hearing on the 12th March, 2018 was issued by the court upon noting that the parties had not taken steps to prosecute the suit since 6th December, 2016 when the matter was stood over generally after the parties and their counsel failed to attend court.*

b. That the copy of the notice on record indicates that it was posted to the plaintiff's counsel on the 6th March, 2018 by the Mail registry, and that it was received by the defendant's counsel on the 7th March, 2018. That while counsel for the defendants attended court on the 12th March, 2018 when the dismissal order was issued, the plaintiff and his counsel did not attend. The plaintiff case is that they did not receive the notice until the 6th June, 2018 and hence did not know of the hearing of 12th March, 2018. That claim has not been disputed as there is no evidence tendered to show otherwise.

c. That the record has a copy of a letter by the plaintiff's advocate dated the 7th June, 2018 addressed to the Deputy Registrar and copied to the defendant's counsel and another, indicating that they received the notice on 6th June, 2018 and that the National Land Commissions was yet to deliver its decision after the hearings of the 9th and 10th November, 2016. That the existence and contents of the said letter has not been disputed and it further goes to confirm the finding in (b) above that the plaintiff was not represented on the 12th March, 2018 for reasons that the notice had not been received by counsel.

d. That further, had the court been informed on the 12th March, 2018 that the parties had been heard by the National Land Commission on the 9th and 10th November, 2016 and were awaiting the Commissions' determination on the matter; the court would most probably have placed the matter for mention instead of dismissal for want of prosecution.

e. That the plaintiff has shown reasonable cause why steps to prosecute the suit had not been taken from the 2016 to the 12th March, 2018 when the suit was dismissed. That the pursuit of a settlement of the dispute through the National Land Commission was an alternative dispute resolution endeavor recognized under **Article 159** of the Constitution and accordingly, it is only fair the costs of the application be in the cause.

6. That in view of the foregoing the court finds merit in the Motion dated 20th June, 2018, which is hereby allowed in terms of prayers 1 and 2 with costs in the cause.

Orders accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

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

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE