



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC NO. 115 OF 2014

LUCAS ONGINJO GOGO.....PLAINTIFF/APPLICANT

VERSUS

NAFTALI OMONDI AMBALA.....1ST DEFENDANT/RESPONDENT

EUNICE AKOTH WANGOMA.....2ND DEFENDANT/RESPONDENT

COSMAS ODHIAMBO.....3RD DEFENDANT/RESPONDENT

EDWIN OLUOCH NYAGAYA.....4TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff seeks vide the Motion dated the 14th June, 2018 to have the orders of 29th May, 2018 reviewed, the suit reinstated for hearing or alternatively transferred to the Siaya Senior Principal Magistrate's court for hearing and disposal. The application is based on the four (4) grounds on its face and supported by the affidavit sworn by the plaintiff on the 14th June, 2018 annexing among others a letter from the Siaya County surveyor dated 8th May, 2018 to effect the court order in Siaya Principal Magistrate's Court Civil Suit 136 of 2011, on the 30th May, 2018, and a letter dated 23rd May, 2018 by the defendant's counsel to the county Surveyor protesting the said visit.

2. The application is opposed by the defendants though the five (5) grounds of opposition and replying affidavit sworn by Naftali Omondi Ambala, 1st Defendant, on the 15th December, 2018 among others deponing that there was no agreement to have the matter sorted out through a survey exercise; that the defendants are not aware of the order in Siaya Principal Magistrate Civil Suit No. 136 of 2011 and that that plaintiff has not justified the delay in prosecuting the case.

3. The learned counsel for the plaintiff and defendants filed the written submissions dated the 11th December, 2018 and 16th January, 2019 for and against the application respectively.

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

- a. *Whether the plaintiff has presented a new and important matter discovered after the order sought to be reviewed.*
- b. *Whether the said new and important matter explains the delay in taking steps to prosecute the suit for more than one year.*
- c. *Who pays the costs?*

5. That the court has carefully considered the grounds on the motion, grounds of opposition, affidavit evidence, written submissions and come to the following determinations;

- a. *That when the matter came up for hearing of the Notice under **Order 17 Rule 2** of the Civil Procedure Rules on the 29th May, 2015, the counsel for the plaintiff submitted that the court file has been missing, and that the parties had been negotiating to implement the Siaya Land Disputes Tribunal award through the Land Registrar. That was in his endeavor to explain the delay in taking steps to prosecute the suit since 7th May, 2015. That counsel for the defendant disputed the said claims and the court went ahead to dismiss the suit for want of prosecution. That the current application is hedged or based on the plaintiff having discovered a new and important matter being the Siaya County Surveyor's letter on a visit to the locus of 30th May, 2018 to implement the tribunal award as adopted in the Siaya Principal Magistrate Civil Suit No. 136 of 2011 of 20th December, 2011. That it is obvious that though counsel for the plaintiff had on the 29th May, 2018 informed the court that the parties had been negotiating, he did not at that time mention about the County Surveyor having written to the parties on 5th May, 2018 scheduling a visit to the suit land on*

30th May, 2018, which was the following day.

b. That the court has noted that the defendant was aware about the County Surveyor's letter as their counsel had done a letter dated 23rd May, 2018 responding to the same. That had the existence of the letter been disclosed to the court at the time of the hearing of the notice to show cause on the 29th May, 2018, it is probable the court would have arrived at a different finding than it did on that day.

c. That the court is satisfied that the fact that the County Surveyor had scheduled a visit to the suit land the day before the suit was dismissed is an indication that some steps, albeit outside the court processes, were being taken by the parties or one of the parties with a view of resolving the dispute between the parties. That the letter by counsel for the defendant responding to the county surveyor's letter may well mean the defendants were not in support of that process.

d. That having found that the evidence presented in the form of the surveyor letter dated 8th May, 2018 for a visit of 30th May, 2018, and considering that the application was filed without undue delay leads the court to find merit in the motion. The costs will be in the cause so as to encourage the parties to continue pursuing the possibility an out of court settlement.

6. That for the reasons set out above, the court finds merit in the motion dated the 14th June, 2018 and orders as follows:

a. That the court order of 29th May, 2018 is hereby reviewed and substituted with an order setting it aside and reinstating the suit for hearing and determination.

b. That costs be 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 Mr. Oguso for Odeny for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE