

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CIVIL SUIT NO. 69 OF 2013

ANDERSON KALIMBO MWERO.....PLAINTIFF

VERSUS

MWANDURYA TSUMA NYASIDEFENDANT

RULING

(Application for reinstatement of a suit dismissed for non-attendance; applicant's counsel stating that he was never served with any notice of attendance; no evidence of service of the notice upon counsel for the applicant; benefit of doubt given to applicant; suit reinstated)

1. The application before me is that dated 10 May 2019 filed by the plaintiff. It is an application brought pursuant inter alia to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, and seeks orders to set aside the orders of 27 November 2018, which led to the dismissal of this suit for non-attendance. Essentially, the applicant wants to have the suit reinstated and be allowed to proceed with it.

2. The background of the matter is that this suit was commenced through a plaint which was filed on 22 April 2013. In the plaint, the applicant averred that he is the owner of the land Minanasini Plot No. 803 situated in Mamba Village, Dzombo Location, Kwale County, having purchased it for the sum of Kshs. 210,000/= from Mwandurya Tsuma Nyasi who he named as the sole defendant. He pleaded that on 16 August 2012, the said defendant accompanied by other persons, entered into the land and took possession of it, and transferred it to a third party. It is the applicant's contention that this is tantamount to trespass and in the suit he sought orders of a permanent injunction to restrain the defendant from the suit land, an order to have the defendant remove the structures on the land, and a declaration that it is the applicant who is the owner of the land. The plaint was later amended to add one Ajali Kombe Ngari as 2nd defendant. It was mentioned that it is the 2nd defendant who is the transferee of the land and a prayer was added that his title be revoked. None of the defendants have entered appearance in the suit. Not much happened in the matter and it was stood over generally on 20 September 2018. Later, the Court issued a notice that the matter would be mentioned on 27 November 2018. My perusal of the mention notice does not reveal why the matter was scheduled for mention on the day. On the said day, the matter was mentioned and dismissed by a visiting Judge.

3. The application in support of the application has been sworn by Jared O. Bosire, counsel on record for the applicant. He has deposed that he was never served with a Notice to Show Cause and that he was not served with any notice that the case would come up on 27 November 2018.

4. I have gone through the record and I have not seen any evidence of service of the mention notice of 27 November 2018. I will therefore give benefit of doubt to the applicant that his counsel was not served, and was therefore not aware that the matter was coming up on the said date for a notice to show cause why it should not be dismissed or for hearing.

5. Given the above, I allow the application and order the reinstatement of this suit. I make no orders as to costs.

6. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Bosire for the applicant.

No appearance for the defendants.

Court assistant; Koitamet