



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 78 OF 2014**

**MUTA CHOKWE NDISI.....PLAINTIFF**

**VERSUS**

**JAMES JUNGO.....DEFENDANT**

**RULING**

1. The Application for determination is the Notice of Motion dated 14<sup>th</sup> December 2017 in which the Plaintiff/Applicant is seeking to set aside the order of this court issued on 12<sup>th</sup> October, 2017 dismissing the Plaintiff's suit for want of prosecution and to reinstate the suit for hearing. The Application is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rule 7, and Order 51 Rule 1 of the Civil Procedure Rules and is based on the grounds.

**a. That the failure to prosecute this suit within the required timeline was occasioned by the disappearance of the court file due to change of case number from 206 of 2011 to 78 of 2014 by the Court registry hence was unintentional but due to factors beyond the Applicant's control.**

**b. That we have since learned that the suit was dismissed on 12<sup>th</sup> October, 2017 by the Honourable Justice M.A. Odeny**

**c. That the Applicant was not aware this matter was coming up on 12<sup>th</sup> October, 2017 but on 26<sup>th</sup> October 2016.**

**d. That the mistake of the Counsel must not be borne by the client.**

**e. That the suit raises pertinent issue that ought to be addressed.**

**f. The Plaintiff would greatly suffer prejudice if this Application is disallowed.**

**g. That the Defendant will not be prejudiced if the orders sought herein do issue.**

The Application is further supported by the affidavit of Shimaka N. Leonard, Advocate for the Plaintiff sworn on 14<sup>th</sup> December, 2017 in which he repeats the grounds stated above.

2. The Application is opposed by the Defendant who filed a replying affidavit dated 10<sup>th</sup> April 2018 in which he depones *inter alia*, that the allegation that the failure to prosecute the case was occasioned by the disappearance of the court file due to change of case number is misconceived because the Plaintiff did not exercise due diligence in tracing the file within time and that no single correspondence to the registry on any difficulty encountered in tracing the court file has been exhibited. That the notice annexed to the supporting affidavit and marked "SNK 1" was served upon the Plaintiff's advocates on 18<sup>th</sup> September, 2017 which was over a month before the matter was before court and that neither the Plaintiff nor his advocate attended court. The Defendant avers that the Plaintiff did not bother to follow up on the matter even after the same came up for notice to show cause on 26<sup>th</sup> October 2017 until filing of this Application on 14<sup>th</sup> December 2017. The Defendant avers that the Plaintiff has failed to prosecute the case for over 2 1/2 years and his conduct is indolent and should not deserve any lenient or favourable exercise of discretion by the court. That the delay is inordinate and has not been explained and therefore inexcusable. It is the Defendant's contention that the Application is devoid of merit and should be dismissed with costs.

3. I have considered the Application and the submissions filed. Order 17 Rule 2(1) of the Civil Procedure provides as follows:

***"In any suit in which no Application has been made or step taken by either party for one year, the court may give notice in***

***writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction may dismiss the suit. ”***

It is clear from this provision of law that the court is required to give notice to the parties to show cause why the suit should not be dismissed.

4. In this case, it is not denied that no action or step was taken in the suit for over one (1) year. The explanation or reason given by the Applicant is that there was a notice which was issued by the court which indicated that the matter was coming up on 26<sup>th</sup> October, 2016, although the notice exhibited indicates 26<sup>th</sup> October 2017. I have looked at the court record. There is a notice dated 26<sup>th</sup> September, 2017 which was served upon the firm of Marende Necheza & Co. Advocates on 6<sup>th</sup> October, 2017 and they acknowledged receipt. The said notice clearly indicated that the matter will be heard on 12<sup>th</sup> October 2017 at 9.00. a.m. On 12<sup>th</sup> October 2017, both the Applicant and the Respondent were absent although they were duly served. The court, having satisfied itself that service was duly effected, rightly dismissed the suit for want of prosecution as no cause was shown as required. The dismissal of the suit therefore was not unprocedural. It was done with compliance of the law.

5. The other reason given by the Applicant for failure to take steps in the matter is that the court file disappeared due to change in case numbers from No.206 of 2011 to No. 78 of 2014. I have perused the court record. I note that when a new file number was allocated to the file, the parties through their advocates were duly notified by the court registry. Indeed when the Applicant's advocates made a request on 11<sup>th</sup> July 2014 to have the file placed before the court for directions on 11<sup>th</sup> July 2014, the letter was rectified to bear the new number that is ELC No. 78 of 2014. I note also that the Applicants' advocates wrote another letter dated 26<sup>th</sup> January, 2015 which correctly reflected the new file number as ELC No.78 of 2014 (formerly HCCC NO.206 of 2011.) To me, the Applicant's averments to the effect that the court file disappeared is not correct. This is so because the Applicant's documents in the court record suggest otherwise. Moreover, the Applicant has failed to give an explanation why the Application was only filed on 14<sup>th</sup> December, 2017, which is two months after the order dismissing the suit was made. The Applicant has stated that he was not aware that the matter was coming up on 12<sup>th</sup> October, 2017 (which I have stated is not true because they were duly served on 6/10/17), but on 26<sup>th</sup> October, 2017. The question that arises is what action did the Applicant take on 26<sup>th</sup> October, 2017 considering that by then the suit had been dismissed on 12<sup>th</sup> October, 2017. I also note that the notice marked "SNK-1" is addressed to the Respondent in person, unlike the other documents on record which are addressed to his advocates. In my view the court cannot exercise its discretion in favour of a party who is not candid. The overriding objective of the court would not come to the aid of a party who is out to mislead the court. I am therefore not satisfied that a good reason has been given to enable the court set aside the order issued on 12<sup>th</sup> October 2017 by Lady Justice M. A. Odeny dismissing the suit for want of prosecution.

6. The upshot is that the Application dated 14<sup>th</sup> December 2017 lacks merit and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED and DELIVERED at MOMBASA this 14<sup>th</sup> of October day 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Kithi for respondent

No appearance for applicant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**