



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 131 OF 2014

CHARLES RADIRO.....PLAINTIFF

VERSUS

RAEL WAMBUGO OMBETTE..... DEFENDANT

RULING

1. Charles Radiro has come to court with two applications for determination. In the 1st application dated 16/5/2019, he seeks orders that the suit be reinstated and the order for dismissal dated 18/12/2017 be set aside.
2. The application is based on grounds that he was not served with the notice to show cause on the date of dismissal. Moreover, he admits that his advocate was served. The Plaintiff does not explain when he came to learn that the suit was dismissed and why he filed the application 4 months after the dismissal. **Article 159 of the Constitution of Kenya 2010**, It has been invoked partially by the applicant. The same Articles provides for expeditious disposal of cases.
3. This court has unfettered discretion under ruleto set aside an order dismissing the suit for want of prosecution, ***however the discretion has to be exercised judiciously and not on whim, sympathy or caprice. The court should consider factors not limited to the period of delay, the reasons for the delay, the degree of prejudice to the other party and whether the issues raised are of public importance.***
4. This application also has no merit as the plaintiff has failed to give sufficient explanation that caused him not to prosecute his case. Moreover, there is no sufficient explanation as why it took the applicant more than four months to come to court and therefore I do find the plaintiff to have been indolent and cannot blame his advocate for the indolence hence the application dated 16th May 2016 is not merited and is dismissed with costs. Orders accordingly.
5. In the second application dated 22nd October 2019, he seeks orders that the **respondent be restrained from selling, disposing, transferring land title KSM/NYALUNYA/3834, 4072 and 4073 pending hearing and determination of the main suit. The costs of this application be provided for.**
6. The application is based on grounds that **the Defendant has repeatedly sub-divided the mother land which was Kisumu Nyalunya 799 and have come out with Kisumu Nyalunya 3834, 4072 and 4073 and still intending to do more sub-divisions despite the fact that the matter is still pending before this Honourable Court. The sub-divisions were done fraudulently by forgoing the plaintiff's signatures in order for them to do the sub-divisions.**
7. There was not even a letter of consent to sub-divide in order for them to do the sub-division meaning that the current owner holding the land got it through an illegality which they are already perpetuating, and if given time will perpetuate unless restrained with by an order of this court.
8. There is real danger that the land which has been sub-divided three times with the same Defendant might again be sub-divided and sold without our knowledge as she has done in the past.
9. The application is supported by the affidavit of Charles Arodi Radiro wherein he states **that from 24th December, 2013 up to now, it's over 5 years, he has been patiently waiting for the hearing of this case being a businessman/family man living miserable life, his children can't go to school and even lack food for waiting for this case but all in vain.**
10. That he has been a businessman dealing in fishing at Lake Turkana and earning a profit of 8,000/= per day.
11. He requests the court to give an order so that nobody should not work on that parcel of land until the case is complete. That since 2013 to date, Rael Wambogo is working on that parcel of land. He requests the court to calculate all those years she has worked on that parcel even though land still has a case.

12. That he requests the court to revoke all those titles back to the first owner as the titles were acquired in the wrong way by forging his signatures.

13. Mr. Baganda for the defendant states that the suit was dismissed and therefore the orders sought can't be granted.

14. Mr. Radiro admits that the case was dismissed and that his advocate was served.

15. I have carefully considered the application and the rival submissions and do find that the orders sought cannot be granted as there is no suit before me having been dismissed on 18/12/2017 for want of prosecution. The application herein dated 22nd October 2019 is dismissed with costs.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 8TH DAY OF **NOVEMBER, 2019.**

In the presence of:

Mr Orieyo for Bagada for defendant.

Plaintiff in person.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE