REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 52 OF 2014

BHAVIN ASHWIN GUDKA..….....PLAINTIFF

VERSUS

EDNA BIYEGON.....1ST DEFENDANT

DAVID ROTICH.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF BOMET.....3RD DEFENDANT

THE BOARD OF MANAGEMENT

KIPTAPSIR PRIMARY SCHOOL.....4TH DEFENDANT

RULING

1. I am called upon to determine a Motion on notice dated 15th April, 2019 filed here on the 25th July, 2019 by the Plaintiff – **BHAVIN ASHWIN GUDKA** – under Order 12 Rule 7 of the Civil Procedure Act, 2010, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21), Articles 27, 47, 48, 50 (1), 159 and 165 of the Constitution, 2010, Sections 13 (7), 19 and 26 of the ENVIRONMENT & LAND COURT ACT, 2011 and the inherent jurisdiction of the court. The plaintiff filed a case against the defendants – **EDNA BIYEGON**, **DAVID ROTICH**, **BOMET COUNTY GOVERNMENT** and the **BOARD OF MANAGEMENT, KIPTAPSIR PRIMARY SCHOOL** and accused them of depriving him of his lawful and legitimate rights over Land parcel No. Grant number IR 54243, L.R NO 7288/243. The plaintiff owns the land but the defendants are said to have conspired or colluded to ensure that the 4th defendant – **THE BOARD OF MANAGEMENT**, **KIPTAPSIR PRIMARY SCHOOL** – is in occupation and use of the land.

2. The suit however was dismissed on 15th November, 2018 for want of prosecution. The application under consideration essentially seeks to reinstate the suit and the following prayers are sought:

> *Prayer 1: The honourable court be pleased to vary rescind and/or set aside the orders dated and made on 15/11/2018 dismissing the plaintiff's suit for want of prosecution.*
>
> *Prayer 2: Consequent to prayer I, the honourable court be pleased to reinstate and/or restore the plaintiff's suit for hearing and disposal on merits.*
>
> *Prayer 3: Costs of this application be provided for*
>
> *Prayer 4: Other or further orders as may be fit or expedient.*

3. The application is anchored on grounds, interalia, that the case was filed in the year 2014 and it thereafter came up for mention in court several times for various other court processes; that the file went missing at some point; that owing to that, the matter couldn't be listed for hearing; and that the filed stayed missing until 10th June, 2019 when the plaintiff's counsel was able to trace it. After finding the file, it was discovered that the suit had been dismissed for want of prosecution.

4. The plaintiff averred that the dismissal took place without him being afforded opportunity to be heard. He was thus subjected to substantial and undue prejudice. The subject matter is said to be land and the plaintiff desires that he be heard on merits.

5. The application came with a supporting affidavit that generally amplified the grounds advanced. The plaintiff talked of efforts by his counsel to follow up on the missing file without success. When, eventually, the file was traced, it was discovered that the suit had been dismissed for want of prosecution. This application was then made; timeously, in good faith, and with promptitude.

6. The defendants responded to the application by way of grounds of opposition. According to the defendants, counsel now acting in this matter is improperly on record, leave of court or consent of the previous counsel in the matter having not been obtained as required by Order 9 rule 6 of Civil Procedure Rules. The application was said to be misconceived and without merit, with the plaintiff being accused of lack of candour in the matter. Further, the plaintiff was said not to have demonstrated the irreparable loss he would suffer. He has not also offered any excusable explanation for failing to prosecute the case for five (5) years. According to the defendants, the court file has all along been available in the court registry. The plaintiff's counsel was faulted for not availing evidence that he was making follow ups at the court registry if at all the file was missing.

7. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 8th October, 2019. Counsel for plaintiff submitted that the court file had gone missing and his efforts to make a follow up or trace it did not bear fruit. When the file was ultimately traced, it was found that the matter had been dismissed for want of prosecution. It was stated that the plaintiff never got notice for dismissal and, had he received it, he would have come to court to explain the delay.

8. Various cases were cited to advance the plaintiff's cause. Among them are **IBRAHIM ATHMAN SAID VS IBRAHIM ABDILLE ABDULLAH & ANOTHER, (2014) eKLR**, and **RICHARD NCHARPI LEIYAGU VS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 2 Others: (2013) eKLR**, both of which emphasised the need to uphold the right of hearing and the need to endeavour to decide a matter on merits. Others were **JAMES KANYITTA NDERITU & ANOTHER VS MARIOS PHILOTAS GHIKAS & ANOTHER (2016) eKLR**, and **KABUTHA V MUCHERU: HCC NO 82 OF 2002, NAKURU**, which emphasised the need to allow a case to proceed to hearing when dismissal has taken place without a notice for dismissal being served. The plaintiff in the application at hand alleged that he was not served with notice for dismissal.

9. According to the plaintiff *"it will be in the best interest of justice to set aside the judgement that dismissed the suit without a full trial and allow the matter to proceed to be heard on its merits as only then can justice be served"*. It was submitted that "*dismissal of a suit unheard is a very punitive and draconian way to deal with a litigant and should be the very last option after exploring all other avenues"*. The court was finally asked to allow the application with costs to the plaintiff.

10. The defendants submissions were filed on 18th November, 2019. It was emphasised that the advocates currently acting for the plaintiff are improperly on record as they have failed to comply with the applicable law; in this case Order 9 (b) of Civil Procedure Rules which require them to obtain leave of court or get consent from the firm of advocates earlier acting for the plaintiff. Two decided cases were cited to buttress the position viz: **W. MUCHANGA & E. OLUNGA T/A WOMI ASSOCIATES VS ATTORNEY GENERAL [2017] eKLR** and **MARY CHELIMO VS MUTINDA NGARI (2014) eKLR**.

11. The delay caused by the plaintiff, it was further submitted, was inordinate and unjustifiable as the plaintiff never took steps to prosecute the suit and has not satisfactorily explained the delay. The case of **PETER NDUNGU JOSEPH NJOROGE VS LAZARO MUGO MUNYI (2014) eKLR** was cited as a good authority on the way forward.

12. Further, the defendants submitted that they will be prejudiced if the orders sought are granted "*as it will affect the fair administration of justice contrary to Article 47 of the Constitution of Kenya, 2010, which provides for the right to administrative action that is expeditious, lawful, reasonable, and procedurally fair"*. The court was asked to dismiss the application.

13. I have had a look at the proceedings in the court file. I have considered the application, the response made, and the rival submissions. In matters of this nature, the court usually considers whether the delay attending the matter is prolonged and/or inexcusable and whether, even if so, justice can still be done despite the delay (see **IVITA VS KYUMBU: [1984] KLR 441)**. Order 17 of Civil Procedure Rules, 2010, exists to serve public interests to ensure expeditious hearing of cases. But the order is merely permissive, not mandatory, and courts have often times taken the position that a plaintiff should not ordinarily be denied a hearing on merits because of a procedural default which cause no prejudice to the defendant (see **PROTEIN & FRUITS PROCESSOR LTD VS CREDIT BANK LTD (2004) 2klr, 409**).

14. In **MWANGI NENDANGI S. KIMENYI VS ATTORNEY GENERAL & ANOTHER: (2014) eKLR**, the court observed that what matters is the need to serve the interests of justice through judicious exercise of discretion. Such exercise of discretion should be predicated on considerations such as whether the delay has been contumelious or intentional; whether such delay amounts to abuse of the court process; whether the delay is inordinate or excusable; whether there is real risk to fair trial posed by the delay; and what kind of prejudice may be caused to either side.

15. Dismissal of this case for want of prosecution was court-initiated. The defendants had not complained. The plaintiff is ready to pay some costs. The matter is emotive, being one that involves land. The right of hearing is sancrosanct and can not lightly be trifled with. A look at the pleadings seems to show the likelihood of the plaintiff still still having the documents of ownership. But his pleadings seems to show that his could be ownership without possession. The defendants have not lodged a counter-claim. Given the scenario, I would be reluctant to drive the plaintiff from the seat of justice without hearing. He very much wants a ready ear to hear his matter. He craves to be heard. He deserves to be heard. This court must be available for him.

16. The defendants counsel raised various technical points – such as the manner in which the present counsel for plaintiff is on record or the law on which the application is anchored – but these are, in my view, minor procedural shortcomings or deviations which can be easily regularised. More importantly, the imperative of justice can not be allowed to be undermined by procedural bottlenecks. In my view too, the explanations given by the plaintiff are reasonable, not wishy-washy, and should be taken seriously in the determination of this matter. On balance too, I consider that it is the plaintiff who will be prejudiced more by being denied hearing. The defendants can easily be compensated with costs.

17. Given the circumstances prevailing, the interests of justice and the applicable law favour the granting of the orders sought. The only thing that I don't agree with is the prayer by the plaintiff to get costs. The plaintiff can not be suggesting that he can pay some costs to be allowed to proceed with hearing and at the same time ask that he should get costs of the application. No, he will not get; he will instead pay.

18. I therefore allow the application in terms of prayers (1) and (2). The plaintiff will however pay the costs of this application.

Dated and signed at Kericho this 6th day of December, 2019.

…....

A. K. KANIARU

JUDGE