



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT ELDORET

E&L CASE NO. 780 OF 2012

ROBERT KIPROP CHELAGAT.....PLAINTIFF/APPLICANT

VERSUS

CHEBII CHELIMO.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of the plaintiff's application dated 13th June 2017 brought by way of notice of motion for orders that the order allowing the respondent's application dated 28th June 2016 be set aside. Counsel agreed to canvass the application by way of written submissions which were filed by the respective counsel.

It was the plaintiff/applicant's Counsel's submission that under Order 12 Rule 7 the court has discretion to set aside or vary the judgement or order upon such terms as may be just. He submitted that this section is well crafted for the sake of fairness to any of the parties and that in many instances, the remedy for setting aside a judgement or order is payment of reasonable thrown away costs which in this case the applicant is ready and willing to pay.

Counsel further cited the provisions of Order 17 Rule 2(2) which provides that;-

"if cause is shown to the satisfaction of the court it may make such order as it thinks fit to obtain expeditious hearing of the suit".

Counsel also submitted that the suit before this Honourable Court is an originating summons for which directions had not been taken in accordance with Order 11 of the Civil Procedure Rules and that efforts had been made by the advocate of the applicant to have it fixed but in one way or another he was unsuccessful.

Counsel cited the case of Kirinyaga General Machinery -vs- Hezekiel Muriithi Ileri Nyeri High Court Civil Appeal No. 98/2003 [20071 eKLR where the judge declined to dismiss the appeal for want of prosecution because directions had not been taken. He urged the court to exercise its discretion and allow the application for reinstatement of the suit.

The respondent's Counsel opposed the application and gave a brief summary of the case. He stated that the plaintiff herein instituted the suit by way of Originating summons on the 7th of December 2010 and on the 29th of July 2011, the plaintiff herein got temporary orders restraining the defendant herein from dealing with the land reference Sacho/Kabasis/400.

Counsel submitted that the plaintiff then slept on his rights to prosecute the matter until the matter was

transferred to Eldoret where it was scheduled for hearing on the 2nd May 2012, a year down the line. He submitted that he did not take steps to prosecute the suit until the defendant filed an application for dismissal of the suit for want of prosecution. Counsel further stated that the application was served on the plaintiff's Counsel and on the day of the hearing neither the plaintiff nor his Counsel was present and therefore the application was allowed. Counsel cited the provisions of order 17 Rule 2 of the Civil Procedure Rules 2010 which states:

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

He emphasized the period of 1 year which requires that action is to be taken and if it is not done by the parties, then the suit may be dismissed. He stated that the plaintiff had not taken any steps for a period of 4 years and no reason was given for the delay. Counsel cited authorities in support of his submissions and urged the court to dismiss the application with costs.

Analysis and determination

The issues for determination in this kind of application are very clear. The issues that must be considered by the court are;

1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case,
2. Whether the delay is intentional, contumelious and therefore inexcusable,
3. Whether the delay is an abuse of the court process,
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.
5. What prejudice will the dismissal occasion to the plaintiff?
6. Whether the plaintiff has offered a reasonable explanation for the delay.
7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

Apart from the above issues the court should also be guided by the dictates to do justice without undue technicalities. The court also takes judicial notice of the fact that this matter was originally filed in the High Court and later transferred to the Environment and land Court in 2012. The court is also aware of the fact that there was only one Judge to handle land matters in this station.

Counsel for the applicant also filed the current application without delay. I have considered the issues above together with the reasons given for not attending court and find that the same is sufficient to warrant the reinstatement of this suit. The mistake is excusable and the dismissal will cause the plaintiff prejudice.

I have also looked at the affidavits and the submissions of both Counsel together with the authorities cited and I have come to the conclusion that this is a case where I will exercise my discretion and allow the reinstatement of the suit.

I order that the plaintiff pays thrown away costs of Kshs 10,000/ to the defendant.

Parties to comply with order 11 within 30 days and fix the main suit for hearing failure of which the suit stands dismissed.

Dated and delivered at Eldoret this 31st day of January 2018.

M. ODENY

JUDGE

Read in the open court in the presence of:

Mr. Kipkenei for Plaintiff/Applicant

Miss Matoke holding brief for Mr. Mboga for the Defendant/Respondent

Mr. Koech – Court Assistant