



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 32 OF 2011

CHERIWOIL LOTANGOLE.....PLAINTIFF

VERSUS

ROTINO MOBEIN.....1ST DEFENDANT

LUKE LOCHAILEM.....2ND DEFENDANT

R U L I N G

1. The application dated 4/4/2017 seeks an order that the dismissal orders issued on 25/7/2016 be varied, reviewed and/or set aside and that the applicant be allowed to prosecute her suit on merits.
2. The grounds upon which the application is based are that the suit was erroneously dismissed; that the suit was listed on 27/7/2017 without the knowledge of the parties; that there is an error on the face of the record; that the parties appeared before the Deputy Registrar on 28/6/2016 and she advised them to take a hearing date at the registry; and that parties were not notified of the hearing date.
3. The application is supported by the sworn affidavit of Robert Chebii who narrates the events surrounding the dismissal order. He avers that on 26/6/2016, the matter came up before the Deputy Registrar who informed the parties that the diary was full and that parties should take a hearing date once the new diary is opened.
4. However on the date when the hearing date was to be taken, Mr. Chebii sent his clerk who was informed that the file was not available then. He avers that later on he was informed that the file was available but the suit was dismissed on 27/7/2016 for want of prosecution and non-attendance of parties yet none of the parties were aware of the hearing date. He avers that the hearing "date given was also altered", and that the non-attendance of the parties was not intentional.
5. The 2nd respondent has filed a replying affidavit dated 5/12/2017. He avers that Mr. Chebii is not candid with regard to the date when he became aware of the dismissal order and that Mr. Chebii took the hearing date before the Deputy Registrar and failed both to notify the other parties as well as to attend court when that date arrived. He avers that the deponent has not demonstrated that justice may still be done after a delay of 5/6 years.
6. In a further affidavit dated 13/12/2017 Mr. Robert Chebii maintains that a date was not issued by the Deputy Registrar.
7. Parties filed their written submissions on the application. The plaintiff filed his on 6/2/2018 and the defendant on 1/2/2018.
8. I have considered the application, the reply thereto and the written submissions, the record shows that on 28/6/2016 Mr. Chebii appeared before the Deputy Registrar and indicated he would be calling 3 witnesses; it would appear that the Deputy Registrar gave the hearing date of 27/7/2016 on that date. However the records shows that there was some alteration on that date. It cannot be known when the alteration, which is done by a different pen, was done or by whom. It would appear that the purpose of the alteration was to bring the date forward to 25/7/2016. And the matter was listed on 25/7/2016, when the court, at 9.30am, recorded an order dismissing the suit for non-attendance. Non-attendance was on the part of all the parties on 25/7/2017.
9. There followed the filing of the instant application on 19/10/2017, about 3 months later. I do not find the delay to be inordinate bearing in mind the confusion in the hearing dates. This is due to the fact that one would expect that the matter not having been listed on the 27/7/2016, one may take some time to find out what happened to the suit.
10. Secondly it appears that Mr. Chebii failed to understand on 28/6/2016 that a date had been given by the Deputy Registrar. As he left the Deputy Registrar's Chambers, it is possible that he expected that a date would be taken by consent when the new diary was opened.
11. For those reasons, I am inclined to exercise my discretion in favour of the plaintiff. The dismissal order issued on **25/7/2016** is hereby set

aside. The plaintiff shall however fix this matter for hearing within 14 days of this order on a priority basis.

Dated, signed and delivered at Kitale on this 28th day of February, 2018.

MWANGI NJOROGE

JUDGE

28/2/2018

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Collins/Picoty

N/A for the Applicant

N/A for the Respondent

COURT

Ruling read in open court in the absence of the parties or their counsel.

MWANGI NJOROGE

JUDGE

28/2/2018