



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.546 OF 2015

AUMA ABUOR.....PLAINTIFF

VERSUS

JENNIFER ADHIAMBO OPIYO.....DEFENDANT

RULING

1. **Auma Abuor**, the Plaintiff, vide the notice of motion dated 21st February 2017 seeks for setting aside of the court's order of 31st January 2017 of dismissing the suit for want of prosecution. The application is based on seven (7) grounds on its face and supported by the affidavit sworn by Maurice Carlos Ouma Advocate, on the 21st February 2017 both summarized as follows;

- a) That the suit was filed on the 15th November 2011 and has been fixed for hearing severally. That the hearing has not taken off due to reasons beyond the control of the Plaintiff and her counsel.
- b) That the Plaintiff is ready and eager to prosecute her case.
- c) That the suit was dismissed without giving the Plaintiff's counsel sufficient notice.
- d) That between 8th July 2015 to 31st July 2017, the parties counsel made several efforts to fix the case for hearing at the registry but were informed the diary was full.
- e) That the notice to show cause was served on the Plaintiff's counsel's chambers on 30th January 2017 at around 11.00 a.m. which was a few hours to the courts sitting and was not brought to the counsel's attention promptly.

2. The application is opposed by Jenifer Adhiambo Opiyo, the Defendant, through the grounds of opposition dated 11th March 2017 summarized as follows;

- a) That the application is misconceived, incompetent, and incurably defective for invoking the wrong provision of the law.
- b) That the application seeks for orders which cannot be granted by the court, and is therefore an abuse of the process of the court and law.

3. The application came up for hearing on the 19th June 2017 when directions on filing and exchanging written submissions were granted. Thereafter, the counsel for the Plaintiff filed their written submissions dated 3rd July 2017. The matter came up for mention on the 4th December 2017 when counsel for the Defendant indicated that they will not be filing any submissions and today's ruling date was fixed.

4. The following are the issues for the court's determination;

- a) Whether the Plaintiff has shown reasonable cause for the order dismissing the suit to be set aside.
- b) Who pays the costs.

5. The court has considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by counsel for the Plaintiff, the court record and come to the following findings;

- a) That whereas it is true that the suit had been fixed for hearing on various dates between the year 2012 and 2015 and adjourned for

various reasons, no steps were taken towards prosecution the suit after 7th April 2015. That on that date, the suit was fixed for hearing on the 8th July 2015 but there is no indication of what happened on that day.

b) That though counsel for the Plaintiff alleges that the court was not sitting on the 8th July 2015, and that they were directed to fix another date at the registry, no other hearing date was fixed. That the counsel's deposition that the parties counsel made several visits to the registry between 8th July 2015 to 31st January 2017 to fix the matter for hearing without success is not verified as the letters annexed to the supporting affidavit dated 7th April 2015, 29th July 2015, 3rd November 201 (sic), 14th April 2016, 13th October 2016 and 10th January 2017 do not have the court's receiving stamps. That the court has also perused the court record and the only documents filed by M/S Odhiambo Ouma & Co Advocates, who is the counsel on record for the Plaintiff, are the Notice of change of Advocates dated 4th October 2013 and letter dated 28th October 2014, filed through the receipts numbers 5510597 and 6250092 respectively.

c) That had the letters annexed to the Plaintiff's counsel's supporting affidavit and referred to in (b) above have been officially received at the registry, counsel would have availed copies of the receipts for fees paid for the mention dates and or obtained an affidavit from the Deputy Registrar acknowledging that the said letters were indeed received.

d) That by the time the notice to show cause dated 5th December 2016 was issued and served on counsel for the parties to come to court on the 31st January 2017 and show cause why the suit should not be dismissed, a period of more than one year had lapsed from the last court appearance on the 7th April 2015. That counsel for the Defendant appeared on the said date and moved the court to dismiss the suit with costs. That the claim by counsel for the Plaintiff that he was not given sufficient notice for the Notice to Show Cause has no basis.

e) That for the court to find favour in the Plaintiff's application, sufficient explanation needed to be presented to this court to show that the Plaintiff had reasonable explanations that made her fail to take action to prosecute the case for the period of about eighteen (18) months. That the court finds no reasonable cause has been shown.

6. That accordingly the court finds no merit in the Plaintiff's notice of motion dated 21st February 2017 and the same is dismissed with costs and the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 7TH DAY OF MARCH 2018

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Owiti for Ouma for Plaintiff

Mr. Onsongo for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/3/2018

7/3/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Owiti for Ouma for Plaintiff

Mr. Onsongo for the Defendant

Court: Ruling dated and delivered in open court in the presence of Mr. Owiti for Ouma for Plaintiff and Mr. Onsongo for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/3/2018