



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 12 OF 2013

PATRICK LUMUMBA OTURO.....PLAINTIFF

VERSUS

RICHARD OKUMU OTURO.....DEFENDANT

RULING

1. The Plaintiff filed the notice of motion dated 8th November 2017 seeking for the order that dismissed the suit on the 23rd October 2017 be set aside and the suit reinstated. The application is based on the three grounds on its face being that, the notice to show cause was not served upon him; that the reasons he had not set the suit down for hearing was due to being unwell and that it is in the interest of justice to allow the application. The application is supported by his affidavit sworn on the 8th November 2017.

2. The application is opposed by the Defendant through his replying affidavit sworn on the 26th January, 2018.

3. The application came up for hearing on the 26th February 2018. The Learned Counsel for the Defendant indicated that they will rely on the replying affidavit. The Plaintiff also relied on the grounds on the application and supporting affidavit.

4. The following are the issues the Court's determination;

a) Whether the Plaintiff was served with the notice to show cause under Order 17 Rule 2 of the Civil Procedure Rules before the order of 23rd October 2017 was issued.

b) Whether the Plaintiff has established a reasonable cause why no step to prosecute this suit was taken for more than one year.

c) Who pays the costs of the suit.

5. The Court has considered the grounds on the notice of motion, the affidavit evidence by both parties and their record and come to the following determinations;

a) This suit was filed on 23rd January 2013 and amended on 17th September 2013. The Defendant filed his statement of defence on the 1st February 2013.

b) That the first notice to show cause under Order 17 Rule 2 of Civil Procedure Rules is dated the 30th June 2017 and issued on the 14th July 2017. It is addressed to the Counsel on record for the Defendant and the Plaintiff in person. The notice required the parties and or their Counsel to attend Court on the 21st September 2017. There is a subsequent notice dated 22nd September 2017 and issued on the 4th October 2017 for parties/Counsel to come to Court on the 8th November 2017 which is then altered to read 23rd October 2017.

c) That the record of the Court does not show how the date of 23rd October 2017 was fixed. That before that date, the matter had been mentioned on the 21st September 2017 before the Deputy Registrar who directed that fresh notice be issued for 8th November 2017. That there being no explanation how the notice to show cause issued on 4th October 2017 for 8th November 2017 was changed to read 23rd October 2017, the Court finds the claim by the Plaintiff that he was never served with the notice for 23rd October 2017 to be probable. This notice of motion is dated 8th November 2017 which is the date initially meant for the notice to show cause before it was changed to the 23rd October 2017.

d) That even though no medical records were availed by the Plaintiff to confirm the period of indisposition, for the reason in (c)

above, the Court finds the notice of motion has merit.

6. The Plaintiff's notice of motion dated 8th November 2017 is allowed in the following terms;

a) **That the order of 23rd October 2017 dismissing the suit is hereby set aside and the suit reinstated for hearing.**

b) **The costs of the application be in the cause.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30TH DAY OF MAY 2018

In the presence of:

Plaintiff Present

Defendant Absent

Counsel Mr. Oriero for Komongo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE