



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 32 OF 2017

(FORMERLY EMBU HCC 174 OF 2011)

WILSON NJOGU KARIMONI.....APPLICANT

VERSUS

EMBU FARMERS SACCO.....1ST RESPONDENT

MWANGI AUCTIONEERS.....2ND RESPONDENT

GITHUMBU NJERU.....3RD RESPONDENT

RULING

1. By a notice of motion dated 29th June 2017 and filed on 30th June 2017 brought under the provisions of **Order 45 Rules 1 and 2 of the Civil Procedure Rules**, the Plaintiff sought an order for setting aside the order made on 2nd November 2015 dismissing the Plaintiff's suit for want of prosecution under Order 17 of the Civil Procedure Rules.
2. The said application was based upon the several grounds shown on the face thereof. The main grounds were that the suit was erroneously dismissed for want of prosecution; that the pleadings had not closed; that the Defendant had blocked the hearing by filing a notice of preliminary objection, and that the Plaintiff's advocate was out of the country for medical attention at the material time.
3. The said application was supported by an affidavit sworn by the Plaintiff on 29th June 2017 in which he reiterated and expounded the grounds on the face of the motion. He also stated that the court file was missing for most of the time hence the suit could not be prosecuted.
4. The Defendants opposed the Plaintiff's said application by filing a replying affidavit sworn by Mr Njeru Ithiga who is their advocate on record in the proceedings. Mr Ithiga stated that he filed an application dated 26th June 2015 seeking dismissal of the Plaintiff's suit for want of prosecution because the Plaintiff had failed to prosecute it for 4 years.
5. He further stated that when the said application was slated for hearing, the Plaintiff's counsel informed the court that he wished to rely upon his replying affidavit dated 5th October 2015 in opposition to the Defendant's said application. A ruling dated 2nd November 2015 was thereafter delivered allowing the said application for dismissal of the suit for want of prosecution.
6. The parties herein agreed to dispose of the Plaintiff's said application through written submissions. Consequently, the Plaintiff filed his written submissions on 13th November 2017 whereas the 1st and 2nd Defendants filed theirs on 7th December 2017. The 3rd Defendant did not file any affidavit or submissions.
7. The court has carefully considered the Plaintiff's said application, the replying affidavit in opposition thereto and the written submissions on record. The main question for determination herein is whether or not the Plaintiff has made out a case for review of the dismissal order made on 2nd November 2015.
8. The material provisions of **Order 45 (1) of the Civil Procedure Rules** provide as follows;

“1 (1) Any person considering himself aggrieved –

a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important

matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

9. The court has considered the ruling dated 2nd November 2015 and the material evidence on record. The Plaintiff had advanced similar grounds as the ones cited in the instant application in opposition to the application for dismissal of the suit for want of prosecution. The court rejected those grounds. The court specifically rejected the argument that the 1st and 2nd Defendant's preliminary objection had prevented the Plaintiff from prosecuting the suit. The court also rejected the argument that the suit had not stayed idle for at least one year on account of negotiations between the parties or discovery under **Order 11 of the Civil Procedure Rules**. The court was satisfied that there was an unjustifiable delay of about 4 years on the part of the Plaintiff in consequence whereof the suit was dismissed for want of prosecution.

10. The court is not satisfied that the Plaintiff's suit was erroneously dismissed for want of prosecution under **Order 17 of the Civil Procedure Rules**. The court's ruling of 2nd November 2015 indicates that the said order was made on merit upon consideration of the Plaintiff's replying affidavit in opposition to the application for dismissal.

11. The court is also not satisfied that the Plaintiff's advocate was out of the country at all material times and that he had no opportunity to oppose or urge his client's case through submissions. The record shows that on 2nd November 2015 an advocate known as Mr Njagi held brief for Mr P.N. Mugo for the Plaintiff and informed the court that Mr Mugo wished to rely upon the replying affidavit already filed. There was no application for adjournment on his behalf or even a request for more time to file submissions.

12. The only new matter which the Plaintiff has raised now which was not raised in the application for dismissal was that the court file was missing for a long time in consequence whereof he was unable to prosecute the suit. In my view, this matter could, with due diligence, have been raised in the earlier application. The Plaintiff must have been aware that the court file was missing hence his alleged inability to prosecute the suit.

13. The upshot of the foregoing is that the Plaintiff has failed to demonstrate before this court any of the grounds for review under **Order 45 of the Civil Procedure Rules**. There is no error apparent on the face of the record; there is no discovery of new and important matter or evidence which could not be produced earlier; and there was no other sufficient reason demonstrated to warrant a review.

14. This court cannot reopen, consider and review the decision of a court of coordinate jurisdiction with a view to reinstating the Plaintiff's suit. If the Plaintiff was aggrieved by the dismissal order of 2nd November 2015, it was up to him to appeal against the same. If this court were to allow the instant application, that would constitute an unlawful usurpation of jurisdiction reserved for the Court of Appeal.

15. In the result, the court finds no merit in the Plaintiff's notice of motion dated 29th June 2017 and the same is hereby dismissed with costs to the 1st and 2nd Defendants.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of **JUNE, 2018**.

In the presence of Mr P.N. Mugo for the Plaintiff, Mr Ithiga for the 1st and 2nd Defendants and in the absence of the 3rd Defendant.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

21.06.18