



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 106 OF 2014**

**DISMAS WAMALWA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMIN MULONGA MANANA.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The plaintiff brought an application dated 17/04/2018 seeking the following orders:

- (1) **That the order made by this honourable court on 7/2/2018 dismissing this case for non-prosecution be set aside.**
- (2) **That the suit be re-instated and set down for hearing.**

2. The application is brought under the provisions of *Sections 3 and 3A of the Civil Procedure Act*, and *Order 12 Rule 3 of the Civil Procedure Rules 2010*. The grounds upon which the application are based are that the suit was scheduled for dismissal for non-prosecution on 7/2/2018; that the plaintiff's counsel didn't inform the plaintiff; that the applicant's advocates were fully paid their professional fees hence the applicant was full represented thus does not understand why counsel failed to fix the case for hearing; that following the position he applicant has been put in by his lawyers he now intends to act in person; that applicants erstwhile the advocates' mistake of not fixing the case for hearing or moving he court should not be visited on the applicant, who is an innocent litigant.

3. The sworn affidavit of the applicant was filed in support of the application. It is also dated 17<sup>th</sup> April, 2018. It reiterates the grounds at the foot of the application which have been set out earlier in this ruling.

4. The applicant argued his application on 16/7/2018. A response was made by counsel for the defendant. The plaintiff urged the court to reinstate the suit for hearing on the grounds that his advocates had never informed him that his suit had been listed for dismissal. He stated that he was a teacher and he had been transferred to Kakamega where he is currently teaching and that if the suit were not reinstated and heard on merit he would suffer much as the defendant would continue to harm his property.

5. Counsel for the defendant on the other hand urged that on 7/2/2017 this court ordered that this suit be set down for hearing within 60 days yet no action was taken; that it was the primary duty of the plaintiff, who dragged the defendant to court, to pursue his case; that the pleadings were closed in 2013; that the plaintiff has not indicated when he was transferred to Kakamega; that litigation must come to an end; that this court set down the matter for dismissal on 3/9/2016; that on 7/12/2017 this court made another order dismissing the suit, and that the application is an afterthought; Counsel relied on *Nairobi HCCC (Commercial Division) 467 of 2009 Fran Investments Ltd -vs- G4S Security 92014) eKLR* and *Nairobi Commercial Division Civil Case No. 38 of 2010 Moses Mwangi Kimari -vs- Shammi Kanjiraparambil Thomas & 2 Others*.

6. I have considered both the submissions of the applicant and the respondent's counsel. In my view the period of two months and several days which lapsed from the date of the dismissal to the date of the filing of the instant application does not amount to inordinate delay. Secondly it is the overriding intent of the court that cases, where possible, shall be heard on the merits especially where litigants have demonstrated the willingness to prosecute their suit even after an order of dismissal for want of prosecution has been made. In this particular case the plaintiff has expressed his desire to be heard and this court is inclined to allow to his plea. I will therefore allow the application dated 17/4/2018.

7. I also direct that the plaintiff shall file and serve upon the defendant his trial bundle duly bound, indexed and paginated comprising of all the documents he wishes to rely on in this suit within 21 days of this order. Upon the plaintiff's failure to comply with any of the orders made hereinabove with the timelines provided this suit shall stand automatically dismissed. The costs of that application shall be in the cause.

Dated, signed and delivered at Kitale on this 31<sup>st</sup> day of July, 2018.

**MWANGI NJOROGI**

**JUDGE**

**31/7/2017**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Majanga for respondent

N/A for the applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGI**

**JUDGE**

**31/7/2018**