



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 38 OF 2009

HUDSON WANJALA KHAOYA.....1ST PLAINTIFF/APPLICANT

PATRICK WAMALWA KHAOYA.....2ND PLAINTIFF/APPLICANT

VERSUS

JOSEPH KUSIMBA & 8 OTHERS.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The 2nd plaintiff brought an application dated 23/5/2018 seeking the following orders:

“(1)spent.....

(2)spent.....

(3) That the dismissal order issued on 22/1/2018 be varied and or set aside and we allowed to prosecute our case.

(4) That costs be in the cause”.

2. The application is brought under the provisions of *Section 1A, 1B, 3, 3A of the Civil Procedure Act* and *Order 12 Rule 7 of the Civil Procedure Rules*. The grounds upon which the application are based are that the suit was dismissed by mistake; that the applicants were not served with the Notice To Show Cause (NTSC) why the suit should not be dismissed; that the advocate on record then received the NTSC why the suit should not be dismissed for want of prosecution for 22/1/2018 in March 2018 after the orders were made; that the 1st plaintiff passed on and he is yet to be substituted; that applicant still have interest to prosecute the case; that it is a land matter which is sensitive and ought to be heard on merit rather than on technicalities; that there is an error on the face of the record and that the suit was dismissed without establishing whether there was service upon our then advocate or the plaintiffs

3. The sworn affidavit of the 2nd plaintiff was filed in support of the application. It is dated 23rd May, 2018. It reiterates the grounds contained at the foot of the application.

4. The 8th respondent opposed the application through his grounds of opposition dated 3/7/2018 in which he states as follows:-

(1) The application is defective and the suit was defective from the date it was filed to the date it was dismissed for want of prosecution.

(2) The applicant Patrick Wamalwa Khaoya has no capacity to pray for reinstatement of these suits on his own behalf and on behalf of the 1st plaintiff given that the 1st plaintiff passed on as stated in paragraph (d) of the notice of motion.

(3) The applicants purported to be the administrators of the estate of Moses Khaoya Wandabwa and purported to bring this case on behalf of the said estate and as a result of the death of the 1st plaintiff, the 2nd plaintiff has no capacity to bring the instant application without a 2nd administrator of the estate of the late Moses Khaoya Wandabwa being substituted in the succession cause.

(4) Paragraph (c) of the application is contradictory of the contents of the paragraph 4 and 5 of the supporting affidavit and the same cannot be verified neither is their evidence in support of the same.

(5) That all the applicants seek in this application is for the suit to be reinstated but the said application does not give

reasons that would have merited the suit not to be dismissed pursuant to the notice of dismissal issued by the court.

(6) This application has been filed to circumvent the purpose and the intention of the notice of dismissal that had been lawfully issued and the same not responded to by the plaintiffs.

(7) The applicant is not entitled to reinstate this case in view of the fact that the 1st plaintiff passed on and he has not clearly stated the dates when he passed on since the said dates are important to inform the court on whether this is a suit that had already abated or not.

(8) This is a suit that was proper for dismissal given that its clear from the record that the plaintiffs never bothered to have this suit prosecuted and up to date no reasons have been advanced for the failure to prosecute the same.

5. The other never opposed the application.

6. I have considered the applicant's application and in my view though this matter is old it would be appropriate to have it heard on the merits so that each and every party can go home satisfied. The grounds of opposition raised may be weighty but the effect of the discovery of the fact that proper service of the Notice to Show Cause outweighs all those grounds. They may be addressed once the suit is reinstated. I therefore grant the application dated 23/5/2018 and grant the following orders:

(1) The order of dismissal issued on 22/1/2018 is hereby set aside and the plaintiffs are allowed to prosecute their case.

(2) The plaintiffs shall file their trial bundle duly bound, indexed and paginated which shall include all the documents they intend to produce in evidence at the hearing, their list of witnesses and their witness statements within 21 days of this order.

(3) The defendants shall likewise respond by filing their trial bundle within 14 days of being served.

(4) This suit shall be allocated a hearing priority date within the second term of this year and the parties shall be ready to proceed with the hearing of the suit on a day to day basis when it commences.

(5) The costs of the application shall be in the cause.

(6) Upon the plaintiffs to comply with any of the orders made hereinabove with the timelines provided this suit shall stand automatically dismissed.

Dated, signed and delivered at Kitale on this 30th day of July, 2018.

MWANGI NJOROGE

JUDGE

30/7/2017

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Chebii for applicants

Mr. Ingosi for Nyamu for the respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/7/2018