

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 136 OF 2008

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

KIMEO STORES LIMITED DEFENDANT

RULING

What is before me is the plaintiff's application brought by way of Notice of Motion dated 3rd March 2017 seeking to have this suit which was dismissed for want of prosecution pursuant to the order made on 26th January, 2012 reinstated. The genesis of the application is that, the plaintiff filed this suit on 2nd April, 2008. No action was taken in the matter for several years with a view to prosecuting the suit. On 20th December, 2011, the court issued a notice to the plaintiff to appear in court on 26th January, 2012 to show cause why the suit should not be dismissed for want of prosecution. The plaintiff appeared in court on 26th January, 2012 through counsel and informed the court that the plaintiff was still interested in pursuing the suit. The court directed the plaintiff to set down the suit for hearing within 90 days in default of which the suit would stand dismissed. There was non-compliance with the said court order with the result that the suit stood dismissed by 26th April, 2012.

The grounds upon which the present application is premised are set out in the supporting affidavit and further affidavit sworn by Charity Kiget Kemboi and Jackie Kibogy on 3rd March, 2017 and 26th September, 2017 respectively. The plaintiff has contended that following the orders made on 26th January, 2012, the advocate who had the conduct of this matter on behalf of the plaintiff left the plaintiff's employment after his appointment as a judge and through inadvertence the file in respect of this case was not re-allocated to another advocate and got misplaced in the plaintiff's registry until 2015. The plaintiff has contended further that, the court file could also not be traced at the registry for them to take further action in the matter. The plaintiff has contended that it wrote letters on 24th February, 2015 and 17th December 2015 to the Deputy Registrar of this court about the loss of the court file. The plaintiff has contended that this suit forms part of a series of matters whose cause of action arose from illegal alienation of Woodley/Joseph Kangethe estate to private individuals and entities and that the public would be greatly prejudiced if the suit was not reinstated to allow the plaintiff to recover the assets that were held in trust for the public.

The application was opposed by the defendant through a replying affidavit sworn on 22nd September, 2017 by its director, John Mungai. In the affidavit, the defendant has contended that it has never been served with summons to enter appearance and pleadings filed herein and that it only learnt of this suit after the instant application was sent to it through post. The defendant has contended that since the institution of this suit, the plaintiff has not been keen on prosecuting the same and as such the plaintiff is undeserving of the court's discretion. The defendant has also contended that the 6 years delay in the filing of this application is inordinate and unexplained. The defendant has contended that the existence of other related matters does not explain the plaintiff's inaction for 9 years since the filing of the suit and that in any event, the order for consolidation which the plaintiff has referred to was given on 11th July 2013 and the plaintiff still took 4 years to bring the present application.

When the application came for hearing before me on 23rd November 2017, the parties' advocates relied entirely on their respective affidavits in support of and in opposition to the application. I have considered the application together with the affidavits filed in support and in opposition thereto. The order sought by the plaintiff is discretionary. Like any other discretionary power, the power to reinstate a suit that has been dismissed for want of prosecution has to be exercised judiciously. I am satisfied that the plaintiff has given reasonable excuse why it failed to comply with the orders that were given by the court on 26th January, 2012 that resulted in the dismissal of the suit. It is not disputed that the advocate that was handling this matter on behalf of the plaintiff was one, Stephen Radido and that he was appointed a judge in 2012. There is also no dispute that the court file in respect of this suit was misplaced at the court registry and could not be traced for some time. The defendant has not disputed the plaintiff's contention that the defendant was served with Summons to enter appearance by way of registered post. The defendant had not entered appearance in the matter as at the time the suit stood dismissed. I am not persuaded that any prejudice would be suffered by the defendant if the order sought by the plaintiff is granted. In the case of Patrick Ayisi Ingoi & another v. Madhav Bhalla t/a Taibjee & Bhalla Advocates & 2 others (2014) eKLR, the court stated that a defendant must state the actual hardship, loss or prejudice he has suffered and will suffer as a result of the delay by showing that the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships.

I am of the view that the plaintiff would suffer serious prejudice if this suit is not reinstated. In the case of Mwangi S. Kimenyi v. Attorney General & another Nairobi HCCC No. 720 of 2009, (2014) eKLR, the court stated as follows:-

“The prejudice to the plaintiff will be ascertained by looking at a number of varying factors which, among the major ones are: the nature of the case-e.g. public litigation, representative suit etc., importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit and so on...”

It is not disputed that the subject matter of this suit is public land. I am of the view that the interest of justice will be better served by hearing the suit on merit. Due to the foregoing, the Notice of Motion dated 3rd March, 2017 is allowed as prayed and the time within which the plaintiff is to prosecute the suit is extended generally until further orders in view of the proceedings in ELC No. 2054 of 2007.

Delivered and Dated at Nairobi this 19th Day of July 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Okwara h/b for Ms. Kibogy for the Plaintiff

Mr. Odawa h/b for Mr. Thuita for the Defendant

Catherine Court Assistant