



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 91 OF 2010

SIMON K. LAGAT & 14 OTHERS....PLAINTIFFS/APPLICANTS

VERSUS

JOEL SOI & 3 OTHERS.....DEFENDANTS/RESPONDENTS

R U L I N G

1. By an application dated 18/4/2018 the applicant sought the following orders:-

- 1. That the applicants be granted leave to act in person in place of their previous advocates on record.**
- 2. That pending the hearing and determination of this application *inter partes* there be a stay of taxation and or execution of the decree herein.**
- 3. That the dismissal order issued on 28/9/2016 be varied and or set aside and the plaintiffs/ applicants be allowed to prosecute their case (suit).**
- 4. That costs be in the cause.**

2. The grounds on which the said application is made are as follows:-

- a. That the suit was dismissed by mistake.**
- b. That the applicants were not served with the NTSC why the suit should not be dismissed.**
- c. That the plaintiffs'/applicant's advocates then on record were not served with the NTSC.**
- d. That there is an error on the face of the record.**
- e. That the suit was dismissed without establishing whether there was service upon the plaintiffs' advocates.**
- f. That the plaintiffs'/applicants' advocates had closed their offices at the time.**
- g. That the plaintiffs/applicants were not aware until on 14/4/2018 when they were served with bill of costs and taxation notice for 19/4/2018.**
- h. That the ends of justice favour grant of the orders sought.**
- i. That the plaintiffs'/applicants' advocates then on record allegedly ceased to act for the plaintiffs without notifying them and without following the laid down procedures.**

3. The application is supported by the affidavit of the Simon L. Langat dated 18/4/2018 which reiterates the contents of the grounds outlined above. He avers that during the pendency of the suit the firm that the plaintiffs had instructed to act for them closed down and the advocate joined the Office of the Director of Public Prosecutions without notifying them or even giving them their file. He avers that to date they have not been given their file and the documents in respect of this suit. They learnt of the dismissal when on the 14th April 2018 they were served with a bill of costs in the matter. They dispute that they were ever served with the notice to show cause in this matter.

4. The curious statement that the plaintiffs make in **paragraph 13** of the supporting affidavit renders this averment of closure of their Advocate's firm subject to question. It reads that after being served with the taxation notice and perusing the court file, they " ... **immediately ... made all the efforts to trace the offices of our then advocates on record whom we traced at Safaricom House having relocated from Mid Africa though they had closed shop at some stage.**"

5. They state that upon discussion with the clerk they found in that office there was no advocate known as John Walter Wanyonyi and it then came to light that the firm had ceased acting for them. Later on in the same affidavit they indicate that they believe that the firm of Walter Wanyonyi & Co Advocates can not represent them adequately. Going by the affidavit evidence presented by the applicants, it is therefore doubtful that the said legal firm is can be said to have closed down.

6. This is an application that arises from an order issued upon this court's own motion to dismiss a suit for want of prosecution on **28th September 2016**. It is not opposed by the defendants.

7. I do note that the suit was dismissed for want of prosecution on the **28th September 2016**, and the application was brought to court on **18th April 2018**, a span of one year and seven months. I find that to be inordinate delay in bringing such an application. However this is a court of justice and it is inclined to hear and determine suits on the basis of evidence.

8. For purposes of the instant application, the most important fact that is to be considered by the court is that the plaintiffs were not in court on the date that the suit was dismissed for want of prosecution. They aver that they could not have been present as they were not notified of that hearing for notice to show cause by either the court or their then advocates on record. The applicants make a curious statement to the effect that they have learnt that their advocates were served only on **28/9/2016**. This statement conflicts with the earlier intimation in the same affidavit that their advocate was not aware or served with the notice to show cause for that date.

9. It is necessary to consider that if they or their counsel were not served, then whatever explanation they could have given at the hearing of the notice to show cause when it came up for hearing on the **28th September 2016** was not heard by this court. However, that explanation is not, and can not be made the substance of the instant application and the mere possibility that it could be a plausible one could tilt this court's discretion in their favour.

10. However, I have examined the record and found that there is a notice to show cause dated **5th September 2016**. The notice was addressed to two firms of advocates: Walter Wanyonyi & Co Advocates and Barongo Ombasa & Co Advocates. Both firms appear to have stamped upon the court copy of the Notice, signifying that they were served with a copy on the **13th September 2016** and on **14th September 2016** respectively. On the day of the hearing of the notice to show cause, Ms. Chebet holding brief for Mr. Barongo appeared for the defendants while no appearance was recorded for the plaintiffs. Ms. Chebet applied for the suit to be dismissed with costs.

11. I find that Ms. Chebet appeared in court pursuant to the service of the notice mentioned above. If this were the case, there is no reason why the plaintiff's counsel could not appear on the basis of the same service. The supporting affidavit dated **18th April 2018** is vacuous on the issue of the dates on which the law firm representing the plaintiffs closed down. In its latter paragraphs the said affidavit also seems to be not very definite as to whether the law firm closed down or not and no documentary evidence is exhibited in support of those statements.

12. In the circumstances, the need to consider in this application the persuasive fact of non-hearing of the plaintiffs' reasons as to why the suit should not be dismissed for want of prosecution fades away, for indeed an opportunity was accorded the plaintiffs which they did not take advantage of. Consequently this court can consider and determine this application only on the basis of whether there was service of the Notice to Show Cause.

13. In my view there was adequate service upon the plaintiff's counsel and there is no good reason given by the application as to why the plaintiffs were not represented in court on the date of the hearing of the Notice to show cause. There is therefore no sufficient evidence on which the impugned dismissal order can be set aside.

14. I therefore dismiss the plaintiffs' application dated **18th April 2018** with costs to the defendants.

Dated, signed and delivered at Kitale on this 9th day of July, 2018.

MWANGI NJOROGE

JUDGE

9/7/2018

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Picoty

Mr. Chebii for the Applicants

N/A for the Respondents

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

9/7/2018