

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 163 OF 2015

RUTH NYAMBURA KARIUKI.....PLAINTIFF

VERSUS

JAMES WAWERU KUNGU.....DEFENDANT

RULING

1. The application is dated 17.10.2017 and made by Plaintiff seeking orders that the orders made on 27.7.2017 dismissing the suit be set aside and the suit be reinstated for hearing and determination on merit. The application is based on grounds that this matter was dismissed on a date when it was not listed for hearing in the cause list and in respect of an application that was opposed without hearing the defendant. The hearing notice served on 5th June 2017 in respect of the application dated 30th January, 2017 was received under protest as the application was overtaken by events. The matter had already been fixed for hearing of the main suit on 12th October, 2017 and thus the application was overtaken by events.

2. The dismissal of the suit was improper as plaintiff had already responded to the defendant's application dated 30th January, 2017 by filing a replying affidavit dated 21st March, 2017. Furthermore, the defendant was served with the hearing notice indicating that the matter was scheduled for hearing on the said date.

3. The plaintiff learnt from the court that the respondent's counsel misled the court to dismiss the main suit knowing very well that it was not the right move as the plaintiff had already responded to the application filed by the defendant seeking to dismiss the suit and the suit was already fixed for hearing on 12th October, 2017.

4. It is fair and just that the orders dismissing the suit be set aside and the matter be reinstated and fixed for hearing on merits. In the interest of justice, this application ought to be allowed.

5. The supporting affidavit by Zephania K. Yego, counsel for plaintiff reiterates the grounds of the application. The further affidavit of Ruth Nyambura Kariuki also reiterates the grounds of the application.

6. In the replying affidavit, Franklin Bosire, counsel for the defendant states that the application dated 30.1.2017 was filed because the plaintiff failed to take action or the prosecution of the suit for 1½ years. The application to dismiss the suit was filed and served upon the plaintiff on 7.3.2017 but the plaintiff did not bother to take any action. The application was set for hearing inter-partes on 5.6.2017 by the court but the court was not sitting. Another date was procured on 27.7.2017.

7. However, the plaintiff took a date for the main suit and abandoned the application already prioritized by court.

8. I have considered the pleadings and the application dated 17.10.2017 and the relevant affidavits and do find that the application was not cause listed for hearing on the 27.7.2017. However, the date was taken by the defendant's counsel and served upon the plaintiff's counsel. This court finds that failure to cause-list the matter is not a ground for a party to fail to attend court. Whether a matter is cause-listed or not, parties should attend court so long as they have been served or taken the date by consent.

9. This court finds that the hearing date taken by the plaintiff when the application was pending was meant to abuse court process. However, since the matter has not been placed before the Judge by either party for pre-trial conference in compliance with Order 11 of the Civil Procedure Rules, Cap. 21, Laws of Kenya, I do agree with the plaintiff that the application for dismissal was pre-mature.

10. The upshot of the above is that the orders made on 27.7.2017 dismissing the suit for want of prosecution is hereby set aside. The suit is fast-tracked and transferred for hearing before the Chief Magistrate's Court, Eldoret.

Dated and delivered at Eldoret this 28th day of September, 2018.

A. OMBWAYO

JUDGE