



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 102 OF 2014**

**MARK SIKALABO OPICHO.....PLAINTIFF**

**VERSUS**

**WILFRED WAFULA OPICHO.....DEFENDANT**

**TIM JUMA OPICHO.....DEFENDANT**

**MOHAMMED ABDALA ASELI.....DEFENDANT**

**RULING**

1. The application dated **23/7/2018** seeks orders that:

1. ....spent

2. ....spent

3. **Pending the hearing of this application inter partes and pending the hearing and determination of the application herein there be a stay of further execution and seizure of the applicant's proclaimed properties by Igare Auctioneers;**

4. **The dismissal order issued on 7/2/2018 be varied and or set aside and the plaintiff be allowed to prosecute his suit on merit**

5. **Costs be in the cause.**

2. The application is premised on the grounds on its face as well as on the supporting affidavit of the plaintiff sworn on the **23<sup>rd</sup> July 2018**.

3. The gist of the grounds for the application is that the suit was dismissed by mistake; that the applicant was not served with the Notice to Show Cause; that the applicant was not served with the Bill of Costs; that there is an error on the fact of the record; that the applicant had been having a sick wife who later on passed away; that the then advocates on record did not notify the applicant of the developments thereon despite being served with the Notice To Show Cause and Bill of Costs; that the applicant was not aware till **18/7/2017** when Igare Auctioneers proclaimed his properties; that the mistake of the Advocate should not be visited on the applicant and that the Advocate then on record ceased to act for the applicant informally.

4. The application is opposed by the defendant who only filed grounds of opposition dated **30<sup>th</sup> July, 2018**. The core grounds evident in that response are that the applicant was adequately represented by Ms. Okile and Company Advocates in this matter until **23<sup>th</sup> July, 2018** when the applicant sought leave to act in person; that the Ruling of the court dated **10/10/2016** was delivered by the court in the presence of the applicant and the advocate for the respondent; that the Notice of Dismissal dated **7/2/2018** was duly served by the court upon both parties when the applicant and his advocates failed to attend court and show cause why the suit should not be dismissed for want of prosecution; that **Order 12 Rule 3 (1) and 6(1) & (2)** are very clear on the consequences of dismissal of a suit when the applicant failed to attend court and show cause to the satisfaction of the court and that this application should be dismissed and the applicant be condemned to pay costs.

5. In his submissions counsel for the plaintiffs reiterated the grounds in the application and the supporting affidavit. He urged that the defence does not deny that the plaintiffs have an interest in the property. He submitted that there are no letters of administration yet and the defendants are therefore intermeddling with the suit property.

6. I have considered the application before me and the grounds of opposition. The applicant attributes his situation to the mistake of his erstwhile advocate who is said to have withdrawn informally and who I have also considered the other factors mentioned by the applicant including the recent loss of his wife who passed on **10/5/2017** - and who is said to have been ailing before that as well as the allegation that

the notice to show cause which led to the dismissal was not served upon the applicant.

7. It is the normal approach of the court that in as far as it is possible suits should be heard and determined on their merits. The notice to show cause was served upon the firm of Okile & Co Advocates on **10/12/2017**. They affixed their stamp thereon upon receipt. There is no indication that they ever informed their client the plaintiff of the said notice and it is his case that he was not so informed. I have noted that the plaintiff has terminated the services of that firm of advocates. An inquiry into this application as to whether the advocates informed him is futile and unnecessary for now.

8. Before me is a litigant who has presented some problems that led to the dismissal of his suit for want of prosecution, and who appears to be keen to prosecute his suit on the merits. I am inclined to grant the application.

9. I hereby allow the application dated **23<sup>rd</sup> July 2018** in terms of **prayer 4** thereof. The dismissal order issued on **7/2/2018** is hereby vacated. The suit will be fixed for hearing on a date convenient to the parties. The costs of the application will be in the cause.

**Dated, signed and delivered at Kitale on this 25<sup>th</sup> day of September, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**25/9/2018**

Coram: Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

Plaintiff present in court

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**25/9/2018**