



**REPUBLIC OF KENYA**

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

**ELC. MISC.CASE NO. 119 OF 2017 (FORMELY MISC. NO. 120 OF 2010)**

**EZEKIEL MESHACK OWIRA.....PLAINTIFF**

**VERSUS**

**REGINA JAIRO OLANGO.....DEFENDANT**

**AND**

**THE DISTRICT LAND REGISTRAR, KISUMU....INTERESTED PARTY**

**RULING**

1. Ezekiel Meshack Owira the Plaintiff, seeks vide the Notice of Motion dated 24<sup>th</sup> July 2017 for the following prayers;

- 1. “That this application be certified urgent and be heard forthwith and exparte in the first instance.**
- 2. That this court be pleased to issue a stay of execution of the orders made against the Plaintiff.**
- 3. That the Plaintiff bears the costs of this application.**
- 4. That this Court be pleased to reinstate ELC 120 of 2012.”**

The application is based on the eight (8) grounds on its face and is supported by the affidavit sworn by the plaintiff on the 24<sup>th</sup> July 2017.

2. The application came up for hearing on the 12<sup>th</sup> April 2018 when the learned counsel for the Plaintiff made his oral submissions in support of the application.

3. The issue for determination is whether the Plaintiff has established a reasonable explanation on why he took no steps to prosecute his case for more than one year preceding the 9<sup>th</sup> May 2016 when his suit was dismissed for want of prosecution.

4. The Court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions and come to the following conclusions;

a) That the Plaintiff filed Kisumu CMCC No. 120 of 2012 against Regina Jairo Olango and the District Land Registrar Kisumu, the Defendant and interested Party respectively, vide the plaint dated 7<sup>th</sup> February 2012. The Plaintiff seeks for permanent injunction against the Defendant over land parcel Kisumu/Karateng/236, general damages and costs. The Defendant raised a preliminary objection on that court’s jurisdiction vide notice dated 30<sup>th</sup> March 2012. The court delivered its ruling on the 25<sup>th</sup> May 2012 directing as follows;

***“The upshot of the aforementioned is that I will uphold the Preliminary Objection but will not dismiss nor strike out the suit.... I will direct that the Plaintiff moves the high court urgently and files an application to have the present suit to be transferred to it for hearing and final determination within the next 30 days, failure of which the suit will then stand struck out.”***

b) That Plaintiff acted within the time given and filed the notice of motion dated 20<sup>th</sup> June 2012 on the 21<sup>st</sup> June 2012 seeking to have Kisumu CMCC No. 26 of 2012 transferred to this court for hearing and determination. The Plaintiff appeared before the court on the 21<sup>st</sup> June 2012 and the application was certified urgent. The court then directed that the application be served for hearing on the 4<sup>th</sup> October 2012. On that date, the Plaintiff informed the court that he had not served the application. The court directed him to

have another date fixed at the registry and the 6<sup>th</sup> February 2013 was fixed. The plaintiff appeared before the High Court on the 6<sup>th</sup> February 2012 when the matter was referred to this court. That on the same date the matter was fixed for hearing on the 20<sup>th</sup> June 2013. That there was no attendance by any of the parties on that date.

c) That the court then issued the notice to show cause why the suit should not be dismissed under **Order 17 Rule 2 of the Civil Procedure Rules** dated 13<sup>th</sup> April 2016 asking the parties to attend court on the 9<sup>th</sup> May 2016. That the notices were addressed to both the Plaintiff and Defendant of postal address 36 Maseno and posted.

d) That on the 9<sup>th</sup> May 2016, none of the parties attended the court to show cause and the application (suit) was dismissed under **Order 17 Rule 2 of the Civil Procedure Rules**. That is the order that prompted the Plaintiff to file the notice of motion dated 24<sup>th</sup> July 2017, subject matter of this ruling. The application is filed through M/s Amondi & Company Advocates for the Plaintiff/Applicant. The said firm of Advocates was not on record for the Plaintiff by the time the dismissal order of 9<sup>th</sup> May 2016 was made and has not filed and served a notice of appointment of an advocate as required under **Order 9 Rule 7 of the Civil Procedure Rules**.

e) That the notice to show cause dated 13<sup>th</sup> April 2016 had been posted to the address the plaintiff had indicated as his in his pleadings. The plaintiff cannot then turn around and allege, without tendering evidence, that the Defendant could have had a role in ensuring that the notice did not get to him. The court has also noted that there is no evidence on record that he had served the Defendant with the notice of motion since filing it on the 21<sup>st</sup> June 2012.

f) That in ground 3 of the notice of motion and paragraphs 5, 9, 10 and 11 of the supporting affidavit, the Plaintiff appears to lay the blame of the delay in prosecution of his case on the court's failure to fix the application for hearing and serve him with the notice. That is an erroneous view as in Civil matters the parties and or their legal representatives have the primary responsibility to take steps to prosecute their cases. The plaintiff in this case was no exemption and as he has not offered any reasonable explanation as to why he did not take any steps to prosecute his application dated 20<sup>th</sup> June 2012 for more than one year from the last court appearance on the 6<sup>th</sup> February 2013, then the court acted in accordance with the law when it dismissed the application for want of prosecution on the 9<sup>th</sup> May 2016, about three years and three months later.

5. That the foregoing show that the Plaintiff notice of motion dated 24<sup>th</sup> July 2017 has no merit and is dismissed. As there was no replying papers filed, the plaintiff to bear his own costs. The court further orders as follows;

**a) That as there was no order issued transferring Kisumu CMCC No. 26 of 2012 to this Court, the Deputy Registrar do ensure that file which is attached to this record is returned to the trial court for their retention.**

**b) That this file be and is hereby closed.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 18<sup>th</sup> DAY OF September, 2018.**

**In the presence of:**

Plaintiff: Present

Defendant: Absent

Interested: Absent

Counsel: Mr. Achira for the Plaintiff and M/s Bagwasi for

Asiwa for 1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**