



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 395 OF 2015 (FORMERLY HCC NO. 209 OF 2009)**

**KARIM ISMAEL SURAN.....PLAINTIFF**

**VERSUS**

**ROSEMARY ADHIAMBO ODINGA.....DEFENDANT**

**RULING**

1. Karim Ismael Surani, the Plaintiff, seeks vide the notice of motion dated 31<sup>st</sup> October 2017, to have the order of 15<sup>th</sup> February 2017, dismissing the suit and all other consequential proceedings be set aside/vacated and that costs be provided for. The application is based on the eleven (11) grounds on its face and is supported by the affidavit of Ambrose Otieno Weda, the Learned Counsel on record for the Plaintiff, sworn on the 31<sup>st</sup> October 2017.

2. The application is opposed by Rosemary Adhiambo Odinga, the Defendant, through the four (4) grounds in the grounds of opposition dated 4<sup>th</sup> November 2017, and filed on the 5<sup>th</sup> December 2017.

3. The application came up for hearing on the 8<sup>th</sup> May 2018 when Mr. Otieno for Weda for the Plaintiff made his oral submissions.

4. The following are the issues for determination;

**a) Whether the notice to show cause why the suit should not be dismissed for want of prosecution was served on the Plaintiff's Counsel.**

**b) Whether the suit has stayed for more than one year without any step to prosecute the suit being taken by the time the notice dated 25<sup>th</sup> November 2016 that was heard on the 15<sup>th</sup> February 2017 was issued.**

**c) Whether the Plaintiff has shown reasonable explanation why no step to prosecute the suit was taken for more than one year.**

**d) Who pays the costs.**

5. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence by counsel for the Plaintiff, the grounds of opposition by counsel for the Defendant, the record and come to the following findings;

a) That the Defendant filed the notice of motion dated 4<sup>th</sup> May 2015, brought under **Order 17 Rule 2 (3) of the Civil Procedure Rules** among other provisions of the law, seeking for the Plaintiff to **“show cause why this suit should not be dismissed AND if cause is not shown to the Court's satisfaction, this suit be dismissed with costs.”** The application was served on counsel on record for the Plaintiff on the 21<sup>st</sup> May 2015 as confirmed by the affidavit of service sworn by one George Onyango on the 22<sup>nd</sup> May 2015 and filed with the court on the 24<sup>th</sup> June 2015. That the court has perused the record and there is no reply filed by the Plaintiff to the said application. The application came up for hearing on the 25<sup>th</sup> June 2015 with Mr. Okero for the Plaintiff and Mr. Otieno S. for Weda for the defendant present. That the record shows that the court directed the Defendant to file their response and fixed the application for hearing on the 17<sup>th</sup> September 2015. That on that date there were no appearance by the parties or their counsel and the court directed that another date be fixed at the registry.

b) That the Plaintiff on their part filed the notice of motion dated 17<sup>th</sup> September 2015 under **Order 11 Rules 3 (1) (h) of the Civil Procedure Rules**, among other legal provisions, seeking for consolidation of this suit with ELC No. 39 of 2015 and costs. That the court has perused through the record and there is no evidence of service of the application or a hearing date being fixed for it.

c) That by the time the notice to show cause dated 25<sup>th</sup> November 2016 for hearing on the 15<sup>th</sup> February 2017 was issued, a period of about one year, two months and eight days had lapsed since the filing of the notice of motion dated the 17<sup>th</sup> September 2015 by the counsel for the plaintiff without any steps being taken to prosecute the case.

d) That the notice to show cause dated 25<sup>th</sup> September 2015 bears the Postal address of the counsel on record for the Plaintiff as **“Box 66911-00200 NAIROBI”** which is the same address appearing in the documents and pleadings filed by the said counsel. That the claim by the counsel for the Plaintiff that they never received the notice cannot therefore be true as it was sent through the correct address.

e) That the only reason given by the Plaintiff through the grounds on the notice of motion dated 31<sup>st</sup> October 2017, and the affidavit in support for not taking steps to prosecute their case for more than one year is found at ground 4 and is as follows;

***“4. The delay in prosecuting the suit has been occasioned by the loss of contact between the Plaintiff and his advocate as well as some missing vital documents. The loss was occasioned by the invasion and demolition occasioned by the Defendant.”***

That the Learned Counsel for the Plaintiff has not provided any evidence confirming whether he has now re-established contact with the Plaintiff. He has also not disclosed the nature of the documents that had gone missing or whether he has since received them. The counsel has also not given particulars of the alleged ***“invasion and demolition occasioned by the Defendant”*** and its relevance to this proceedings.

f) That in view of the findings above, the court finds the explanation offered by the Plaintiff through his counsel on record on their failure to take steps to prosecute their case for more than one year is not sufficient to be the basis of setting aside the order of 15<sup>th</sup> February 2017 dismissing the suit.

6. That flowing from the foregoing, the court finds and orders as follows:

**a) That the Plaintiff’s notice of motion dated 31<sup>st</sup> October 2017 is without merit and hence is hereby dismissed with costs.**

**b) That the suit do remain dismissed with costs for want of prosecution in accordance with Order 17 Rule 2 of Civil Procedure Rules as ordered on the 15<sup>th</sup> February 2017.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2018**

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Mr. Olel for Weda for Plaintiff.

Mr. Mweisigwa for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**