



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 402 OF 2011**

**ABDULLAHI MOHAMMED SHEKH .....PLAINTIFF/APPLICANT**

**VERSUS**

**BOARD OF GOVERNORS OF MAINA**

**WANJIGI SECONDARY SCHOOL.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff filed a Notice of Motion dated 22<sup>nd</sup> February 2018 in which he seeks the orders of the Court dismissing his suit for want of prosecution reviewed and set aside. The plaintiff's suit was dismissed for want of prosecution on 21<sup>st</sup> June 2017. The applicant contends that when the case came up for notice to show cause on 21<sup>st</sup> June 2017, his advocate did not attend court and had not informed him. He states that he is the registered owner of the suit property and that if the dismissal order is not set aside, he will be greatly prejudiced.

2. The applicant's application was opposed by the respondent through a replying affidavit sworn on 18<sup>th</sup> April 2018. The respondent contends that the applicant does not deserve the orders to be set aside because this suit was filed in 2011 and since then the plaintiff has never bothered to prosecute the same; that no explanation has been given why the applicant or his advocate were not in court when the suit was dismissed and that the plaintiff's suit has no chance of success and to reinstate it will be a waste of judicial time.

3. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the applicant has demonstrated that he deserves the exercise of the court's discretion to set aside the dismissal order. I have looked at the record and notice that this suit progressed well from the time it was filed. Interlocutory applications were dealt with and concluded by 20<sup>th</sup> July 2012. Pre-trial directions followed. The parties filed their respective documents and even issues were drafted. The matter was to come up for mention on 4<sup>th</sup> July 2014 for further direction but it appears the matter was not listed. It remained in limbo until 5<sup>th</sup> April 2017 when the Deputy Registrar listed it for mention on 17<sup>th</sup> May 2017.

4. Though all the advocates for the parties were served with a mention notice for 17<sup>th</sup> May 2017, none attended court. The Deputy Registrar then directed that Notice to show cause be issued. The same was issued for 21<sup>st</sup> June 2017 and the advocates for the parties were served. When the matter came up for notice to show cause, only the defendant's counsel was present. He asked that the plaintiff's suit be dismissed. The Counsel did not disclose to court that there was a counter claim by the defendant. The plaintiff's suit was dismissed but no order or directions were given regarding the counter-claim which still stands.

5. When it comes to reinstatement of suit which has been dismissed, the consideration is the reason given why the applicant did not attend court. In the instant case, the applicant states that his then advocate did not inform him of the notice and the advocate did not attend court. The applicant was formerly being represented by the firm of *Ahmednasir, Abdikadir & Co. Advocates* but he is now being represented by the firm of *Githinji & Co. Advocates*.

The merits or otherwise of the dismissed suit is not a factor to be considered in an application like this. The concern of the court is to ensure that where an explanation has been given, the applicant ought to be given a chance to be heard on merits. I am convinced with the reason given by the applicant for his failure to be in court. As there is a counter-claim pending, it will be fair that the dismissed suit be reinstated so that it is heard together with the counter-claim. I therefore allow the applicant's application with the result that the order dismissing the plaintiff's suit which was given on 21<sup>st</sup> June 2017 is hereby set aside. The applicant's suit is hereby reinstated for hearing. Costs of this application shall be costs in the suit.

It is so ordered.

Dated, signed and delivered at *Nairobi* on this 11<sup>th</sup> day of *October 2018*.

**E.OBAGA**

**JUDGE**

In the absence of parties who were aware of the date and time of delivery of Ruling.

Hilda: Court Assistant

**E.OBAGA**

**JUDGE**