



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC SUIT NO. 145 OF 2013 (O.S)

**IN THE MATTER OF SECTION OF THE LIMITATION OF
ACTIONS ACT (CHAPTER 22) LAWS OF KENYA**

CHRISTINE JAOKO OKETCH.....1ST PLAINTIFF

JACOB JUMA OKECH.....2ND PLAINTIFF

VERSUS

ALOYCE ODHIAMBO OKOTH.....1ST DEFENDANT/RESPONDENT

CHRISTINE OTIENO JAMBA.....2ND DEFENDANT/RESPONDENT

CLEOPHAS OUMA JUMA.....3RD DEFENDANT/RESPONDENT

JUDITH ADHIAMBO AKONGO.....4TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs filed the notice of motion dated 15th November 2017 seeking for setting aside of the order made on the 10th October 2017 dismissing their suit and for reinstatement of the case for hearing. The application is based on the five (5) grounds on its face and the supporting affidavit sworn by Tom Achillah, advocate for the Plaintiffs, and that of Edward Meshack Otieno on the 15th November 2017. That the grounds and depositions are as summarized herein below;

- a) **That the suit has a pending application dated 13th May 2015 and should not have been dismissed for want of prosecution under Order 17 Rule 2 of Civil Procedure Rules.**
- b) **That the delay in prosecuting the case has been occasioned by their failure to locate the 3rd Defendant/Respondent for service.**
- c) **That the failure to attend court on the 10th October 2017 when the notice under Order 17 Rule 2 of Civil Procedure Rules was coming for hearing was not intentional.**
- d) **That the Counsel for the Plaintiff had received the notice under Order 17 Rule 2 of Civil Procedure Rules through Postal Office on the 14th July 2017 with a hearing date of 10th October 2017. That he instructed one Edward Meshack Otieno Advocate to hold his brief and the said counsel left a note with the 2nd Plaintiff/Applicant to give to a counsel present when the matter is called to ask for the file to be placed aside to enable him attend to a mention in Election Petition No. 4 of 2015. That the said counsel later received a call from the 2nd Plaintiff to the effect that the suit had been dismissed. That Edward Meshack Otieno Advocate has confirmed that position through his affidavit sworn on the 15th November 2017, filed with the application.**

2. The application was served on M/s. S.O. Madialo & Co. Advocates for the Defendants on the 15th May 2018 and affidavit of service sworn on the 24th May 2018 by Nornel Okello G'oganyo. That no replying papers had been filed by the time the application came up for hearing on the 26th September 2018, which date had been fixed with the parties Counsel's present on the 14th May 2018. That the Defendants and their Counsel did not attend the hearing of the application and Counsel for the Plaintiff moved the court for the orders.

3. The issues for determination of the court are as follows;

- a) **Whether the Plaintiffs have shown reasonable explanation why no steps had been taken to prosecute this case for more than one year by the time the notice to show cause under Order 17 Rule 2 of Civil Procedure Rules was issued and granted on the 10th October 2017.**
- b) **Who pays the costs.**

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

- a) That this suit was commenced vide the originating summons dated 6th June 2013 and filed in court on the 10th June 2013 vide receipt number 5121785 of the same date. That the Defendants/Respondents are indicated as Aloyce Odhiambo Okoth, Christpine

Otieno Jamba, Cleophas Juma and Judith Adhiambo Akongo in that order.

b) That the affidavit of service by Nornell Okello G'oganyo sworn on the 15th July 2013 shows that all the Defendants/Respondents were served with the copies of the authority, originating summons and supporting affidavit dated 6th June 2013 on the 22nd June 2013. That vide memorandum of appearance dated and filed on the 24th June 2013, M/s S. O. Madialo & Co. advocate entered "**appearance for the Defendants**" That memo contravenes **Order 6 Rule 5 of the Civil Procedure Rules** as it does not set out the names of the Defendants whose appearance is entered. That it is therefore surprising that the Plaintiffs latter filed the notice of motion dated the 13th May 2015, and filed on the 15th May 2015, seeking for leave to serve the "**Third Defendant/Respondent....Cleophas Ouma Juma by way of substituted service through advertisement**", when he already appeared through counsel on record appearing for him though he has not filed a replying affidavit. That the court has however noted the coram of 19th May 2015 and 8th October 2015 had specified that Madialo advocate was for 1st, 2nd and 4th Defendants only, which would then mean that there is no appearance for the 3rd Defendant. That the affidavit of service by Nornell Okello G'oganyo sworn on the 22nd June 2017, and filed on the 23rd August 2017, indicates that the 3rd Defendant/Respondent was not traced to be served with copies of the authority, originating summons and supporting affidavits dated 6th June 2013 contrary to the deposition in the earlier affidavit of service of 15th July 2013 referred to, at paragraph one above.

c) That **Order 5 Rule 7 of the Civil Procedure Rules** empowers this court to dismiss the suit if summons are not served after twenty four (24) months from the date of issue, if no application to extend it has been made. That in this suit, there is no pending application to extend the summons in respect of the 3rd Defendant/Respondent. That the Plaintiffs claim against the 3rd Defendant/Respondent became ripe for dismissal for failure to serve the summons in 24 months on or about 11th June 2015.

d) That the fact that there is a pending application in a suit does not stop this court from issuing and allowing a notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** if no action has been taken to prosecute the suit in more than one year. That the notice to show cause that came up for hearing on the 10th October 2017, had been issued on the 14th July 2017, and received by counsel for the Plaintiff on the 27th September 2017. That the last step aimed at prosecuting this suit had been on the 8th October 2015, when direction on fixing another date at the registry among others were given with both parties counsel's being present. That it therefore shows that a period of about one year, nine months and six days had lapsed by the time the notice dated 14th July 2017 was issued without any steps being taken.

e) That while the explanation given on why Mr. Edward Meshack Otieno, who had been instructed to hold brief for counsel on record for the Plaintiff on the 10th October 2017 may be true, it is however not explained how the 2nd Plaintiff/Applicant got the information that he allegedly passed to him, that the suit had been dismissed, when the record clearly indicates no party was present in court when the matter was called and dismissal order issued. That there is also no evidence in the form of cause list or copy of the counsel's diary to confirm that the Election Petition No. 4 of 2017 was coming up on the same date as alleged.

f) That court has considered the superior courts decisions in **Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR**, **Jane Waithera Kihara vs Njihia Mucheke [2018] eKLR** and **Peter Ndungu Njoroge vs Iazaro Mugo Munyi [2014] eKLR** and taken the view that though the Plaintiffs have not given reasonable explanation for the delay in taking steps to prosecute their case, the court's overriding objectives under **Section 1A**, and the duty of the court under **Section 1B, both of the Civil Procedure Act**, will be better served by giving them one last opportunity to prosecute their case. That the Plaintiffs will however meet their own costs of the application.

5. That in view of the foregoing, the court orders as follows;

a) **That the notice of motion dated 15th November 2017 is hereby allowed, and the order of 10th October 2017 dismissing the suit set aside and the suit reinstated for hearing.**

b) **That the Plaintiffs bear their own costs in the application.**

Orders accordingly.

S.M. KIBUNJA
ENVIRONMENT & LAND
JUDGE

DATED AND DELIVERED THIS 5TH DAY OF DECEMBER, 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Ms. Murugi for Achira for Plaintiff

Mr. Mwembe for Defendants

S.M. KIBUNJA
ENVIRONMENT & LAND
JUDGE