



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC SUIT NO. 402 OF 2015

WILLIS OCHIENG ODHIAMBO.....PLAINTIFF

VERSUS

KENYA TOURIST DEVELOPMENT CORPORATION.....1ST DEFENDANT

HOTEL BIG FIVE LTD.....2ND DEFENDANT

RULING

1. Willis Ochieng Odhiambo, the Plaintiff, through notice of motion dated 22nd November 2017, seeks to have the order of 11th April 2017 dismissing his suit reviewed and or set aside, and the suit reinstated for hearing. The application is based on the seven (7) grounds on its face and is supported by the affidavit of Kennedy Bosire Gichana, counsel on record for the Plaintiff, on the 22nd November 2017.

2. The application is opposed by Kenya Tourist Development Corporation, the 1st Defendant, through their four (4) grounds of opposition dated 13th November 2017.

3. The directions on filing and exchanging written submissions were given on the 14th March 2018. The learned counsel for the Plaintiff and 1st Defendant then filed the written submissions dated 10th May 2018 and 7th June 2018 respectively.

4. The following are the issues for the court's determination;

a) **Whether the Plaintiff has presented reasonable explanation as to why steps to prosecute the suit had not been taken for more than one year.**

b) **Whether counsel on record for the Plaintiff was served with the notice to show cause issued under Order 17 Rule 2 of Civil Procedure Rules.**

c) **Who pays the costs of the application.**

5. The Court has after considering the grounds on the application, grounds of opposition, the supporting affidavit, submissions by both counsel and the decided cases cited therein, come to the following conclusions;

a) That before the notice to show cause why the suit should not be dismissed for want of prosecution dated the 9th March 2017 was issued, the last step by the parties in the suit to prosecute the case was the fixing of a hearing date on the 10th December 2014. That on that date, all parties were represented by counsel and the matter was fixed for hearing on the 7th May 2015. That however on the hearing date only counsel for the Plaintiff was represented and the court directed another hearing date be fixed at the registry. That between that , (7th May 2015) and the 9th March 2017 when the notice was issued, a period of about one year and ten months had lapsed.

b) That while the Plaintiff's suit had been filed through M/s Nyamweya Osoro & Nyamweya Advocates, there is a Notice of Change of Advocates dated the 26th February 2009, and filed with the court on the 4th July 2009, indicating that M/s Bosire Gichana & Co. Advocates had taken over from the previous counsel. That it is obvious that the notice dated 9th March 2017 was addressed to M/s Nyamweya Osoro & Company Advocates and Behan & Okero Advocates only. That M/s Bosire Gichana Advocates, who were the counsel on record for the Plaintiff, and M/s Odhiambo Ouma & Co. Advocates, who are on record for the 2nd Defendant, were not served with the notice and their clients were not given the opportunity to be heard before the order of the 11th April 2017 was issued.

c) That the annexures “**KBG-2 to 4**” confirms that the counsel on record for the Plaintiff was engaging the Deputy Registrar through correspondence on the whereabouts of the file without success, prompting the filling of the application annexed as “**KBG-5**” to reconstruct the file. That the foregoing are facts that have not been disputed and suffices to show that the Plaintiff would have offered a reasonable explanation why the suit should not be dismissed for want of prosecution had he been properly served with the notice issued under **Order 17 Rule 2 of the Civil Procedure Rules**.

d) That **Article 159 (2) (d) of the Constitution of Kenya, Sections 1A and 1B of Civil Procedure Act, Chapter 21 of Laws of Kenya, Order 51 Rule 10 of Civil Procedure Rules** requires the courts to among others do substantive justice without emphasizing on technicalities. That the Supreme Court of Kenya in **Hermanus Phillipus Steyn vs Giovanni Gnechi- Ruscone [2013] eKLR** pronounced itself in the following words when considering an application that had not cited the enabling provisions of the Constitution;

“The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a court of law has to be moved under the correct provisions of the law. We note that this court is the highest court of the land. The court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite Article 163 (5) will not be fatal to the applicant’s cause.”

That the court therefore finds that the Plaintiff’s failure to cite the provisions of the law under which the notice of motion is predicated is not fatal to the application as the substance is apparent in its body.

e) That there is no evidence of reasonable apprehension that the application, if allowed, will amount or cause prejudice to the 1st Defendant’s case.

6. That in view of the foregoing, the court finds merit in the Plaintiff’s notice of motion dated the 22nd November 2017 and orders as follows;

a) **That the order of 11th April 2017, dismissing the Plaintiff’s suit be, and is hereby set aside and the suit reinstated for hearing.**

b) **That costs of the application be in the cause.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS...5TH ...DAY OF DECEMBER 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Ms. Owuor for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE