



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.499 OF 2015

ELENA MEDICARE HOME LIMITED.....PLAINTIFF

VERSUS

CHARLES RUTTA KASAMANI T/A

KASAMANI & COMPANY ADVOCATES.....1ST DEFENDANT

DAVID OCHIENG OSODO2ND DEFENDANT

PHANUEL OKWENGU SILVANO.....3RD DEFENDANT

MARY AKINYI OYUGI.....4TH DEFENDANT

BENJAMIN NYAKIRA.....5TH DEFENDANT

AUMA ABUORO.....6TH DEFENDANT

KENNEDY ODERA MASIME.....7TH DEFENDANT

RUTH ONGACHI AGWA.....8TH DEFENDANT

JOSHUA OJWANG LUSI.....9TH DEFENDANT

EDCOM SYSTEMS LIMITED.....10TH DEFENDANT

DICK ORANJA.....11TH DEFENDANT

PHILIDIA AMOLO OTHIENO12TH DEFENDANT

WINEM DEVELOPERS LIMITED.....13TH DEFENDANT

RULING

1) Elena Medicare Home Limited, the Plaintiff, vide the notice of motion dated 7th December 2016, seeks to have the order of 9th May 2016 dismissing the suit for want of prosecution set aside and the suit reinstated for hearing and determination on merit. The application is based on the five grounds on its face and supported by the affidavits of Paul Amuga, advocate, and David Odhiambo Opot, a clerk with a firm

of advocates, sworn on the 7th December 2016. The application is opposed by David Ochieng Osodo, the 2nd Defendant, through his replying affidavit sworn on the 8th February 2017.

2) The application came up for hearing on the 4th April 2017 when Mr. Amunga, Masake and Mwamu for the Plaintiff, 1st and 2nd Defendant respectively, made their oral rival submissions.

3) The issues for determination by the court are as follows;

- a) Whether the Plaintiff has established a reasonable cause for the dismissal order to be set aside and suit reinstated.
- b) What orders to issue.
- c) Who pays the costs.

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

a) That this suit was commenced by the Plaintiff through the originating summons dated 18th June 2012 with **Charles Lutta Kasamani T/A Kasamani & Co. Advocates**, the 1st Defendant, as the only Defendant. That the 1st Defendant then applied to enjoin **David Ochieng Osodo, Phaniel Okwengo Silvano, Mary Akinyi Oyugi, Benjamin Nyakira, Auma Abuor, Kennedy Odera Masime, Ruth Ongachi Angwa, Joshua Ojwang Lusi, Edcom Systems Limited, Jane auma Odhiambo, Dick Oranja, Philidia Amolo Othieno and Winem Developers Limited** as the 2nd to 13th Defendants respectively. The application was allowed vide the court's ruling of 23rd January 2013.

b) The Plaintiff then filed the amended originating summons dated 10th October 2014 incorporating the new defendants but is yet to be served on some of the Defendants.

c) That the 1st Defendant vide notice of motion dated 26th September 2014 applied to have the Plaintiff's suit dismissed for want of prosecution. The application was on 30th October 2014 fixed for hearing on the 19th February 2015. That when that date came, the 1st Defendant informed the court that the parties were trying to resolve the matter and a mention date of 25th March 2015 was fixed. That on 25th March 2015, the court was informed by counsel for the 1st Defendant that parties were still negotiating. The court then directed that parties do take another date at the registry but that appears not to have happened.

d) The parties did not fix any other date and come the 15th April 2016, the court issued Notices to show cause under **Order 17 Rule 2 of Civil Procedure Rules** for the 4th May 2016. On that date the matter was mentioned before the Deputy Registrar with only the counsel for the 1st Defendant present and he moved the court to dismiss the suit with costs. The Deputy Registrar directed that the matter be mentioned before the Judge on the 9th May 2016 when the dismissal order, subject matter of the application, was made. The record shows that only counsel for the 1st and 10th Defendants were present in court on that date.

e) That the Plaintiff's main grounds for the application are that they had not been served with the notices and that the change of case file number had caused the delay in fixing the case for hearing. The Plaintiff has annexed copies of two letters dated 27th August 2015 and 15th June 2016 addressed to the Deputy Registrar seeking to have a date fixed. The court has noted that the two copies do not have any court receiving stamps to confirm that they were received at the registry. That in the absence of any affidavit evidence from the Deputy Registrar or court registry personnel, the court is unable to confirm whether the letters were indeed done on those dates and received at

the registry. That notwithstanding, the court has noted that there is no evidence to confirm that the Notice to show cause dated 15th April 2016 was ever served on the Plaintiff's counsel. There is also no evidence that after the Deputy Registrar fixed the notice to show cause for 9th May 2016 before the judge that any notice was served by the court or counsel for the Defendants in attendance, on the Plaintiff's counsel. That alone makes the case by the Plaintiff to have the orders made on 9th May 2016 set aside reasonable in that their case was dismissed without according them an opportunity to be heard.

f) That the dismissal order of the 9th May 2016 was not pursuant to the 1st Defendant application dated 26th September 2014, but the court's Notice to show cause dated 15th April 2016, which appear not to have been served on the Plaintiff at any one time.

5. That flowing from above, the plaintiff's notice of motion dated 7th December 2016 has merit and is allowed as prayed with costs in the cause. The Plaintiff's suit is therefore reinstated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2017

In presence of;

Plaintiff Absent

Defendants 1st Defendant present

Counsel Mr. Kasamani for the 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17/5/2017

S.M Kibunja Judge

Oyugi court assistant

1st Defendant present

Order: Ruling dated and delivered in open court in presence of the 1st Defendant only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017