



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 170 OF 2013

KAZUNGU BURASHI BAYA.....PLAINTIFF

VERSUS

ALPHONCE VICTOR GAMBO MAROPIADEFENDANT

RULING

1. In his Application dated 10th May, 2016, the Plaintiff is seeking for the following orders:

- a. That the proceedings and the consequential orders of this Honourable Court issued on 6th October, 2014 dismissing this suit for want of prosecution be set aside.***
- b. That the suit be reinstated for hearing and determination on merit.***
- c. That the costs of this Application be awarded to the Applicant.***

2. The Application is premised on the grounds that both the Plaintiff and counsel for the Plaintiff did not know that the Application had been fixed for hearing; that the Application dated 28th October, 2015 was never served upon the Plaintiff and that the Plaintiff has always been ready and willing to prosecute the suit.

3. The Plaintiff deponed that the process-server did not effect service as alleged in his Affidavit of service and that the signature of Mr. Thoya was forged by the said process-server.

4. In response, the Defendant deponed that the Plaintiff and his advocate were served with the Application for dismissal of the suit; that the Plaintiff left the matter to lie unprosecuted for long and that in any event this suit is *res judicata* by virtue of the Judgment in Kilifi SPMCC No. 144 of 2011.

5. In his Further Affidavit, the Plaintiff deponed that the Affidavit of service is by two different process-servers; that it is not clear which process-server effected service and that the notice for dismissal of the suit for want of prosecution was filed prematurely.

6. The parties filed submissions in which they reiterated the contents of the Affidavits on record. I have considered those submissions and the authorities.

7. In the Application dated 28th October, 2015, the Defendant sought to dismiss the suit for want of prosecution.

8. When the Application came up for hearing on 25th February, 2016, the same was not opposed. The

court proceeded to allow the Application as prayed.

9. The Plaintiff now claims that he was never served with the said Application and that is why his advocate did not attend court on 25th February, 2016.

10. In his Affidavit of service sworn on 19th February, 2016 and filed in court on 22nd February, 2016, the process-server, one Michael Thoya M'bwana deponed that he served the senior clerk of the firm of Manwa Mabeya & Co. Advocates with the Application of 28th October, 2015 together with the hearing notice. However, the said clerk declined to stamp and sign his copy.

11. After this court dismissed the Plaintiff's suit for want of prosecution, the firm of Mwahunga Mtana & Co. Advocates took over the conduct of this matter from the firm of Manwa Mabeya & Company.

12. Although the Plaintiff has deponed that neither him nor his former advocate were served with the Application dated 28th October, 2015, they did not find it fit to call the said process-server for cross-examination.

13. Indeed, the Plaintiff did not also bother to call the purported senior clerk in the law firm of Manwa Mabeya to testify on the contents of the Affidavit of the process-server.

14. Having failed to call the process-server for cross-examination, and in view of the fact that the clerk or advocate in the Plaintiff's former firm did not file any Affidavit to deny the allegations in the Affidavit of service, I am convinced that the Plaintiff's former advocate was aware of the Application of 28th October, 2015 but failed to file a response.

15. In the circumstances, I decline to set aside the orders of the court of 25th February, 2016.

16. For those reasons, I dismiss the Application dated 10th May, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE