



**REPUBLIC OF KENYA**  
**IN THE E.L.C. COURT OF KENYA AT EMBU**

**E.L.C. NO. 219 OF 2014**

**SAMUEL KIVUTI CIRIBA.....PLAINTIFF**

***VERSUS***

**JOEL KITHAKA MARINGA.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated and filed on 17<sup>th</sup> March, 2017, the Plaintiff/Applicant sought reinstatement of the suit which was dismissed pursuant to an order made by this court on 2<sup>nd</sup> March, 2017. The Plaintiff also sought an extension of time within which to comply with Order 11 of the Civil Procedure Rules (hereinafter the Rules) with respect to filing of documents in preparation for trial.
2. The orders made on 2<sup>nd</sup> March 2017 required the Plaintiff to comply with Order 11 of the Rules within 10 days failing which the suit were to stand dismissed without further order. That order was made in the absence of the Plaintiff's advocate.
3. The Plaintiff sought reinstatement of the suit on various grounds including the grounds that the Plaintiff has been unwell and that the Plaintiff's counsel was not served with the orders made on 2<sup>nd</sup> March 2017 regarding the timelines for compliance. The Plaintiff's counsel also indicated that he was ready to set down the suit for hearing within the shortest time possible.
4. The Defendant filed a replying affidavit on 31<sup>st</sup> March 2017 in opposition to the Plaintiff's said application. Mr. Njage for the Defendant submitted that the Plaintiff has never been diligent in prosecuting the suit. He submitted that it is the Defendant who has been pushing the Plaintiff to comply with Order 11 of the Rules over the years.
5. The Defendant's counsel also submitted that the indolence on the part of the Plaintiff was running contrary to the overriding objective of expeditious disposal of cases. He further submitted that the Plaintiff had lost interest in the suit and that he had never served summons to enter appearance upon the Defendant. He, therefore, urged the court to dismiss the application for reinstatement of the suit and extension of time to comply with Order 11 of the Rules.
6. The main issues for consideration in the instant application are twofold. The first is whether the Plaintiff's counsel was aware of the orders made on 2<sup>nd</sup> March 2017. The second is whether the Plaintiff's suit should be reinstated in the circumstances of this case.
7. According to the record, on the 2<sup>nd</sup> March 2017 the Plaintiff's counsel was not present in court although he had been duly served. The court noted that the Deputy Registrar had made previous orders for the Plaintiff to comply with Order 11 of the Rules. Some of the dates on which the Plaintiff was

ordered to comply were 3<sup>rd</sup> May 2016, 10<sup>th</sup> June 2016 and 27<sup>th</sup> July 2016. In these circumstances, the court made an order for the Plaintiff to comply with Order 11 of the Rules within 10 days in default of which the suit would stand dismissed without further order.

8. The court did not make an order for the Defendant to extract and serve the said order upon the Plaintiff's advocate within a specified period. However, on or about 9<sup>th</sup> March 2017 at 12.30 p.m, the Defendant's counsel served the Plaintiff's counsel with a mention notice informing him of the mention date of 16<sup>th</sup> March 2017 and notifying him as follows;

*“TAKE NOTICE that you were granted another fourteen (14) days to comply failing which the Honorable Court shall dismiss the suit.”*

9. Although the Defendant's counsel did his best to notify the Plaintiff's counsel of the orders made on 2<sup>nd</sup> March 2017, it is evident the correct information was not communicated. First, the period of compliance was 10 days and not 14 days as communicated. Second, no further order was required for dismissal of the Plaintiff's suit. It was to stand dismissed automatically without further order in the event of default.

10. In the premises, the court is satisfied that the Plaintiff's counsel was not aware of the actual and full terms of the order made on 2<sup>nd</sup> March 2017.

11. It is evident from the record that the Plaintiff has not been diligent in the prosecution of the suit over the years. It would appear that the Defendant has taken initiative on several occasions to list the matter for mention and to push for compliance with pre-trial procedures in preparation for the hearing. Consequently, the Plaintiff was given an opportunity to comply with Order 11 of the Rules on the various dates shown in paragraph 7 hereof.

12. The Plaintiff's counsel filed an affidavit explaining his inability to comply with Order 11. He was apparently unable to get further instructions from his client on the filing of witness statements and documentary evidence. It would also appear that the Plaintiff has been unwell in the past one year or so. In my view, the reasons given for the delay in complying with Order 11 Civil Procedure Rules are not unreasonable. Although there has been considerable delay in the prosecution of this suit which is more than 10 years old, the Plaintiff should be given a last opportunity to prosecute it.

13. Where a suit can be prosecuted and justice done in spite of the delay in its prosecution, a party should be given a chance to do so. It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the course of justice. See **Shah & Another v. Mbogo [1967] EA 117 and Ivita v. Kyumbu [1984] KLR 44.**

14. In the premises, and for the foregoing reasons, the court is satisfied that it is in the interest of justice to allow the said application and extend the timelines for compliance with Order 11 of the Rules in preparation for trial of the suit.

15. The court shall not deal with the Defendant's objection to the jurisdiction of the court on the basis of the provisions of the Land Adjudication Act since that issue was disposed of by the High Court on 22<sup>nd</sup> April 2015. The Defendant is at liberty to raise the issue of service of summons to enter appearance by moving the court in the appropriate manner and not by way of reply to the application.

16. The court therefore makes the following orders:

a. The Plaintiff's Notice of Motion dated 17<sup>th</sup> March 2017 is hereby allowed in terms of prayers (2) and (3).

b. The Plaintiff is granted an extension of 15 days within which to file and serve witness statements and documentary evidence failing which the suit shall stand dismissed without further order.

- c. The Defendant shall similarly comply by filing his documents within 21 days from the date of the Plaintiff's compliance.
- d. The parties shall thereafter exchange and agree on a common statement of issues within 15 days from the Defendant's compliance.
- e. The matter shall be mentioned on 27<sup>th</sup> July, 2017 to confirm compliance and take directions on the hearing of the suit.
- f. The Plaintiff to bear costs of the application.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day of **June, 2017**.

In the presence of Mr Adande for the Plaintiff and Mr Njagi for the Defendant.

Court clerk Mr Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**12.06.17**