



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 2364 OF 2007

SUKHDEV SIGN SIDHU (suing in his capacity as the Administrator

of the Estate of KEHAR SINGH SIDHU (deceased).....PLAINTIFF

= VERSUS =

KULDIP SINGH & HARMIDER KAUR w/o

KULDIP SINGH T/A HILL TOP PRIMARY SCHOOL TIGONI...DEFENDANT

R U L I N G

1. Through a Notice of Motion dated 4/5/2016, the plaintiff seeks an order reinstating this suit. The suit was dismissed by Angote J on 29/5/2015 under Order 17 Rule 2 of the Civil Procedure Rules. The plaintiff contends that at the time the suit was dismissed for want of prosecution, it was not ripe for dismissal because prior to that, specifically on 15/10/2014, the plaintiff's previous advocates, M/s Ogola Okello & Co. Advocates had taken steps towards prosecution of the suit, by filing a request on 15/10/14 for the suit to be listed for pretrial conference. In his view, dismissal of the suit was, in the circumstances, premature. On their part, the defendants contend that they are not aware of the steps allegedly taken by the plaintiff's previous advocates aimed at preparing the suit for trial. Secondly, the defendants contend that the notice to show cause was addressed to the respective law firms on record for the parties.

2. I have perused the court file. This suit was originally filed in the pre- 2010 High Court. The court is alive to the fact that the Constitution of Kenya 2010, promulgated on 27/8/2010, redesigned and reconstructed Kenya's Judiciary. Article 162 (2) of the Constitution created a superior court vested with exclusive original jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Article 165 divested similar jurisdiction from the High Court. What followed the promulgation of the Constitution of Kenya 2010 was the transition process, entailing enactment of enabling legislative instruments and operationalization of court registries, appointment of judges and operationalization of courts.

3. This suit was filed on 20/12/2007. The court record shows that diligent steps were taken by the plaintiff to prosecute the suit between December 2007 and 2013. I will not outline all the steps. I will only outline a few of them. On 19/11/2009, the plaintiff's advocates attended the High Court Registry and set down this suit for hearing on 15/6/2010. For reasons that are not clear, there were no court proceedings in the File on that day. On 21/1/2011, about five months after the promulgation of the Constitution of Kenya 2010, the plaintiff's advocates set down this suit for hearing on 22/9/11. Again on the scheduled date there were no court proceedings in the File. On 15/2/12, the plaintiff's advocates

again set the suit down for hearing on 17/7/2012. Similarly, there were no court proceedings on 17/7/2012. Lastly, on 26/3/13, the plaintiff's advocates set down this suit for hearing on 19/12/2013. Like before, there were no court proceedings on 19/12/13. On their part, on 25/10/2013, the defendants filed their bundle of documents and notice to produce. The last scheduled activity which preceded the dismissal order was the hearing slated for 19/12/2013. I have observed that court proceedings were not taken on that day.

4. I have perused the Notice to Show Cause, culminating in the dismissal order. It was issued by the court on 7/5/2015 and addressed to **"M/s Mandla & Schmi Advocates, Queensway House, P. O. Box 48642 Nairobi"** and **"M/s Ogola & Okello Advocates, Next to Liverpool VCT Center, Argwings Kodhek Road, Nairobi"** respectively. The Notice to Show Cause was served on M/s Mandla & Sehmi Advocates on 28/5/2015. They stamped and signed on the original Notice, acknowledging receipt. There is, however, no evidence of service of the notice to show cause on the plaintiff's then advocates, Ogolla Okello & Co. Advocates. There is no evidence of any notice whatsoever to the plaintiff's advocates.

5. Order 17 Rule 2 (1) which contains the legal framework for dismissal of suit for want of prosecution provides as follows:-

"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

6. In my view, written notice to the parties to show cause why the suit should not be dismissed for want of prosecution is a mandatory requirement that ought to be satisfied before a dismissal order can be issued. In the absence of evidence that indeed written notice was given to the plaintiff or his advocates in tandem with the requirements of Order 17 Rule 2(1), a dismissal order ought not issue.

7. I have perused the cause list of 29/5/15, the day when the plaintiff's suit was dismissed. In the said cause list, M/s Mandla & Sehmi Advocates were incorrectly captured as acting for the plaintiff, Sukdev Sidhu while M/s Ogola & Co. Advocates were captured as acting for the defendants. Even if the day's cause list were to be considered as some form of short notice, it was largely misleading and cannot be accepted as proper notice within the framework of Order 17 Rule 2.

8. Section 3A of the Civil Procedure Act gives courts inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 Rule 15 of the Civil Procedure Rules gives courts the power to set aside any order made ex-parte. This discretionary power is to be exercised judiciously with the overriding objective of achieving justice to all the parties. Had the requirements of Order 17 Rule 2 (1) of giving of written notice to show cause been satisfied, I would have gone a step further and considered the present application on the basis of the guiding principle laid down in **Mbogo & Another. Vs Shah (EALR) 1908**. It provides that a court's discretion to set aside an ex parte order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error; and it is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice. In the present application, there is no evidence that written notice was given to the plaintiff as required under Order 17 Rule 2(1) of the Civil Procedure Rules. In the circumstances, the dismissal order ought to be set aside.

9. In light of the above reasons, the Plaintiff's Notice of Motion dated 4/5/16 seeking reinstatement of this suit is hereby allowed in terms of Prayers 1 and 2. There shall be no order as to costs.

Dated, signed and delivered at Nairobi on this 31st day of August 2017.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court clerk