



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 744 OF 2012

JOHN NYAGUCHA NYANGOTO ::::::::::::::::::::1ST PLAINTIFF

JAMES OBIRI OENGA::::::::::::::::::2ND PLAINTIFF

(Suing As The Legal Representatives And Administrator Of The
Estate Of The Late Thomas Anching'a Nyangoto)

VERSUS

PATRICK CHANUA ONDICHO:::::::::::::::::: DEFENDANT

RULING

Introduction:

This is the ruling in respect of an application dated 26.15.2017 brought by way of a Notice of Motion by the Plaintiff/Applicant for orders that;

1. The order dismissing the suit made on 18.5.2017 be set aside.
2. The suit be reinstated and set down for hearing.
3. Costs be in the cause.

This application came up for hearing *interpartes* on 18.7.2017 when the Plaintiff's counsel argued the application. Mr. Momanyi relied on the grounds on the face of the application together with the supporting affidavit.

It was his submission that the mistake was solely his as he failed to Notice that the matter was in the cause list for hearing. He stated that he went to the registry but the staff were not able to trace the file. He submitted that later in the day the clerk attending to Justice Matheka informed him that the matter had been dismissed.

Counsel further submitted that the failure to attend court was not intentional and he is prepared as an advocate to bear the thrown away costs in case the same is ordered.

Mr. Momanyi urged the court to exercise its discretion and reinstate the suit as the plaintiff has always been desirous of prosecuting the case. He relied on Court of Appeal Case No. 329 of 2011 in which a similar situation arose.

Defendant's counsel's submissions.

The application was opposed by Mr. Kiboi counsel for the defendant who relied on the replying affidavit sworn by the defendant. He stated that the court dismissed the Plaintiffs suit on its own motion. Counsel further stated that even though the advocate for the Plaintiff failed to attend court, the court would still have dismissed the suit as per the notice for dismissal for want of prosecution which had been issued.

Mr. Kiboi submitted that the last time the matter was in court was in 2014 and there has been inordinate delay in prosecuting this case as the Plaintiff has lost interest. Counsel urged the court to dismiss the application.

Mr. Momanyi in reply stated that the matter was not in court for dismissal as no notice has been served for the same as he is the one who had taken the hearing date in the registry.

Analysis and Determination

This is an application for reinstatement of a suit that was dismissed for want of prosecution.

The issues that must be considered are;

1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case,
2. Whether the delay is intentional, contumelious and therefore inexcusable,
3. Whether the delay is an abuse of the court process,
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.
5. What prejudice will the dismissal occasion to the plaintiff?
6. Whether the plaintiff has offered a reasonable explanation for the delay.
7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

I notice that it is counsel for the plaintiff who fixed this matter for hearing in the registry on 31.3.2017. He took steps to have the matter heard. It is also not true that the matter had been scheduled for dismissal as stated by the counsel for the defendant as no such notice was issued by the Deputy Registrar. The record is clear that the matter had been fixed for hearing by counsel for the plaintiff.

It is also on record that counsel for the defendant and his client were also not present in court when the same was dismissed.

Counsel for the plaintiff filed the current application without delay.

I have considered the issues above together with the reasons given for not attending court and find that the same is sufficient to warrant the reinstatement of this suit. The mistake is excusable and the dismissal will cause the plaintiff prejudice.

I have also looked at the relevant authorities and I am persuaded that this is a case where I will exercise my discretion in favour of the plaintiff.

Accordingly, I set aside the order issued on 18.5.2017 dismissing this suit and reinstate it for full hearing.

Parties to comply with order 11 within 30 days and fix the suit for hearing.

Costs in the cause.

Dated and delivered at Eldoret on this 27th day of September, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Momanyi for the Plaintiff/Applicant.

Koech- Court Assistant