



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 72 OF 2011

WESAKULILA FARMERS KTDPLAINTIFF

VERSUS

MAURICE BIKET & OTHERSDEFENDANT

RULING

1. The application dated 15/12/2016 seeks the following orders:-

- (a) The matter be certified urgent and serviceable dispensed with in the first instance.**
- (b) This Honourable Court be pleased to set aside the court orders made on 12th February, 2015 dismissing the plaintiff's case and be pleased to reinstate the suit herein for hearing.**
- (c) That the dismissal of the suit is prejudicial to the applicant and it is only fair and just that the same be reinstated and be determined on merits.**
- (d) The defendants will not be prejudiced by the orders herein sought.**
- (e) The cost of this application be proved for.**

2. It is premised on the grounds that though the plaintiffs suit was dismissed on 12/2/2015, the applicants directors were not served by the defendants as had been earlier ordered by the court on 20/1/2015 and the plaintiff was therefore unrepresented as it was unaware of the date.

3. The plaintiff avers that it is desirous of ventilating their case and it would suffer prejudice if the dismissal denies it a chance to do so. It is stated that since the defendants have filed a counterclaim, both sides will have an opportunity to be heard.

4. The application is opposed. The defendants filed an affidavit sworn by one Bramwel Wanjala on 28/3/2017. He avers that he has been authorized by his "co-applicants" to swear the replying affidavit on their behalf. He states that the suit has now attained its 6th years; that since inception the plaintiffs have never been ready to proceed; that as early as 29/1/2013, the then plaintiffs' counsel had intimated he was ready to hand over the matter to another counsel; that on all occasions when the suit came up for hearing it was adjourned at the instance of the plaintiffs. Counsel including the current counsel, that after their counsel died the plaintiff appeared in court on 12/2/2015 though with no representations; that they were not ready to proceed and the court therefore dismissed the suit for want of prosecution; that the court may even dismiss a suit *suo motu*; that there has been a 2 year delay in bringing the instant application; and that the application is an afterthought since the applicant never raised the issues it is raising when the

matter came up on 19/10/2015 and 24/10/2016 for the hearing of the counterclaim.

5. The questions that lend themselves to the determination of this court in the instant application are as follows:-

(1) Should the dismissal order issued on 12/2/2015 be set aside?

(2) Who should bear the costs?

6. It is now a well-established principle that this court has a very wide discretion, unfettered discretion to set aside judgment in deserving cases. The instant case is not a situation where judgment was entered but the result of an order of dismissal is the same – the plaintiffs’ suit does not exist anymore – it has been determined by reason of default by the plaintiff – against the plaintiff who is even likely to be compelled to bear the costs thereof.

7. The plaintiffs’ suit was dismissed on 12/2/2015. None of the parties appear to have been in court on that day – even the defendants or their counsel.

8. It is not disputed that the suit by the plaintiff came to a standstill by reason of the death of their lawyer. Subsequently to the dismissal, the plaintiffs have shown an interest in the suit and have brought this application.

9. It is also the correct position that the defendants counsel was to serve the directors of the plaintiff before 12/2/2015 though the Replying Affidavit asserts that the plaintiffs were in court on 12/2/2015, there is no proof of such service having been effected. There is also no proof who is being referred to as “*plaintiffs*” in that replying affidavit.

10. In any event the court record for 12/2/2015 does not show that there was any presence of any representative of the plaintiff or the defendant and no affidavit of service is exhibited by the defendants to show that the plaintiffs’ directors were served for the mention dated for 12/2/2015.

11. Notably, the mention of the case was scheduled only for the purpose of ascertaining from the defendants’ counsel that he had effected service on the directors of the plaintiff. The defendants’ counsel did not appear in court to prove that. The suit was therefore dismissed during a mention for failure to both parties to appear.

12. I believe it when the plaintiff states that the directors were not served as ordered by court for 12/2/2015. They would not then have known of that mention date. The defendants’ counsel, if he had effected service as ordered could have as well filed an affidavit of service here which he has not done.

13. I find it improper in the circumstances that the only thing he has is word of mouth, to say that the plaintiffs were in court on the day of dismissal.

14. It is only by good fortune that the defendants’ counterclaim which was still subsisting was not expressly dismissed and it is not clear whether the court was aware there is a counterclaim or not while issuing the order dismissing the plaintiff’s suit.

15. I have perused the court record and found nothing that happened in this matter that is so grievous as to subject the plaintiff to total loss of opportunity to prosecute their claim especially now that they are back on their feet after they secured the services of a new advocate and brought this application.

16. A closer look at the record reveals that there has also been some indolence on the part of the defendants who should have prosecuted their counterclaim to completion during the two-year interregnum separating the dismissal order and the filing of the setting aside application.

17. I also do not see any prejudice that the defendants would suffer if the dismissal order is set aside as

prayed, reason being that the same witnesses who would testify for the plaintiff in the original case begun by way of plaint would almost certainly be the ones who would testify against the defendant in the suit begun by way of a counterclaim.

18. For the above reasons I find that justice in this case requires this court to afford both the parties a hearing in their respective cases especially because it will cost all parties very little if the plaintiffs' case is reinstated.

19. I therefore grant prayer No. **(b)** in the application dated **15/12/2016**. There shall be no orders as to costs.

Dated, signed and delivered at Kitale on this **19th** day of **October, 2017**.

MWANGI NJOROGE

JUDGE

19/10/2017

Coram before Mwangi Njoroge Judge

Court Assistant – Isabellah

Kiplagat holding brief for Kipseii for plaintiff/applicant

COURT

Ruling read in open court in the presence of the counsel for the applicant.

MWANGI NJOROGE

JUDGE

19/10/2017