



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ENVIRONMENT AND LAND CASE NO. 3 OF 2013**

**WILSON NATO.....PLAINTIFF**

**VERSUS.**

**FRANCIS SIMIYU WEKESA.....DEFENDANT**

**RULING.**

[1]. The application herein is brought under Sec. 3, 3A and 63 of the Civil Procedure Act 2010 and under order 12 rule 7 and 45 of Civil Procedure rules. The applicant prays for an order of stay of the orders made by this court on 17/5/2014 pending the hearing of this application inter partes. The applicant avers that this suit was dismissed for want of prosecution on 17/4/2014 in the absence of the applicant and in the absence of his counsel. The applicant states that he was sick and that he had not been informed of the hearing date by his counsel on record when the suit was dismissed. He argues that the date was obtained prematurely since the hearing date was fixed by the defendant. He argues that it is in the interests of justice and fairness that the orders prayed herein be granted.

[2]. The application was opposed by the respondent who filed a replying Affidavit on 16/4/2015. Who swore an affidavit stating that the application was an afterthought and meant to deny the respondent his enjoyment of possession and use of his land.

The respondent argued that the applicant is not entitled to the orders sought in absence of an explanation of why the application was not brought without inordinate delay. It was also argued that the applicant has not demonstrated why the courts discretion should be exercised in his favour. The respondent argued that there was no due diligence on the part of the applicant and/or his Counsel. The respondent further argues that he is the one who fixed this case for hearing and served the applicant. That this is a demonstration by the applicant of lack of interest in the prosecution of the suit. That the land is truly in the name of the respondent.

[3]. I have considered the arguments by the applicant and the reply of the respondent and I have perused the court file. I note that the fixing of this case for hearing was done on 6/6/2014 by Ingotsi & Company. There was no appearance for the applicant.

The hearing notice was served on 9/6/2014. This was a personal service on the advocates of the applicant at their offices in Kakamega. The applicant is the one who had appointed Wetsutsa & Co. to conduct the case on his behalf. The advocates had a duty to inform the applicant. The applicant now argues that he was not informed by the said advocates of the hearing date. There is no affidavit or any form of document from the said advocates to show that indeed, they forgot or that through inadvertence they failed to inform their client the applicant. If they failed to inform the applicant, then, the applicants claim lies elsewhere under the law of negligence. The overriding objective of the Act demands that any party to Civil proceedings is under a duty to assist the Court to further overriding objective of the Act and to that effect, to participate in the process of the court and to comply with directions and orders of the court. See Section 1A (3)A of the Civil Procedure Act.

[4]. The applicant therefore was obliged not only to visit his advocates and find out about his case, he was also enjoined to visit the court registry and find out about his case. He no longer can sit at home and only wait for summons from his lawyer.

The applicant attached Medical documents to show that he was sick over the period. That may well have

been so. But this sickness had no bearing to the hearing of the suit. He claims that he was not aware of the hearing date. So even if he was well he would not have come to court. Those medical documents therefore do not help and or explain his absence in court. The case having been fixed for hearing by the respondent, and also having been served by the respondents advocate to the counsel for the applicant is a testament that the applicant was either disinterested in the case or had gone to sleep over the same.

I am not persuaded to grant the prayer sought. I dismiss the application with costs to the respondent.

**Dated at Bungoma this 4<sup>th</sup> day of October, 2017.**

**S. MUKUNYA**

**JUDGE**