



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MERU
ELC CASE NO.57 OF 1999

CATHOLIC DIOCESE OF MERU TRUSTEES (REGISTERED)...PLAINTIFF

VERSUS

AGASTINE NJAGI NJIIRI.....DEFENDANT

FRIDAH WARUE NJAGI.....1ST INTERESTED PARTY

EMELDA MUTHONI NJAGI.....2ND INTERESTED PARTY

MARTIN MIRITI NJAGI.....3RD INTERESTED PARTY

R U L I N G

The application before me is the **Notice of Motion** dated 26/5/2017 brought under **Order 51 CPR, Section 1A, 1B and 3A CPA and Article 159 of the Constitution of Kenya, 2010**. The applicant is seeking the following orders:-

- 1. THAT this application be certified urgent and be heard urgently on priority basis.**
- 2. THAT this Honourable court be pleased to set aside its dismissal orders of 23rd May 2017 and reinslate this suit to hearing.**
- 3. THAT the injunction orders subsisting before the dismissal of the suit on 24/5/2015 be reinslated.**
- 4. THAT costs be int he cause.**

The application is supported by an affidavit of Mutegi Mugambi advocate sworn the same date. The application is further supported by grounds on the face of the said application. The application is opposed with grounds of opposition filed through the firm of Charles Kariuki and Kiome Associates filed on 4th June 2017.

The gist of this application is an order of the court issued on 23rd May 2017 dismissing this suit for non-attendance and for want of prosecution with costs to the defendant. In his supporting affidavit, he avers that on the fateful date, he attended court for the hearing of this case but was held up in High Court Number 2 and 3 in succession Cause No.415 of 2006 and 432 of 2010. He attached a copy of the cause list for that date. He said that he requested M/s Mwirania to hold his brief who instead held brief in a different file on the mistaken belief that it was the file I had requested her. When this case was called out, there was not response and the case was then dismissed for non-attendance and for want of prosecution. The learned counsel stales that having perused the court file he was surprised that the counsel for the

defendant/respondent Mr. Mwiti appeared on that date and misled the court that the suit had abated as a result of which the suit was dismissed. The learned counsel deponed that it was the defendant who were supposed to apply for substitution. He further deponed that the plaintiff is keen to prosecute this suit and that the mistake by counsel should not be visited upon his client. The learned counsel also stated that the subject of this suit is land and that the defendant will not be prejudiced if the dismissal order is set aside and the suit reinstated so that the case can be heard on merit. The defendant filed the following grounds in opposition to the application.

- 1. THAT the suit abated upon demise of the defendant who died on 27th October 2015.**
- 2. THAT the application is untenable as no claim stands against the deceased defendant.**
- 3. THAT the application is unmerited as the plaintiff has never done any substitution to the deceased defendant.**
- 4. THAT the matter stands dismissed for want of prosecution, hence no cause of action would suffice.**
- 5. THAT the application is unmerited untenable in law and frivolous.**

I have considered the application, the grounds of opposition and the submissions by the counsels. In an application to set aside an order for dismissal of a suit for non-attendance and want of prosecution the court shall consider the reasons why the party in whose favour the order is being sought was absent. The applicant has given explanation for his absence in court on 23/5/2017. Those factual matters have not been controverted by the respondent who filed grounds of opposition only. Grounds of opposition raises issues of law only and not facts. Looking at ground No.1 of the grounds of opposition dated 14/6/2017 the respondent alludes to this suit having abated upon demise of the defendant who allegedly died on 27/10/2015. Those averments in my view cannot be raised as a point of law since the death of a person is a factual issue which has to be proved by tendering a death certificate.

The plaintiff/applicant has deponed in paragraph 18 stated that the application for substitution of the defendant (deceased) was agreed to be made by counsel for the defendant/Respondent on 9/6/2016. Those in my view are issues that need to be interrogated at another level where all parties are given an opportunity. Since this application is seeking the exercise of this courts discretion, I am satisfied that it will be in the interest of justice to allow the application. Consequently I find merit in the application dated 26th May 2017 and the same is hereby allowed as prayed.

SIGNED AT GARISSA BY JUDGE CHERONO

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

Janet Court Assistant

Kithinji H/B for Mutegi for Plaintiff present

Miss Wanjohi H/B for Kiome for Defendant present

Muthomi for Interested Parties present

HON. L. N. MBUGUA

ELC JUDGE

Further orders: Directions are given to the effect that the firm of Kiautha Arithi to substitute the Defendant within 60 days otherwise the suit will stand as dismissed Notice to show Cause on 13:02:2018.

HON. L. N. MBUGUA

ELC JUDGE