



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 105 OF 2010

VANISHING AFRICA LTD.....PLAINTIFF/APPLICANT

=VERSUS=

- 1. SHELLA WELFARE GROUP.....DEFENDANT/RESPONDENT**
- 2. AZHAR ALI MBARAK.....DEFENDANT/RESPONDENT**
- 3. HAMID MOHAMED ABDALLA.....DEFENDANT/RESPONDENT**
- 4. ATWAA SALIM MASSOUD.....DEFENDANT/RESPONDENT**
- 5. MAALIM SHUKRY.....DEFENDANT/RESPONDENT**
- 6. ABDULNASSER SALIM.....DEFENDANT/RESPONDENT**
- 7. NASIR MOHAMEDDEFENDANT/RESPONDENT**
- 8. HAFIDH AHMED.....DEFENDANT/RESPONDENT**
- 9. AHMED AWADH.....DEFENDANT/RESPONDENT**
- 10. ABDULWAHID MOHAMED.....DEFENDANT/RESPONDENT**
- 11. ADALLA FASHIL.....DEFENDANT/RESPONDENT**
- 12. ABDALLA MOHAMD ALI.....DEFENDANT/RESPONDENT**
- 13. SHIBAN ADUL NASSERDEFENDANT/RESPONDENT**
- 14. MOHAMED SULTAN.....DEFENDANT/RESPONDENT**
- 15. OMAR SULTAN.....DEFENDANT/RESPONDENT**

RULING

1. On 18th September, 2015, this court, on its own motion, dismissed the suit for want of prosecution.

2. The Plaintiff has now filed an Application dated 14th January, 2016 in which he is seeking for the following orders:-

(a) THAT the Plaintiff's suit dismissed on 18th September 2015 by Justice Angote for want of prosecution be reinstated.

(b) THAT costs of this Application be provided for.

3. The Application is premised on the grounds that Mr. Bernard Spoerry and his advocates have been intermittently under medical treatment from injuries and ill health; that the issues and the subject matter are substantial involving 18 litigants in Shella Village, Lamu Island and that the reinstatement of the suit will not cause any prejudice to the Defendants.
4. In his affidavit, the Plaintiff's director deponed that the hearing notice of 18th September, 2015 was sent to his advocate by ordinary mail to his Mombasa Postal address; that although his advocate's postal address is in Mombasa, he resides in Lamu; that his advocate does not have sufficient staff and that the hearing of 18th September 2015 came to his advocate's knowledge after that date.
5. The said director further deponed that he suffered serious physical injuries from an attempted murder and that he is under medical management.
6. In his response, 2nd Respondent deponed that the reinstatement of the suit will be prejudicial to the Defendant and that it is the primary duty of the Plaintiff to take steps to progress his suit.
7. The advocate for the Plaintiff and the Defendants filed their respective submissions which I have considered.
8. The Plaintiff's claim is that the Defendants have commenced building and are continuing to build a sea wall on his plot thus obstructing and interfering with its proprietorship rights and peaceful enjoyment of unobstructed view of the sea and access to the beach.
9. The Plaintiff has admitted that indeed the suit was last in court on 25th July, 2012 before it came up on 18th September, 2015 for dismissal for want of prosecution.
10. The Plaintiff has also admitted that his advocate received a Notice to Show Cause vide his Mombasa postal address albeit after the date indicated in the Notice to Show Cause.
11. Although this suit was dismissed by the court for want of prosecution on 18th September 2015, it was not until 15th January, 2016 that the Plaintiff filed the current Application.
12. The Plaintiff's advocate has not denied that indeed he practices from Mombasa. The said advocate has also not stated the date that he received the NTSC from this court.
13. It is very unlikely, as deponed by the Plaintiff's director, that the NTSC was received after 18th September, 2015 by its advocate considering that Mombasa is only two hours drive away from Malindi.
14. In any event, the failure by the Plaintiff's advocate to depone on the exact date that he received the NTSC from his postal box clearly shows that he must have received the NTSC before 18th September, 2015 but refused to attend court.
15. I have gone through the Plaintiff's affidavit and I have not come across any good reason as to why the Plaintiff did not fix the matter for hearing for over three years.
16. The medical reports annexed on the affidavit do not in any way indicate that the Plaintiff's director could not prosecute its case between the year 2012 and 2015.
17. The injuries that the Plaintiff's director was inflicted on were sustained in the year 2010, whereafter this suit was filed. There is no evidence before me to show that the Plaintiff's director was incapacitated to the extent that he could not fix the matter for hearing.
18. In the absence of a good reason as to why the Plaintiff or his advocate did not progress the matter between 25th July, 2012 and 18th September, 2015, I find and hold that the Application dated 14th January, 2016 is unmeritorious.
19. For those reasons, I dismiss the Application dated 14th January, 2016 with costs.

Dated, signed and delivered in Malindi this 14th day of July, 2016.

O. A. Angote

Judge