



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CIVIL CASE NO.21 OF 2002

DOUGLAS RAPEMO ADERO.....1ST PLAINTIFF

WILLIAM ODERO RAPEMO.....2ND PLAINTIFF

VERSUS

I.C.D.C LIMITED.....1ST DEFENDANT

JULIUS OLOO AMIMO.....2ND DEFENDANT

ARTHUR OMONDI OJEE.....3RD DEFENDANT

RULING

1. The 2nd Plaintiff, **William Odero Rapemo**, filed the notice of motion dated 27TH August 2015 seeking to have the order dismissing the suit set aside and the suit be reinstated. The Plaintiff listed eight grounds on the notice of motion which is also supported by the affidavit of **William Odero Rapemo** sworn on the 25th August 2015 summarized as follows:

- a) That the failure by the Plaintiff and his counsel to attend court on 13th July 2015, when the dismissal order was made, was because the advocate's clerk obtained the cause list late.
- b) That the delay in prosecuting the case was due to the preliminary applications that had been filed, the death of 1st Plaintiff and the deponent ill health that has rendered him partially crippled.
- c) That the Defendants will not be prejudiced if the suit is reinstated.

2. The 2nd Defendant, **Julius Oloo Omimo**, opposed the application through the grounds of opposition dated 1st October 2015 summarized as follows:

- a) That pursuant to the 2nd Defendant notice of motion dated 3rd August 2009, the 2nd Plaintiff had in his replying affidavit sworn on 9th November 2009 raised the issue of death of 1st Plaintiff as the reason for delay as he does in the current application. That the court had in its ruling delivered on 26th November 2009 directed that the 2nd Plaintiff substitute the 1st Plaintiff in 28 days and set the suit down for hearing on priority basis but did not do so.
- b) That the court declined to allow the 2nd Plaintiff's application to extend the time to substitute the 1st Plaintiff in its ruling of 17th February 2012. That the application has no basis in view of **Section**

77 (3) of the Registered Land Act Chapter 300 of Laws of Kenya (repealed), as the 2nd Defendant was an innocent purchaser for value without notice of the alleged irregularities.

c) That the application is not merited, justified and is an attempt to prolong the life of this suit which has no cause of action.

d) That the application is misconceived and constitutes an abuse of the court process and ought to be dismissed with costs.

3. The Plaintiffs counsel filed their written submission dated 26th October 2015 on the 27th October 2015 while counsel for the 2nd Defendant filed theirs dated 26th October 2015 on the same date. The 1st Defendant, I.C.D.C Limited, also filed written submissions dated 12th July 2016 on the 13th July 2016. There are no replying documents or submissions filed by or for 3rd Defendant, Arthur Omondi Ojee.

4. The following are the issues for determination by the court;

a) Whether the Plaintiff have established reasonable grounds for setting aside the dismissal orders of 13th July 2015.

b) What orders to issue.

c) Who should bear the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by 2nd Plaintiff, the grounds of opposition filed by 2nd Defendant, the written submission by the three counsel for the Plaintiff, 2nd and 1st Defendants respectively and come to the following findings;

a) That before the issuance of the notice to show cause why the suit should not be dismissed under **Order 17 Rule 2 of the Civil Procedure Rule**, that culminated to the dismissal order of 13th July 2015, the matter was last in court on the 25th July 2013 and no party had taken any step to prosecute it for more than one year.

b) That come the date for the notice to show cause why the suit should not be dismissed on 13th July 2015, only the counsel for the 2nd Defendant was in court and he lamented that the suit has been pending since 2002. The counsel then moved the court to dismiss it.

c) That there is no evidence availed to confirm or suggest that the Plaintiff counsel had not been served with the notice to show cause, and the excuse that the counsel's clerk obtained the cause late has not been confirmed through an affidavit.

d) That in view of the fact that the 1st Plaintiff is said to have died 7th March 2004 (see certificate of death NO.787707) and that the 2nd Plaintiff had obtained Limited grant ad litem in Kisumu H.C Cause No.354 of 2006 on the 8th August 2006, there is no justified reasons why the substitution of the Plaintiff has not been done despite the various court directions on the matter.

e) That the death of the 1st Plaintiff having occurred about eleven (11) years before the order of dismissal of 13th July 2015 would not suffice to explain why the 2nd Plaintiff did not take steps to prosecute the case since 25th July 2013.

f) That the copy of the doctor's note annexed to the supporting affidavit is dated 31st July 2015 and does not explain the health status of the 2nd Plaintiff between the 25th July 2013 to 13th July 2015, which is the relevant period.

g) That the affidavit of James Aggrey Mwamu sworn on 25th August 2015 attached to the supporting to the effect that he had a matter before Maseno Resident Magistrate Court, being Criminal case No.889 of 2015 and that his clerk had not made a copy of the cause list falls short of rebutting service of the notice to show cause that was coming for hearing on 13th July 2015 and does not explain why counsel did not attend court or send a representative. The counsel has not explained why he gave preference to the matter in the lower court instead of this court.

h) That there has been inordinate delay by the Plaintiff to set this matter for hearing and there are no sufficient grounds presented by the 2nd Plaintiff to enable this court exercise it's discretion in his favour.

6. That in view of the foregoing the court finds that the Plaintiff's notice of motion dated 27th August 2015 is without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 26TH DAY OF OCTOBER 2016

In presence of;

Plaintiffs absent

Defendantsabsent

Counsel Mr Onyango for Onsongo for 1st Defendant and Mr Njoga for for Ragot for 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

26/10/2016

26/10/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mr Ouma Njoga for Ragot for 2nd Defendant

Mr Onyango for Onsongo for 1st Defendant

Court: Ruling dated and delivered in open court in presence of Mr. Njoga for Ragot for 2nd Defendant and Mr. Onyango for Onsongo for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

26/10/2016