



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT KITALE

LAND CASE NO. 98 OF 2013

KANYONGO AREPEL RIAMASIA.....PLAINTIFF

VERSUS

APALINE AREPEL.....DEFENDANT

RULING

BACKGROUND

1. The plaintiff filed a chamber summons dated 16/3/2001 seeking to set aside the order of court issued on 2/10/2000 dismissing the suit herein for want of prosecution. The applicant and the respondent are brother and sister respectively. The two have been litigating over LR. No. West Pokot/Siyoi/125 since the 80's (suit land). The respondent had filed proceedings before the elders in respect of the suit land in or around 1985. The proceedings were filed pursuant to the provisions of the Magistrates' Jurisdiction (Amendment) Act of 1981 (now repealed). The verdict of the elders which was in favour of the respondent was adopted as a judgment of the court vide Kitale Senior Resident Magistrate's Court land Case No. 22 of 1985.

2. The applicant filed an application before the Senior Resident Magistrate's court seeking extension of time within which to object to the verdict of the elders. This application was rejected by the court. The applicant then filed an appeal against the refusal vide Eldsoret HCC Civil appeal No. 60 of 1986. This Appeal was summarily rejected by the High Court. The applicant preferred an appeal against the summary rejection vide Nakuru Court of Appeal Civil application No. 162 of 1988. This application was dismissed by the Court of Appeal on 29/9/1988 for non attendance of both parties who had been duly notified of the hearing date.

3. On 13/5/1991, the applicant herein filed a suit against the respondent seeking nullification of the elders verdict as well as the adoption of the same as judgment of the court vide Kitale Senior Resident Magistrates Court Land case No. 22 of 1985. The applicant also sought a declaration that he was the sole proprietor of the suit land and orders of eviction against the respondent.

4. On 16/6/1993, the applicant obtained an injunction restraining the respondent from cultivating, ploughing, building, harassing, evicting or in any way interfering with the suit land until the hearing and determination of the suit. The suit was thereafter set down for hearing on 10/3/1994 but the applicant did not attend court. The suit was dismissed for non attendance. An application to reinstate the suit was filed in court on 5/1/1995. This application was set down for hearing on 7/3/1995 but the same was dismissed for non attendance. An application to reinstate the dismissed application was filed on 20/11/1995. This application was allowed on 22/4/1996.

5. The suit which had been dismissed on 10/3/1994 was reinstated vide application dated 5/1/1995 which was allowed on 18/11/1996. The reinstated suit was fixed for hearing on 14/3/1997 but the same could not proceed as the case could not be reached due to pressure of work. The case was adjourned generally. The applicant never took any step to prosecute the suit until 2/10/2000 when the same was dismissed for want of prosecution.

APPLICANT'S APPLICATION

6. The applicant filed the present application on 23/3/2001 seeking reinstatement of the dismissed suit. The applicant contends that between 1997 and 2001 his advocates were trying to have the suit transferred from Nakuru to Kitale High Court for hearing and disposal when his advocates learnt on 21/2/2001 that the case had been dismissed for want of prosecution on 2/10/2000. The applicant contends that he will suffer irreparable damages if the dismissal order is not set aside as this is a matter involving land. It is in the same application for reinstatement that the applicant sought to transfer this case from Nakuru to Kitale High Court. The case was finally transferred to Kitale High court vide a consent recorded by counsel for the applicant and respondent on 1/7/2013 and filed in court on 5/7/2015. The file was sent to Kitale vide covering letter dated 8/7/2013. Kitale High court acknowledged receipt of the file vide letter dated 17/7/2013.

7. The applicant further contends that he lost touch with his advocates who closed their Eldoret offices. When his son contacted an advocate called J. Kimani, he told him that he was not left with his file. He contends that he has not lost interest in the case and that if given time they will agree.

8. The application is opposed by the respondent through replying affidavit filed on 24/4/2014 with leave of court. The respondent also relies on grounds of opposition filed on 11/12/2013. The respondent contends that the applicant has not offered any explanation why he did not prosecute his case. The respondent also contends that the applicant has taken long to prosecute the application for reinstatement of this case.

9. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. Setting aside an order dismissing a suit is a matter of discretion which should be exercised judiciously based on the facts as presented by the applicant. I have gone to great lengths to lay down the background of this case. It is from this background of the case that I will decide on whether to exercise my discretion in favour of the applicant. The applicant contends that the suit was dismissed as he attempted to have the case transferred to Kitale High Court from Nakuru. From the annexures to the applicant's affidavit, it shows that the applicant took about 5 years trying to have the case transferred from Nakuru to Kitale. A mere transfer of a case should not take 5 years. When the applicant became serious about transfer of the case from Nakuru to Kitale, it took a week to do so. It is therefore ironical for the applicant to say that he took about five years trying to have the file transferred to Kitale.

10. The case was last in court for hearing on 14/3/1997. The trial judge advised in her order that the case should be heard at Eldoret where it had been initially filed. This advise was made in writing in the presence of the applicant's counsel. The judge's advise was not considered until 14/10/1997 when the applicant's advocates wrote to the respondent's advocates to consider the case being transferred back to Eldoret High Court. The process of transfer dragged on until 21/2/2001 when the applicant's advocates realised that the case had been dismissed on 2/10/2000. The application for reinstatement was made one month after discovery of dismissal. The application to reinstate the suit was first listed for hearing on 9/7/2001 when the same was stood over generally at the request of the applicant's advocates. The same was again listed down for hearing on 4/2/2002 when again the applicant's advocate requested that it be stood over generally. The applicant went into slumber until after 10 years later that the file was transferred to Kitale. There was no action taken to prosecute the application for reinstatement for those 10 years.

11. The application was listed for hearing on 18/12/2013. The same could not proceed as the parties were said to be negotiating. The negotiations took a full year in vain. The application was finally argued on 4/12/2014. It is clear that the applicant has not been keen on prosecuting the suit. The applicant should

have taken initiatives to prosecute his application for reinstatement in time but he did not. He has been given time to have the matter settled amicably but this is not possible. He is again pleading for more time to agree with his sister the respondent. This is a clear indication that he is not keen on prosecuting his application but is only out to delay the finalization of this case. The reason for this is because he is enjoying an injunction which was given some years back. What the applicant doesn't know is that those injunctive orders lapsed upon dismissal of the suit on 2/10/2000.

12. The applicant filed this suit after he failed to have time to challenge the elders verdict in the manner provided under the Magistrates Jurisdiction (Amendment) Act 1981 (now repealed). Section 9 E (2) of the said Act provided as follows:-

2. "Upon judgment being entered a decree shall follow and no appeal shall lie from that decree except in so far as the decree is in excess of, or not in accordance with the decision of the panel of elders."

The applicant lost his battle to challenge the elders award both in the High Court and Court of Appeal. Without appearing to prejudge the present suit, I do not think that the same suit has any chances of success. However, this is not the reason for arriving at the decision which I will shortly arrive at.

13. It is clear that the applicant does not deserve exercise of discretion in his favour. He is guilty of inordinate delay which has not been convincingly explained. I therefore find that the applicant's application lacks merits. The same is hereby dismissed with costs to the respondent.

It is so ordered.

[Dated, signed and delivered at Kitale on this 27th day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of Mr. Kiarie for defendant/respondent and Mr. Chebii for plaintiff/applicant.

Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

27/1/2015.