



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.59 OF 2009

MADZO MWANGOLO HENRY.....PLAINTIFF/APPLICANT

VERSUS

JAMES MUNGA ODONDI.....1ST DEFENDANT
ZAKARIA KARANJA KINYANJUI.....2ND DEFENDANT
CHARLES MAINA.....3RD DEFENDANT
GITAU MUCHUNU.....4TH DEFENDANT
RONALD KIBE KINYANDUI.....5TH DEFENDANT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Application dated 22nd September 2014 seeking for the following orders:
 - (a) **That the order of this Honourable Court made on the 28th March, 2014 dismissing the suit filed herein be set aside and the said suit as filed herein on 15th June 2009 be reinstated**
 - (b) **That the Applicant will offer the costs of this Application**
2. The Application is premised on the grounds that the suit concerns land on which the Plaintiff has lived for more than 50 years and it is only fair that she gets her day in court.
3. According to the affidavit sworn by the Plaintiff's counsel, they could not proceed with the prosecution of the suit because the Defendants could not be traced for service; that the Originating Summons was eventually served on the Defendants by way of substituted service and that after the Defence was filed, they invited the Defendants' advocate to take a convenient hearing date but they could not trace the said advocate.
4. The Plaintiff's counsel deponed that when the matter was fixed for the hearing of the Notice to show cause why the suit should not be dismissed, he was not in court because the matter had escaped his attention; that the Plaintiff has been very keen to have the matter prosecuted and that

- the court should indulge the Plaintiff.
5. In response, the Defendants' counsel submitted that the Application is an abuse of court process; that no reason has been given as to why the Plaintiff's counsel was not in court on 28th March, 2014 and that due diligence has not been exercised in this matter.
 6. The Plaintiff's counsel filed his written submissions which I have considered. The Defendants did not file their submissions.
 7. The record shows that this matter came up for the hearing of the Notice to show cause why the suit should not be dismissed pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules on 7th March 2014.
 8. The matter was placed before the Deputy Registrar who directed that the same should be mentioned before the Judge on 28th March 2014 for directions. On that day, neither the Plaintiff nor his counsel was in court. The court proceeded to dismiss the matter for want of prosecution.
 9. As I have stated, the matter came up for mention on 28th March 2014 for directions on the pending "Notice to show cause". The correct thing that should have happened on that day was to set down the said Notice to show cause for hearing.
 10. The matter was coming up for mention on 28th March 2014 and an order dismissing the suit was therefore inappropriate.
 11. Consequently I shall, which I hereby do, set aside my order of 28th March 2014 dismissing the suit and direct that the Notice to show cause why this matter should not be dismissed for want of prosecution dated 8th January 2014 be set down for hearing by the Plaintiff within 30 days from the date of this Ruling.
 12. Unless the Notice to show cause dated 8th January 2014 is set down by the Plaintiff for hearing within 30 days as stated above, the suit shall stand dismissed with costs.

Dated and delivered in Malindi this 6th day of February, 2015.

O. A. Angote

Judge