



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 26 OF 2006
(formally Mombasa HCCC No. 284 of 2005)

MOHAMED MUNIR EBRAHIM.....PLAINTIFF/APPLICANT

=VERSUS=

1. IBRAHIM HANI

2. MAHAMOUD HANI.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. This court dismissed this suit for non-attendance and want of prosecution on 7th May, 2014.
2. The Plaintiff has now filed an Application dated 5th September 2014, seeking for the following orders:

(a) THAT this Honourable Court be pleased to set aside its dismissal orders made on the 7th day of May, 2014, and the Plaintiff/Applicant be granted leave to pursue his claim by way of viva-voce evidence hearing albeit conditionally.

(b) The Honourable Court do grant any other or further directions as it may deem fit and just to grant.

The Plaintiff's/Applicants' case

3. The Application is premised on the grounds that the non-attendance of the Plaintiff's counsel when the matter came up for hearing was not deliberate and that unless the dismissal order is set aside, the Plaintiff will suffer irreparable loss and damage.
4. The Application is supported by the Affidavit of the Plaintiff in which he has deponed that when the matter came up for hearing on 7th May 2014, his advocate was in Nairobi; that the said advocate instructed his clerk to get a counsel to hold his brief because the Defendant's advocate had received the hearing notice under protest and that the counsel who held brief for the Plaintiff's advocate mistakenly asked the court to dismiss the suit.
5. The Plaintiff finally deponed that the Defendant has never attended court; that he has made efforts

to have his suit heard on merit since 2013 and that unless the dismissal order is set aside, he stands to lose his plot.

6. The Plaintiff's advocate also filed an affidavit in which he deponed that on 7th May, 2014, he was held up in Nairobi on a personal matter with the Law Society of Kenya; that his clerk had informed him that another counsel held his brief and that he had given instructions that an early hearing date be taken since the Defendants have never attended court.

Analysis and findings:

7. This suit was filed in the year 2006. I have perused the file and noticed that the suit was dismissed by Omondi J on 16th July 2009 for want of prosecution and non-attendance.
8. It would appear that the registry did not take note of the said dismissal order because by way of a notice dated 18th July 2013, the court summoned the Plaintiff to show cause why the suit should not be dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules.
9. The Plaintiff appeared in court on 6th September 2013 and informed the court that he still wished to prosecute the matter. This matter was then fixed for mention on 18th September 2013 on which date neither the Plaintiff nor his counsel was in court. The matter was stood over generally.
10. The Plaintiff's advocate fixed the matter again for mention for 9th December 2013. On that day, neither the Plaintiff nor his advocate was in court. The matter was once again stood over generally by the court.
11. The Plaintiff's advocate, for the third time, fixed the matter for hearing on 7th May, 2014. Again, neither the Plaintiff nor his advocate was in court on the said date. The court proceeded to dismiss the matter for non-attendance and for want of prosecution.
12. The order of Omondi J dismissing the suit for want of prosecution was never set aside. All the proceedings after 16th July 2009 after the court had dismissed the suit are therefore a nullity. This suit stood dismissed as at 16th July 2009.
13. Even if Omondi J had not dismissed the suit on 16th January 2009, I would still not have allowed the Plaintiff's Application.
14. The Plaintiff and his advocate have not been interested in prosecuting the suit since it was filed in the year 2006. On the three occasions the matter was fixed for mention and hearing, the Plaintiff and his advocate were not in court. The reason advanced by the Plaintiff's advocate that he was attending to a personal matter in Nairobi is not plausible at all.
15. For those reasons, I find and hold that the Plaintiff's Application is unmeritorious and the same is dismissed with costs.

Dated and delivered in Malindi this 17th day of **October, 2014.**

O. A. Angote

Judge