



REPUBLIC OF KENYA



KENYA LAW
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**Wanda v Njimbi & 2 others (Civil Appeal 252 of 2017)
[2023] KECA 378 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 378 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 252 OF 2017
HM OKWENGU, K M'NOTI & F SICHALE, JJA
MARCH 31, 2023**

BETWEEN

AGGREY SIMIYU WANDA APPELLANT

AND

NANCY WAMBUI NJIMBI 1ST RESPONDENT

TOWN CLERK, CITY COUNCIL OF NAIROBI 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

(Appeal from the Ruling and Order of the Environment & land Court at Nairobi (Gitumbi, J.) dated 27th January 2017 in ELCC. No. 2263 of 2007)

JUDGMENT

- 1 This is an appeal by the Appellant, Aggrey Simiyu Wanda, against the ruling and order of the Environment & land Court at Nairobi (Gitumbi, J) dated January 27, 2017. By that ruling, the learned judge dismissed the appellant's application seeking to reinstate his suit which had been dismissed on March 11, 2015 for want of prosecution. The learned judge did not make any orders on costs.
- 2 The short background to the appeal is that on or about November 9, 2007, the appellant filed a suit against the three respondents to this appeal, for trespass to Plot No B6-328 Kayole, Nairobi (the suit property), over which he claimed to hold letters of allotment. He prayed for a permanent injunction, general damages and costs. Subsequently the appellant applied for an interim injunction to restrain the respondents from interfering with the suit property pending the hearing and determination of the suit, which the court granted on May 28, 2008. The order was to last until June 24, 2008 but on that date the appellant and the 2nd and 3rd respondents extended the orders by consent, pending settlement of the suit.



- 3 The record does not show exactly what happened to the proposed settlement, but it is evident that judgment was entered against the 1st respondent in default of appearance and defence, and the appellant contends that the suit was then ordered to proceed to formal proof, which it did not. The appellant contends that he tried to list the matter for hearing but each time it was taken out of the cause list.
- 4 On February 26, 2015, the court served upon the appellant through his postal address a notice to show cause why the suit should not be dismissed for want of prosecution. The appellant did not show cause, and as a result, the High Court (Onguto, J.), dismissed the suit on March 11, 2015 for want of prosecution.
- 5 On June 19, 2015, the Appellant applied under Order 21 rule 7, Order 51 rules 8 and 10 (2) of the Civil Procedure Rules, for reinstatement of the dismissed suit. He explained that the suit had been listed for hearing several times but it was taken out of the hearing list for one reason or another; that he was not served with the notice to show cause either personally or through his postal address; that on May 15, 2015 he saw in the Daily Nation newspaper a notice indicating that some cases listed therein would be dismissed for want of prosecution; that his suit was not among them; that he subsequently visited the Deputy Registrar and learnt that his suit had already been dismissed in March 2015 for want of prosecution; and that the dismissal of the suit amounted to deprivation of his right to property.
- 6 The application was heard by Gitumbi, J. who in the ruling impugned in this appeal found that a notice to show cause dated February 26, 2015 was indeed sent to the applicant through his postal address indicating that the suit would be listed for the appellant to show cause on March 11, 2015, why it should not be dismissed for want of prosecution. The learned judge also found that the suit was supposed to be listed for hearing on February 28, 2012, but on that day, it was not listed and that the appellant never took any action thereafter until the suit was dismissed on March 11, 2015. Satisfied that the appellant had been properly served with the notice to show cause and that he had been dilatory, the learned judge dismissed the application, as we have already indicated.
- 7 After filing a notice of appeal, the appellant lodged this appeal with a memorandum of appeal raising 11 grounds, some of which are repetitive. In substance the appellant contends that the learned judge erred by: holding that he was served for the notice to show cause; holding that he was inactive for four years and had not shown any interest in the suit; ignoring the evidence on record that showed he was diligent; and by ignoring the fact that the application for reinstatement was made timeously and was not in any case opposed by the respondents.
- 8 None of the parties filed their written submissions and none attended the online hearing of the appeal on July 26, 2022. The hearing notice on record shows that the parties were duly served through their email addresses with a hearing notice on July 4, 2022.
- 9 We have considered the appeal carefully. Even before addressing its merits, there is an obvious question of jurisdiction that arises in this appeal. As has been stated times without number, an issue of jurisdiction may be raised, even by the Court *suo motu* and must be determined in limine. The jurisdictional question is whether the trial court, as at January 27, 2017, had jurisdiction to entertain an application to reinstate a suit that had been dismissed for want of prosecution.
- 10 It is important to recall that the suit was dismissed for want of prosecution on March 11, 2015 and the appellant filed the application for reinstatement of the suit on June 19, 2019. The ruling dismissing that application was rendered on January 27, 2017. Order 17 rule 2 of the Civil Procedure Rules provided as follows at the material time:

“Notice to show cause why suit should not be dismissed [Order 17, rule 2.]



In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
4. The court may dismiss the suit for non-compliance with any direction given under this Order.”

11 As is plainly obvious, the rule did not provide for an application to reinstate a suit that had been dismissed for want of prosecution. This Court addressed a similar issue in *Erick Kimingichi Wapang'ana t/a Magbaribi Machineries Ltd. v. Equity Bank Ltd Another*, CA No 107 of 2016. In the leading judgment by Kiage, JA, the Court stated:-

“I agree with the learned judge that upon an order of dismissal (for want of prosecution) being made, the suit ceased to exist and that rendered the court functus officio, its powers therein at an end. The only recourse available to the appellant was to appeal against such dismissal, as was rightly held by the learned judge.”

12 In a concurring judgment, M’Inoti, JA, added:-

‘As Order 17, Rule 2 of the Civil Procedure Rules stood at the material time, the court became functus officio once it dismissed a suit for want of prosecution. It was only in February 2020 that the Civil Procedure Rules were amended vide *Legal Notice No 22 of 2020* to allow a party whose suit has been dismissed for want of prosecution to apply. The amendment introduced Rule 2 sub-rule 6, which provides as follows:

“(6) A party may apply to court after dismissal of a suit under this order.’ ”

13 Accordingly, the trial court had no jurisdiction to entertain the purported application for reinstatement of the suit which was dismissed for want of prosecution. The appellant’s remedy lay in an appeal against the order of Onguto, J dated March 11, 2015.

14 Satisfied as we are that the trial court did not have jurisdiction to entertain the application to reinstate the suit that was dismissed for want of prosecution, it is not necessary to address the issues raised by the appellant. Consequently, this appeal is dismissed with no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

