



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.112 OF 2007

SAMWEL KIPLANGAT MWELI.....APPLICANT/PLAINTIFF

VERSUS

RICHARD CHEBOTIBIK (DECEASED).....1ST DEFENDANT

JOEL CHEBOTIBIK.....2ND DEFENDANT/RESPONDENT

ELIZABETH MAINA.....3RD DEFENDANT/RESPONDENT

RULING

(Application to reinstate suit dismissed for want of prosecution; notice to dismiss issued by court but not served on applicant; applicant having interlocutory judgment in his favour; whether interlocutory judgment can apply in a land case; application for reinstatement allowed on basis that the notice to dismiss was not served and the plaintiff is keen to prosecute his case; interlocutory judgment set aside as suit is not a liquidated claim and not a suit for pecuniary damages)

The application before me is that dated 7th October, 2014 filed by the plaintiff. It is an application said to be brought under the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The substantive prayer sought is for reinstatement of the suit which was dismissed on 23rd September, 2014 for want of prosecution. There is also a prayer that if the suit is reinstated, the plaintiff be allowed to add one Wilfred Chepkwony and remove the 1st defendant from this suit since the 1st defendant is deceased. The application is grounded on the reasons inter alia that the plaintiff could not prosecute the suit because the court file went missing and that he did not receive the notice for dismissal for want of prosecution.

The defendants have never entered appearance in this matter and have not filed any papers to oppose the application.

I have considered the application and the record herein. The suit itself was filed on 9th October, 2007 by way of plaint. In the plaint, the plaintiff pleaded that he is the proprietor of the land parcel Kericho/Chesoan/34 and that the defendants have on several occasions trespassed into his land and destroyed the common boundary between his land and the parcels No. 33 and 35 where the defendants reside. In the suit, the plaintiff asked for orders to restrain the defendants from trespassing into his land.

The defendants were served with summons but did not enter appearance. The plaintiff filed a request for judgment on 11 August 2008 and pursuant to the request, judgment was entered on 13th August, 2008. Nothing else transpired in the suit, until a notice of dismissal under Order 17 Rule 2 was issued on 25

June 2014, notifying the plaintiff to attend court on 23 September 2014, to show cause why his case ought not to be dismissed for want of prosecution. There is an affidavit of service from one Joseph Weiwei, a court process server, sworn on 5th August 2014, where he has stated that he could not trace the parties and he was unable to serve the notice of dismissal. When the matter appeared before the court (Waithaka LJ) on 23 September 2014, the Honourable Judge observed that the notice of dismissal had not been served, but considered that since no action has been taken since 2008, the suit ought to be dismissed for want of prosecution.

The plaintiff has now appeared and he has stated that he is eager to prosecute his suit. I will allow the application to reinstate suit, based on the reason that the plaintiff was not served with the notice of dismissal, and he has now demonstrated interest to prosecute the suit. But I will not go further to entertain the other prayers. Those to me ought to be canvassed in a separate application, giving reasons why the new person, Wilfred Chepkwony, ought to be introduced into this suit.

I am also of the view that the interlocutory judgment was wrongly entered in this matter. Judgment in default, according to Order 10 Rules 4 and 6, can only be entered in liquidated claims or in claims for pecuniary damages. The suit herein is for trespass. It is not one where interlocutory judgment may be entered. I therefore set aside the interlocutory judgment entered on 13th August 2008. In other words, the plaintiff must prove his case, by providing evidence, in the normal manner.

I must however warn the plaintiff to be serious with his case for this case has now been occupying our registries for a period in excess of 8 years without any significant movement.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 30th DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:

Plaintiff/Applicant- Acting in person

Defendants/Respondents- Absent