



**Wainaina v Wainaina & 3 others (Environment & Land Case
291 of 2018) [2023] KEELC 16949 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 291 OF 2018**

JG KEMEI, J

APRIL 17, 2023

BETWEEN

SAMUEL NDUNG’U WAINAINA PLAINTIFF

AND

MICHAEL NDIRANGU WAINAINA 1ST DEFENDANT

AMOS NGUYAI 2ND DEFENDANT

FRANCIS NUTHUA NGUGI 3RD DEFENDANT

PAUL WAITI NGUGI 4TH DEFENDANT

RULING

1. The Plaintiff/ Applicant moved the Court by way of Notice of Motion dated February 9, 2023 seeking the following orders:-
 - a. Spent.
 - b. That this Court be pleased to grant the firm of Daniel Henry & Co Advocates leave to appear and come on record on behalf of the Plaintiff/Applicant in the matter.
 - c. That this Honourable Court be pleased to set aside the dismissal orders and all consequential orders thereof entered in this matter on June 13, 2022 against the Plaintiff/Applicant pending hearing and determination of this Application.
 - d. That this Honourable Court be pleased to reinstate the suit being ELC No 291 of 2018; Samuel Ndungu Wainaina versus Michael Ndirangu & Others and allow the same to go to full hearing.
 - e. That cost of the Application be provided for.



2. The Application is supported by the grounds thereon and the Supporting Affidavit of the Applicant sworn on February 9, 2023.
3. In summary the Applicant states that he learnt of the suit through Notice of Taxation scheduled for January 18, 2023; he was not informed by previous Counsel that his case Thika CMCC No 1012 of 2010 had been transferred to Environment & Land Court, Thika and renamed ELC No 291 of 2018; he was not notified of the hearing date.
4. He pleaded with the Court to be given another chance to prosecute his case, faulting the previous Advocates for inadvertent mistake which should not be visited upon him.
5. The Application is opposed by the Defendants/Respondents vide an undated Replying Affidavit sworn by Michael Ndirangu Wainaina filed on February 27, 2023.
6. The deponent stated that the Application is mischievous, vexatious, frivolous and devoid of any merit. On various occasions the Plaintiff and his Advocate failed to attend Court hearings. Though the matter has been pending since 2018, the Plaintiff has never fixed the matter for hearing and all the hearing dates were fixed by his Counsel exposing the deep disinterest that the Applicant showed in prosecuting his case.
7. The deponent averred that the Plaintiff being the litigant in this case cannot be heard to blame his Advocates for the delay in prosecuting this matter for a period of 12 years. That the Plaintiff has been indolent and undeserving of this Court's discretion.
8. The Respondent further contended that the Applicant is economical with the truth that he was not aware of the transfer of Thika CMCC No 1012 of 2010 to this Court and yet he is the one who swore the Supporting Affidavit dated January 20, 2015, in ELC Nairobi Misc Appl No 323 of 2015.
9. He faults the Applicant for being a dishonest litigant who has approached the Court with unclean hands for the reasons of perjury, which attracts criminal sanctions. Even after being served with a taxation notice he took 3 months to file this Application. They urged the Court to dismiss the Application.
10. On March 14, 2023 parties appeared before me and argued the Application orally before Court. The Applicant relied on the grounds annexed to the Notice of Motion and the Supporting Affidavit of the Applicant of even date and reiterated its contents.
11. The Respondents relied on the Replying Affidavit filed on February 27, 2023.
12. Having read and considered the Application, the Replying Affidavit and the oral submissions the key issue is whether the Application has merit.
13. First is the history of this case. Its odyssey is traced to CMCC No 1012 of 2010 filed in Thika on September 23, 2010, hence this case has been lingering in our Court corridors for the last 12 years or so.
14. At the instance of the Plaintiff the suit was transferred to Environment & Land Court Thika on November 22, 2018 and to date hearing is yet to commence.
15. The record is replete with hearing notices issued but no show by the Plaintiff. There is no plausible reason on record leading to the dismissal of the suit on June 13, 2022 for want of prosecution.
16. That said it took the Plaintiff upto February 2023 to file this Application, a period of 8 months.
17. The explanation offered by the Applicant is that he was not served by his Advocate then on record.



18. It is trite that a case belongs to the litigant and not the Advocate. Once a Plaintiff lodges a claim in Court it becomes his sole business to manage and follow up his case diligently.
19. Section 3A of the *Civil Procedure Act* provides for overriding objectives of the Court which bind the Applicant to promote the expedient determination of the cases filed in Court.
20. I agree with the Respondents that the Applicant is an indolent litigant who has disintitiled himself of equitable remedies. His dilatory tactics must be contained.
21. The question that this Court ought to ask is given the circumstances of this case, whether justice can still be achieved for the parties.
22. In the case of *Shah vs Mbogo (1967) EA 166* the Court stated as follows:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
23. Purely on the interests of justice I allow the Application on terms that I deem just in the circumstances.
24. Orders:-
 - a. The Application is allowed.
 - b. The Plaintiff to list the matter for hearing within a period of 15 days in default the suit shall be deemed dismissed and the Defendants to proceed to tax the matter.
 - c. The Plaintiff to pay the Defendants throw away costs of Kshs 50,000/- within the next 15 days in default the suit shall stand dismissed.
 - d. Once the date for hearing is fixed the case shall proceed without any adjournment.
 - e. Costs of the Application shall be in favour of the Respondents.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Nyamu HB Gachau for Plaintiff/Applicant

Ms Mugo for 1st, 2nd, 3rd and 4th Defendants / Respondents

Court Assistants – Kevin/Lilian

