



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

ELC NO. 97 OF 2001 (O.S)

TABELGAA CHEPNGENO TELE (deceased).....1st PLAINTIFF

TABULE TELE (deceased).....2nd PLAINTIFF

JOHN KIPROTICH NGETICH (joined to the suit as the)3rd PLAINTIFF/APPLICANT

VERSUS

JOHN KIPROTICH NGETICH (legal representative of KIPGOSGE TELE

Deceased (struck off from the proceedings).....1st DEFENDANT

SALLY CHEPKOECH MISK2ND DEFENDANT

PHILIP KIPLANGAT KORIR3rd DEFENDANT

CHAIRMAN BURETI DISTRICT LAND CONTROL BOARD.....4th DEFENDANT

THE LAND REGISTRAR KERICHO/ BURETI DISTRICT.....5th DEFENDANT

THE ATTORNEY GENERAL.....6th DEFENDANT

RULING

1. The application dated 27th May 2021 is brought under the provisions of Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act, Order 12 Rule 7 & Order 40 Rule (1) (2) (3), (4) of the Civil Procedure Rules and Sections 3, 13, (7) (i) & (19) (1) 92 & (3)(f) & (j) of the Environment and Land Court Act Gazette Practice Directions and all other enabling regulations under the law of Kenya. The said application seeks for orders of stay of execution of the court's ruling/decreed issued on 2nd March 2021 and thereafter an interlocutory order of injunction to issue against the Defendants/Respondents, their servants, agents and/or any other person working on their instructions, from entering, trespassing, remaining, or in any manner dealing with the land parcel No. Kericho/Kapkatet/2334, 2335 & 2336 previously known as No. Kericho/Kapkatet/1390.
2. The Applicant also seeks that the Officers Commanding (OCS) Litein and Kapkaket station to ensure compliance with the court order.
3. The Applicant further seeks that the orders dismissing his suit be set aside and he be accorded an opportunity to be heard and for costs of the application.
4. The application is premised on the grounds therein as well as on the supporting affidavit of John Kiprotich Ngetich dated the 7th June 2021.
5. The Applicant concedes that indeed the suit was dismissed on 2nd March 2021 for want of prosecution. That their inability to file the present application on time was for reasons that immediately after the court gave its decision, its premises were closed such that it became impossible to access the court file and move the court appropriately. That in the ensuing circumstances, the Respondents moved the Kericho Magistrates court under a Miscellaneous Application No. E008 of 2021 and obtained orders granting the Officer Commanding (OCS) Kapkaket station to provide adequate security to them during the erection of a fence on the suit lands. That the said orders were prejudicial to

him as he was desirous of prosecuting the suit to its logical conclusion.

6. The Applicant further conceded that indeed this was an old matter and that the hearing date was taken in the year 2021 but had not been diarized by Counsel because diaries of the current year had not been put on sale. That further, all the initial Plaintiffs were now deceased and the matter could therefore not proceed and be determined expeditiously due to the issues that were beyond his control.

7. The application was opposed through the 2nd Respondent's Replying Affidavit, on behalf of both Respondents, dated the 29th June 2021 to the effect that it was incompetent, fatally defective and an abuse of the court process and therefore ought to be struck out.

8. That the Respondents were the registered proprietors of the suit lands and the Applicant's Counsel had been served four (4) months before the hearing date with the hearing notice pursuant to which the matter had been properly dismissed for want of prosecution the same having been pending in court for more than 20 years without the Applicant making any meaningful steps to prosecute his case.

9. That whereas it was true that the court premises was closed on 5th March 2021, however the e-filing system was available to all litigants. That the court had subsequently been re-allocated to "Corner C" on the 26th April 2021 yet the Applicant failed to file the present application. The delay was inordinate in the circumstance and no plausible explanation had been given for the delay.

10. That no Appeal had been lodged challenging the court's decision and the Applicant only awoke from slumber and filed the current application after realizing that the Respondent had erected a fence on the suit property with the assistance of Officer Commanding (OCS) Kapkaket station who provided security during the exercise, pursuant to an order from the Magistrates Court.

11. That on the 23rd June 2021, the Applicant, who resides on parcel No. Kericho/Kapkatet/1389, in the company of others and while armed with a machete trespassed on the suit lands and chased away the Respondents' employees claiming that the Respondents had been evicted from the suit land.

12. That the Applicant had come to court with unclean hands, and had not put forth any tangible reason as to why the court should review its decision of dismissing the suit. That the Applicant's actions are in violation of the Respondents' rights to property and they had not offered any restitution for the expenses incurred in defending the claim over the suit properties.

13. That litigation has to come to an end and the Applicant's application should be dismissed with costs to the Respondents.

Determination.

14. While the Notice of Motion application includes certification of urgency as the first prayer, there was neither an application seeking that the matter be certified urgent nor was there any affidavit deposed to in support to the urgency prayer. It suffices then to say that the urgency prayer was abandoned. Before I embark on the determination of the issues herein, I wish to first and foremost comment on the Applicant's application which I have anxiously considered and which I must state was poorly drafted. The same did not specify the provisions of the law under which the Applicant sought the orders herein stated but was brought under the provisions of Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

15. Indeed in the case of **Mumias Out growers Company (1998) Ltd vs Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that:

'The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed'.

16. In the case of **Muchiri vs Attorney General & 3 Others (1991) KLR 516** stated at page 530 that:-

"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."

17. Order 17 Rule 2 (6) of the Civil Procedure Rules further stipulates that a party may apply to court after dismissal of a suit under this Order. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. The Applicant's claim ought to have been dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction so as to ensure the observance of the due process of law, and to prevent vexations or oppression between the parties.

18. I shall now interrogate the matter before me summarily. This suit was filed as an Originating Summons way back on the 28th November 2001 where the original Plaintiffs; Tabelgaa Chepngeno Tele and Tabule Tele sought for orders for a declaration that they had acquired title to the whole parcel of land being No. Kericho/Kapkatet/1390, by adverse possession. Contemporaneously with the Originating Summons, the Plaintiffs had filed an application dated the 28th November, 2001 seeking interim orders of injunction where the court held that the said application could not be heard *ex parte* under the circumstances as the suit lands were in the name of the Respondent. The court had directed that the same would be heard *inter parte* upon service.

19. On the 28th February 2002, by consent the application dated the 26th February 2002 seeking orders restraining the land registrar Kericho from issuing title deeds and/or causing transfer of subdivided portions of the suit land to third party and further restraining the Defendants from transferring the subdivided portions of the suit land to third party, was allowed.

20. On the 28th March 2002, by consent, the application dated 28th November 2001 was dispensed with and directions taken that the Originating Summons and any application in support thereof be treated as a plaint while the Replying Affidavit dated the 15th January 2002 be treated as a defence. Parties were directed to comply with the provisions of order X Rule 11A within 14 days from date thereof wherein the hearing of the main suit was scheduled for the 30th May 2002. There were further orders that the parties do agree on sustaining the status quo obtaining at the moment and a consent order to be filed so that the same could be maintained pending the determination of suit.
21. On the 2nd April 2002, a consent was recorded by both parties to the effect that an order of prohibition do issue restraining the Land Registrar from effecting transfer of all that parcel of land known as L.R.No. Kericho/Kapkatet/1390 and more specifically from further dealing with parcel numbers 2334, 2335 and 2336 which parcels were a resultant subdivision of L.R No. Kericho/Kapkatet/1390, until the determination of this suit.
22. Vide an application dated 17th May 2002, the Plaintiff sought for the joinder of the second and third Defendants who were now the registered owners of the resultant parcels of land upon the subdivision of the original parcel No. Kericho/Kapkatet/1390, the subject matter of the suit. The application was unopposed and therefor allowed.
23. Thereafter there was yet another application by the Plaintiff dated the 2nd May 2003 seeking that the Chairman Bureti District Land Control Board and the Land Registrar Kericho be joined to the suit as the fourth and fifth Defendants respectively which application was allowed on the 10th May 2005.
24. The matter was then fixed for hearing for the 27th July 2006 on which day there was no appearance for Parties and the matter was stood over generally with court adjournment fee of Ksh. 1,000/- to be paid before the date could be fixed.
25. It was while awaiting the hearing of the suit, that the 1st -3rd Defendants filed an application dated the 3rd August 2006 seeking to have the Originating Summons struck out on the grounds that the same was frivolous as land parcel L.R No. Kericho/Kapkatet/1390 had ceased to exist on the 14th November 2001, prior to filing of the suit on the 28th November 2001. The application was heard on the 8th February 2007 and dismissed via a ruling delivered on the 22nd March 2007 with reasons that the fact that parcel L.R No. Kericho/Kapkatet/1390 had ceased to exist was curable through an amendment to the pleadings.
26. Thereafter another application dated the 7th September 2007 was filed by the Plaintiff seeking leave to amend their pleadings. The application was allowed ex parte by the Deputy Registrar on the 27th September 2007 wherein the Defendants were granted leave to file a response to the said amended Originating Summons, within fourteen (14) days of service. On the 14th March 2008, the case was fixed for hearing for the 15th July 2008 but did not take off. On the 24th October 2008 the 1st -3rd Defendants took a hearing date for the 18th February 2009 but again there were no proceedings.
27. On the 18th May 2009, during a call over, the matter was confirmed for documents and slated for hearing for the 28th May 2009 on which day the Plaintiff's Counsel informed the court that service had not been effected upon the 4th and 5th Defendants. A further mention to confirm service and compliance was slated for the 9th July 2009 on which day the court had been informed that there had not been compliance as the Plaintiff's Counsel now needed to join Hon Attorney General, the Director of Surveyor and Commissioner of Lands to the suit. He sought for 30 days within which to comply.
28. A further mention date for the 28th September 2009 was slated to confirm whether the 4th and 5th Defendants had been served. On 28th July 2009, (mistakenly indicated as 28th February 2009) the court was informed that there had been compliance and by consent, the matter was slated for mention for the 16th November 2009.
29. On the 9th November 2009 during a call over, the Plaintiffs' Counsel informed the court that they were not ready to proceed and prayed for the matter be taken out.
30. On a date that is not indicated, the proceedings before court were to the effect that the Plaintiff sought for time to file an application to join the Hon Attorney General to the proceedings wherein a further mention date was slated for the 10th February 2010 to confirm compliance of joinder of parties.
31. During a call over of the 27th January 2010, Counsel for the Plaintiff informed the court that his clients were slow to seek from him confirmation on compliance. The matter was nevertheless certified as confirmed.
32. On the 10th February 2010 when the matter came up for hearing, Plaintiffs' Counsel informed the court that he had filed his Chamber Summons dated 1st February 2010 where he had sought join the Attorney General as the 6th Defendant. That the authority was ready and it was only the Attorney General whom they awaited to be added. That they hadn't served any parties. Counsel then sought for leave and the case was stood over generally.
33. The Chamber Summons dated 1st February 2010 seeking to join the Attorney General was heard on the 17th March 2010 and allowed vide a ruling delivered on the 19th March 2010 in terms of prayer 1 and 2.
34. The 1st-3rd Defendant's Application dated 15th April 2009, seeking for directions, was heard inter parties on the 14th March 2011 in the absence of the Hon. Attorney General for 4th, 5th and 6th Respondents who had entered appearance, but not filed any Replying Affidavit to the Originating Summons.

35. A ruling to the said application was delivered on the 13th April 2011 to the effect that the Deputy Registrar had no power, pursuant to the provisions of Order 49 of the Civil Procedure Rules, to hear and determine the application. That pursuant to allowing the said application, the Plaintiffs' amended Originating Summons had not only joined the Hon. Attorney General, but had also effected other amendments which had neither been sought in the application nor allowed. The orders made ex parte by the Deputy Registrar on 19th March 2010 were thus set aside and expunged from the record.
36. The application for directions dated 15th April 2009 was then slated for hearing afresh on 27th February 2011 on which day there are no proceedings recorded but on the 27th July 2011, the court noted that the Applicants had sued the Defendants by way of an Originating Summons but had failed to expeditiously prosecute the case. That since the 13th April 2011, they had had time to amend their Originating Summons but had failed to do so. The court also noted with dismay that through the amended the Originating Summons, the Plaintiff had introduced the 4th and 5th Respondents yet had not effected any service upon them.
37. The matter was set for the taking of directions pursuant to the application dated 15th April 2003, for the 23rd November 2011 with caution to the Plaintiff to effect service upon the 3rd and 4th Respondents with the amended Originating Summons together with the Replying Affidavit of 1st, 2nd and 3rd Respondents before the 3rd October 2011, failure to which the names of the added Respondents No. 4 and 5 were to be struck out.
38. Pursuant to the application dated 13th April 2009, directions to the Originating Summons dated 28th November 2001 were issued vide a ruling dated 11th November 2011 and delivered on 21st February 2012.
39. On the 29th June 2012, the 1st -3rd Defendants fixed the matter for pretrial for the 1st October, 2012 but the same did not take off, however on the 4th October 2012, the Plaintiff's Counsel informed the court yet again that they would be filing an application to join the Attorney General in the matter. He sought for a further mention date which was granted for the 5th November 2012 on which date, parties sought for more time to comply with the provisions of Order 11 of the Civil Procedure Rules in regard to pretrial conference. The matter was slated for further mention for the 22nd November 2012 to confirm compliance and whether Counsel would have filed his application.
40. On the 22nd November 2012, Counsel for the Plaintiff sought for more time to file their application to join the Attorney General which application was objected to by the 1st -3rd Defendants' Counsel for reasons that the Plaintiffs were not serious in prosecuting the matter as they had been using all manner of tactics to delay the matter which had been pending in court for a period of 11 years.
41. The court extended time to which the application was to be filed by 14 days and a mention date was rescheduled for the 14th January 2013 on which day the matter did not proceed wherein on the 8th February 2013 the Defendant's Counsel took a date for mention for the 22nd April 2013 and thereafter sought that the matter to be fixed for hearing within 60 days.
42. Nothing transpired wherein on the 19th July 2013, Counsel for the 1st -3rd Defendants yet again fixed the matter for mention for directions for compliance for the 29th October 2013. On the said date, whereas the defence had complied, the Plaintiffs' Counsel informed the court that the 2nd Plaintiff was deceased and sought for time to substitute him so as to enable him proceed with this matter. He sought for 30 days which was granted and the matter slated for mention for the 28th November 2013 on which day the Plaintiffs' Counsel yet again sought for more time to contact his clients. The court directed that the 2nd Plaintiff be substituted and Counsel moves the court when ready.
43. The matter went to slumber until the 3rd February 2015, when Counsel for the 1st -3rd Defendants yet again took a mention date for directions and further orders for the 26th March 2015 wherein due to lack of service, the matter was deferred to the 22nd June 2015. There was no appearance for the Plaintiffs' Counsel wherein the defense sought that the suit against the 2nd Plaintiff now deceased be marked as abated there having been no substitution within one year upon his death. Pursuant to the provisions of Order 24 of the Civil Procedure Rules, that the 2nd Plaintiff's suit was marked as abated and further directions were taken to the effect that the matter would proceed by way of viva voce evidence and a hearing date be given at the registry.
44. On the 28th July 2015, Counsel for the 1st -3rd Defendants once again took a mention date for the 29th September 2015 for directions on which day there was no appearance for Counsel for the Plaintiff and since the diary for the year was closed, the court directed for the matter to be mentioned on 26th November 2015.
45. The notice had been sent out to all advocates and litigants to the effect that the court would not be sitting on the 23rd to 27th November 2015 and that the matters falling within those dates would be brought forward wherein on the 12th November 2015 the matter came up for mention and parties took dates for hearing of the suit for the 23rd May 2016.
46. On the 23rd May 2016, the record is clear that whereas the defence was ready to proceed for hearing with 4 witnesses, the Plaintiffs' Counsel informed the court that he was unable to proceed because whereas the 1st Plaintiff was not in court, the 2nd Plaintiff was deceased. He sought to substitute the 1st Plaintiff whom he claimed was about 90 years old with her son, as she was unable to attend court. He sought for 14 days. The application for an adjournment was vehemently opposed by the defense who contended that this was a 1997 matter wherein the Plaintiffs were not desirous of the prosecuting the same and its continued delay had occasioned parties injustice and a denial of justice. He submitted that the date had been taken by consent wherein the Plaintiffs' Counsel had been aware of the age of the Plaintiff at that time. He sought for the application for adjournment to be denied and if the court would be inclined to grant the adjournment, then the same be the last adjournment.
47. Counsel for the Plaintiff conceded that notwithstanding the age of the matter, the parties should be given an opportunity to be heard.

The court considered the submission by the parties Counsel and agreed with the argument by the defence Counsel that age alone was not a ground for an adjournment. That there had been no evidence tendered that the surviving Plaintiff was in anyway incapacitated and unable to attend court or proceed with the matter. Be as it may, the court gave the Plaintiff's Counsel the benefit of doubt and directed him to file an application that was appropriate and hereafter effect service of the same within 14 days for the same to be heard on the 30th June 2016 when further directions would be given.

48. On 30th June 2016, the court had been informed of the compliance by the Plaintiffs' Counsel to the effect that he had filed an application dated 22nd June 2016 to substitute the 1st Plaintiff which application had not been opposed. The court was further informed that parties were amenable to negotiations in order to settle the matter out of court. The court gave directions that the said application be disposed of by way of written submissions so that the oral arguments could be taken on the 25th August 2016. In the meantime, parties were encouraged to pursue a settlement.

49. On 1st September 2016, the application dated 22nd June 2016 was withdrawn and directions were issued to the Plaintiffs' Counsel to make a formal application within 14 days seeking to have one John Kiprotich Ngetich joined as Plaintiff in the Originating Summons. The application was slated to be heard on 27th October 2016.

50. The matter went to slumber yet again until 19th January 2017, where Counsel for the 1st -3rd Defendants took a mention date for the 8th February 2017 to fix the matter for hearing. On the said date, by consent, an application dated the 13th September 2016 seeking to join John Kiprotich Ngetich as a Plaintiff was allowed. Counsel for the Plaintiff then sought yet again for leave to file an application to join the Land Control Board, Land Registrar and the Hon. Attorney General as Defendants which application was allowed and Counsel granted 7 days within which to file the said application. The matter was slated for mention to confirm compliance for the 20th February 2017.

51. On the 28 February 2017 Counsel for the Plaintiff sought to have his application dated 1st of February 2010 heard on the basis that it had the effect of correcting the issues raised in the ruling of 13th April 2011. This application was opposed yet again by the 1st -3rd Defendant's Counsel on the grounds that the prayers sought had been granted by Justice G.B.M Kariuki on the 27th July 2011 who had allowed the Plaintiffs to join the Plaintiffs mentioned in their application dated the 1st February 2010. That similarly, through the ruling delivered on 21st February 2012, the Plaintiffs had been given time to amend their pleadings. That to date, 6 years after the orders had been made, the Plaintiff had not complied. That on the 22nd March 2013, the Plaintiffs once again been given 30 days to comply with Order 11 of the civil procedure rules but had failed to comply. The application dated 1st February 2010 had been pending for seven years wherein Counsel for the Plaintiff had neither served nor attempted beforehand to take a hearing date on it and therefore the current application was only intended to further delay the suit.

52. The ruling to the submissions was delivered on the 10th March 2017 wherein the same was allowed and the Plaintiff was given seven days to file an amended Originating Summons and to serve the same upon the Defendants' Counsel, who were granted corresponding leave of 14 days to respond, failure to which the order would lapse.

53. On the 17th November 2017 Counsel for the Defendants took a mention date for the 5th February 2018 wherein he sought for directions on how to proceed with the matter. The State Counsel on behalf of the office of the Attorney General for the 4th, 5th and 6th Defendants submitted that although the dispute was mainly between the Plaintiffs and the 1st, 2nd and 3rd Defendants, she needed to take further instructions from the Land Registrar on the issuance of the title deed. She sought for 30 days. There was no opposition and the matter was set for mention for the 21st March 2018.

54. On the said date, there had been no appearance for the Plaintiff wherein Counsel for the 1st, 2nd and 3rd Defendants informed the court that the matter had been scheduled for mention to confirm whether the 4th, 5th, and 6th Defendants had put in their reply to the amended Originating Summons and also to confirm if the Plaintiffs had put in a further affidavit. That none of the parties had complied. The court was further informed that the 1st Defendant had passed away on 8th March 2018 wherein they intended to apply for a Limited letters of Grant in order to substitute him with his son, they sought for 90 days to comply.

55. The court granted the 1st Defendant time to be substituted and the 4th 5th and 6th Defendants 21 days to file their responses to the Originating Summons. The matter was further slated for mention for the 3rd July 2018 on which day the court was informed that a petition for letters of Administration ad Litem in regard to the deceased 1st Defendant had been filed and Counsel sought for 14 days to file their application for substitution. The court was further informed that the 1st Plaintiff was also now deceased wherein the Plaintiffs' Counsel sought for time to obtain further instructions. A mention date was slated for the 24th July 2018, but the court was informed that there had been filed an application for substitution of the 1st Defendant which application was allowed unopposed and one Stanley Koskei was joined to the suit in place of the late Kipkosgei Arap Tele the 1st Defendant herein. Counsel for the Plaintiffs then sought for mention date to enable them substitute the 1st Plaintiff wherein they were granted 60 days to obtain the Limited letters of Grant and thereafter apply for substitution of the deceased. The matter was then slated for mention for the 12th November 2018.

56. On the said date, Counsel for the Plaintiff informed the court that they had realized that there was no need to substitute the 1st Plaintiff wherein he sought for leave of 21 days to file a supplementary affidavit in the name of the surviving Plaintiff one John Kiprotich Ngetich. The Counsel for the 1st -3rd Defendant sought for leave of 14 days after service, to file a Replying Affidavit in the name of the Defendant who substituted the 1st Defendant.

57. Counsel for the 4th, 5th and 6th Defendants also informed the court that they had filed a Preliminary Objection seeking that the 4th, 5th and 6th Defendants be struck out from the proceedings. He sought for 14 days to put in their written submissions. The court directed that the

Plaintiff and 1st Defendant do file their Replying Affidavits within 21 and 14 days respectively and slated the matter for mention for the 23rd January 2019 to confirm compliance, on which day, the court was informed by the Plaintiffs' Counsel that parties had agreed for the Attorney General to file their submissions within 14 days with a corresponding 14 days to respond after service. The court obliged parties and set the matter for mention for the 6th March 2019 while granting 1st – 3rd Defendant 21 days to file a Replying Affidavit to Originating Summons.

58. On the 6th March 2019, the Plaintiff's Counsel sought more time of 14 days to respond to their submissions on the preliminary objection which he had just been served. He also informed the court that the Plaintiff was no longer interested in pursuing the suit against the estate of the 1st Defendant. The court granted the Plaintiff 14 days to file his submissions on the Preliminary Objection. The 1st Defendant was struck off from the proceedings as the Plaintiff was no longer interested in pursuing the case against his estate. The matter was further slated for mention for the 1st April 2019 on which day Counsel for the 1st, 2nd and 3rd Defendants informed the court that they were yet to be served with the Plaintiffs' submissions. Counsel for the Plaintiff then informed the court that upon consideration of the entire Originating Summons they intended to have the suit against the 4th, 5th and 6th Defendants withdrawn and sought for leave to file an application to amend the Originating Summons. The application was not opposed wherein the court held that the preliminary objection had been compromised upon the withdrawal of the Plaintiff's suit against the 4th, 5th and 6th Defendants. The Plaintiff was then granted leave to amend the Originating Summons within 14 days. The matter was slated for mention for the 15th May 2019 to confirm the filing of the Plaintiff's amended Originating Summons on which day there had been no compliance and the Plaintiff sought for a further 7 days to comply. A mention was slated for the 17th June 2019 for directions on which day there had been no compliance by the Plaintiff who sought to comply by the end of the day.

59. The further further amended Originating Summons amended on the 14th June 2019 was filed on an equal date wherein on the 11th July 2019 when the matter came up for mention for directions and having confirmed compliance by the Plaintiff, the 2nd and 3rd Defendants were granted leave of 14 days to file their responses to the amended Originating Summons. Parties were directed to file their compliance documents within 30 days.

60. It is worth noting from the further amended Originating Summons that despite there having been a withdrawal of the suit against the 1st, 3rd, 4th, 5th and 6th Defendants, they still remain parties to the suit.

61. When the matter came up for mention on 16th October 2019, the Plaintiff's Counsel sought for leave to consult his client over documents he had been served with wherein the matter was slated for further mention for the 28th November 2019 on which date the Plaintiff's Counsel sought for time to comply with pre-trial requirements.

62. The hearing of the suit was then slated for the 25th February 2020 wherein on that date, Counsel for the Plaintiff was said to have travelled to Nairobi and the matter was slated for hearing for the 4th May 2020 the same did not take off, on the 23rd June 2020 Counsel, now for the 2nd and 3rd Defendants fixed the matter for mention for directions for the 1st July 2020 on which day that there was no appearance by both the Plaintiff and his Counsel. The matter was then slated for mention for the 30th September 2020 on which day there was yet no appearance by the Plaintiff and his Counsel. The court having taken judicial notice of the age of the matter, fixed the same for hearing for the 17th November 2020 on priority basis, with notice to be served upon the Plaintiff.

63. On the 17th November 2020 the matter was mentioned in the registry in the absence of the Plaintiff, as the presiding judge was on transfer, wherein the same was scheduled for hearing for the 2nd March 2021. The hearing notice was served upon the Plaintiff's Counsel on the 23rd November 2020 as per the Affidavit of Service herein filed. On the 2nd March 2021, whereas Counsel for the defense was ready to proceed, the Plaintiff's Counsel was not ready to proceed for reason that he had just seen the matter on the cause list, he proceeded to inform the court that since the suit was an old matter, he had been having difficulties in getting his witnesses. He sought for one more chance to try and get witnesses so that he could salvage the case.

64. Of course the application for an adjournment was opposed by Counsel for the defense seeking that the matter be dismissed for want of prosecution the same being an old matter where the original Plaintiffs had since passed away.

65. The court in its ruling on whether or not to grant the adjournment so sought by the Plaintiff's Counsel considered the submissions by both Counsel and the intrigues of the matter, with a lot of anxiety wherein it held that pursuant to the matter having been filed way back in the year 2001, the Plaintiff in one way or another had failed to prosecute the same. The court further found that it had been Counsel for the 1st -3rd Defendants who had all along fixed dates for either mention or hearing and which dates had been served upon the Plaintiff's Counsel who all along took no initiative to prosecute the matter. That in fact the day's hearing Notice had been served upon the Plaintiff's Counsel. That it was therefore not conceivable for the Plaintiff's Counsel to inform the court that he has just seen the matter on the cause list on that very day.

66. That although it was trite that dismissing of a suit was not the proper way and could be termed as barbaric in dealing with the same, yet in some instances the court's hands could be tied owing to how parties had handled a matter. That in the present matter the court had found that there had been inordinate and inexcusable delay by the Plaintiff in prosecuting this matter which had caused grave injustice to the Defendants. That in the circumstances and pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 3 of the Civil Procedure Rules, the suit was dismissed for want of prosecution, with costs.

67. Pursuant to the dismissal of the suit, the Plaintiffs' Counsel filed the present application dated the 27th May 2021 under a Certificate of Urgency dated 10th June 2021 seeking orders as herein above enumerated. On the 21st June 2021, my brother judge sitting in the Environment and Land in Migori issued ex parte interim orders of stay of execution of the court's decree of 2nd March 2021 and also granted prayer No. 4 of the application which had sought that the Officers Commanding Letein and Kapkatet Police station to ensure compliance with the court

order, pending the hearing of the application before myself.

68. On the 28th July 2021 the court gave directions that the application dated 27th May 2021 be disposed by way of written submissions. Leave was also granted the Plaintiff to file their supplementary affidavit to the Defendants' Replying Affidavit dated 29th June 2021 within 14 days. Leave to file their written submissions was granted for 21 days. Armed with the order of the 21st June 2021, and while in the course of giving directions on the disposal application dated 27th May 2021, the Plaintiff's Counsel awoke from slumber and embarked on a rampage of filing application upon application wherein on this particular day he sought for leave to file a formal application on contempt proceedings against 1st, and 2nd Defendants/Respondents. The leave was granted to file the said application within 7 days wherein the matter was slated to confirm compliance on the 6th October 2021 and interim orders were extended.

69. On the 6th of October 2021, when the matter came up to confirm compliance Counsel for the Plaintiff sought for an extension of 7 days to file the said contempt proceedings against the 1st, and 2nd Defendants and the OCS Kapkatet Police Station. The matter was further slated for mention for the 3rd of November 2021 to confirm compliance with the directions issued by the court.

70. On the 13th of October 2021 Counsel for the Plaintiff filed the formal application albeit out of time seeking that the 1st, and 2nd Respondents herein be held in contempt of the court orders issued on 21st June 2021 on the grounds that they entered on the suit land, erected a fence therein, demolished buildings thereto and commenced constructions on the suit subject parcels of land.

71. On the 3rd November 2021 when the matter came up for mention, there was no appearance by Counsel for the Plaintiff despite the date having been taken by consent. The defence Counsel informed the court that he had not been served with any submissions or application. That this notwithstanding and having been informed by the court of the existence of an application dated 13th October 2021, Counsel sought for leave to respond upon service. The court directed for the application dated 13th October 2021 to be served upon the Defendants within 3 days, and granted leave to the Defendants to respond within 7 days upon service. The Defendants were further granted leave to file their submissions to the application dated 27th May 2021 irrespective of the non -service upon them of the Plaintiff's submissions.

72. The matter was thus slated for mention for compliance and for further directions for the 20th December 2021 on which day Counsel for the Plaintiff sought to have the latter application dated 13th October 2021 disposed of in the 1st instance and that the same be deemed properly on record. Counsel for the defence confirmed that they had filed their response to the application dated 13th October 2021 as well as their submissions to the application dated the 27th May 2021.

73. The application dated 13th October 2021 was confirmed as being properly on record wherein the court directed that the application dated the 13th October 2021 be canvassed in the 1st instance through written submissions. Parties were to file and serve their written submissions within 21 days. In the meantime, the OCS Kapkatet Police Station was to be served through the OCPD Litein Police Stations, as prayed, within the next 7 days and was granted leave to file his response within 7 days and thereafter comply with the directions herein above captured. There was further directions that the application dated 27th May 2021 remains in abeyance awaiting the finalization of the application dated 13th October 2021. The matter was slated for mention for compliance on the 15th March 2022.

74. While awaiting compliance of the above orders, the Plaintiff's Counsel filed yet another application dated the 20th December 2021 seeking inter alia for the grant of interim injunctive orders as sought in the application dated 27th May 2021 or in the alternative that there be orders of status quo pertaining before 20th May 2021. The Plaintiff's Counsel further sought for orders inhibiting the Officer Commanding Kapkatet police station from intermeddling with the suit properties and further that the Deputy Registrar be directed to visit the disputed parcels of land with a view of compiling a comprehensive report on the events that transpired after 20th May 2021 to date. Lastly that the Officer Commanding Kapkatet police station do ensure compliance of the prayers as sought.

75. Close on the heels of this application was yet another application by way of notice of motion dated the 21st December 2021 seeking to have the application dated 20th December 2021 be heard during the Christmas vacation.

76. On the 22nd December 2021, the application dated the 21st December 2021 was not certified as urgent instead the Plaintiff was directed to serve the same upon the Defendants who were granted leave of 14 days to respond. Parties were directed to maintain the status quo pertaining as at 21st December 2021 when the matter was filed in court. A further mention for compliance was now slated for the 24th January 2022 on which date Counsel for the Plaintiff confirmed having effected service of their application dated 20th December 2021 and sought to take directions and an extension of interim orders. He also sought to put in a supplementary affidavit to their application and to serve the courts orders/directions and the application upon the Kapkatet OCS through the office of the OCPD Litein Police Station. Leave was granted as prayed. The Respondent's Replying Affidavit filed on the 17th January 2022 was also deemed as being properly on record albeit having been filed out of time. The matter was then slated for mentioned on the 16th February 2022 for further directions with an extension of interim orders, on which day Counsel for the Plaintiff confirmed compliance and sought yet again to have their supplementary affidavit which was filed out of time to be deemed properly filed in court.

77. An objection was raised by Counsel for the defense who submitted that the matter had been dismissed on 12th March 2021 and Counsel for the Plaintiff had kept taking parties and the court in circles by filing application upon application. That they too had filed an application dated the 14th February 2022 seeking a permanent injunction restraining the Plaintiff from interfering with the suit pending determination of the application dated 21st December 2021.

78. The court took cognizance of the fact that the matter had been dismissed on the 2nd March 2021, wherein after there have been application upon application filed by the Plaintiff which included an applications dated the 27th May 2021, 13th October 2021, 20th

December 2021, 21st December 2021 and lastly 14th February 2022, by the Defendants. The court went on to hold that this matter could not be disposed of through the filing of application after application and directed that since the suit had been dismissed and had not been reinstated, that it would be superfluous to proceed with the filing and/or obtaining orders upon orders on a non-existent suit.

79. The court directed that the latest application dated the 14th February 2022 be served upon the Plaintiffs/Respondents within 7 days with corresponding leave of 7 days to respond. That since the suit stood as dismissed at the moment, the application dated the 27th May 2021 was to be disposed of in the first instance before any further orders could issue. That since parties had complied with the directions issued on the 28th July 2021 and filed their submissions, this current ruling to the application dated the 27th May 2021 was confirmed for delivery.

80. Having given an exhaustive history of the matter in question the court finds that issue for determination herein as being whether the court should re-instate the Plaintiff's suit which was dismissed for want of prosecution, for hearing. The suit was filed as an Originating Summons way back on the 28th November 2001, during its pendency, the Plaintiff made no effort to have the same prosecuted and along the way both the original Plaintiffs and the 1st Defendant passed on, the original parcel of land had been sub-divided wherein the 1st -3rd Defendants took possession of the subsequent subdivisions. Still no effort was made by the Plaintiff to have the matter prosecuted. The court record would bears witness that it had been the Defendant who had always made effort to have the matter listed for mention to take directions for hearing but whose effort was thwarted by the Plaintiffs' Counsel's numerous applications and/or and excuses which hindered the prosecution of the suit to the effect that by the time the matter was placed before myself for hearing on the 2nd of March 2021, the court took cognizance of the fact that the matter had been pending in court without being prosecuted for a period of about 21 years and yet the Plaintiff was still not ready to proceed for hearing.

81. The current suit was dismissed pursuant to the provisions of Order 17 Rule 3 of the Civil Procedure Rules which provide as follows;

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.

82. Order 12 rule 3.of the Civil Procedure Rules

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

83. The effect of dismissal under Order 12, rule 6.of the act is that:

(1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the Plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

84. Although it has been declared in some spheres that a dismissal of a suit without hearing it on merit is a draconian act, yet the same ought to be checked against yet another equally important Constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied and that cases should be disposed of expeditiously.

85. Having in mind that justice is to all the parties and not only the Plaintiff, there is nothing on record to prove that the Plaintiff herein tried to set the matter down for hearing and the order for the dismissal of the suit was at the instance of the court. In other words, the court was not moved by any application, when it dismissed the suit.

86. The question I ask myself is whether it will be possible to conduct a fair hearing after the lapse of about 21 years since the suit was filed. Having regard to the fact that the suit was filed in 2001, I find that the delay is a source of prejudice to the Defendants as well as to the fair administration of justice. I find that the amount of time which has passed is not conducive to having a fair trial in this matter. I also find that the Plaintiff's conduct in the prosecution of this matter is an abuse of the court process.

87. The court's exercise of its discretion to set aside its order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

88. In the case of **Shah vs Mbogo & Another (1967) EA 116** it was held;

"The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

89. In this instance, the Plaintiff's suit was dismissed on the 2nd March 2021 for want of prosecution which the present application arose. Given the above set of facts, the question for determination is whether the reasons advanced by the Applicants amount to 'sufficient reason' to justify the exercise of the court's discretion in their favour.

90. *It has been submitted that the cause of the turn of events in this matter was that the hearing date was taken in the year 2021 but had not been diarized by Counsel because diaries of the current year had not been put on sale. That further, all the initial Plaintiffs were now deceased and the matter could therefore not proceed and be determined expeditiously due to the issues that were beyond his control. The view that this court takes is that the Plaintiff's Counsel is not being honest, and has deposed to matters that are not true and therefore the*

explanation was not plausible.

91. The conduct in the prosecution of this matter right from its inception does not warrant the exercise of the court's discretion in favour of the Plaintiff /Applicant. Indeed while it is true that the objective of the court is to do justice, such justice must cut both ways. *In the case of Bains Construction Co. Ltd. vs John Mzare Ogowe [2011] eKLR the Court observed as follows:-*

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences”.

92. The Court of Appeal held in the case of **Rajesh Rughani vs Fifty Investment Ltd. & Another [2005] eKLR** that:-

“If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

93. Indeed as it had been held in the case of **Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014) eKLR**:-

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court.”

94. There would be no injustice to a party who for 21 years has failed to set down their case for hearing as he has been “surviving” on interim orders, and/or failed to attend court for hearing of their case, and no satisfactory reasons are given. Indeed in the circumstances it is the Defendant/ Respondents who were prejudiced by the Plaintiff/ Applicant's failure to prosecute the case without unreasonable delay. I find the delay of 21 years as being inordinate and inexcusable.

95. Pendency of a case in court when it is obvious that the Plaintiff is not interested to prosecute it costs time and money to the Defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in finalizing it, when in effect and in most of the cases, it is the parties, mostly the Plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts. **See Bilha Ngonyo Isaac v Kembu Farm Ltd & another & another [2018] eKLR.**

96. Accordingly, and with a lot of trepidation, I dismiss the application dated the 27th May 2021 seeking that the orders dismissing the Plaintiff/Applicant's suit be set aside and the Plaintiff be accorded an opportunity to be heard. In essence thereof the Plaintiff's from suit remains dismissed.

97. The court has inherent jurisdiction to review its own orders made expecting the specially when there is a mistake is shown to have been committed which is apparent and which is remediable by the court. The court's discretion is therefore not fettered in exercise of its inherent powers to so review its own orders and may therefore not invoke the specific provisions of Order 45 of the Civil Procedure Rules on Section 80 of the Civil Procedure Act. The interim orders herein were improperly and incompetently obtained and in order for the necessary ends of justice to prevail and enable the court maintain its character as a court of justice, it is herein ordered that since there is no suit pending before this court, all subsequent applications made subsequent to the dismissal of the suit are null and void *abi initio*. Further the interim orders granted by the court after the dismissal of the suit are herewith vacated. The Plaintiff /Applicant to bear costs.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF MARCH 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE