



**Mururu & 6 others v M’Muthaka & 2 others (Estate of M’Imirongo M’Muthaka (through the administrators)) (Environment & Land Case 43 of 2020) [2023] KEELC 20337 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 43 OF 2020  
CK NZILI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**CHRISTINE W. MURURU ..... 1<sup>ST</sup> PLAINTIFF  
JECINTA KAREME MUCIRI ..... 2<sup>ND</sup> PLAINTIFF  
FRANCIS MBAE NYAGA ..... 3<sup>RD</sup> PLAINTIFF  
ISAIAH ITHALII M’IMANYARA ..... 4<sup>TH</sup> PLAINTIFF  
NICHOLAS NJUE NYAGA ..... 5<sup>TH</sup> PLAINTIFF  
LAWRENCE MWITHALII MICHUBU ..... 6<sup>TH</sup> PLAINTIFF  
IBRAHIM KOBIA ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**ANDREW MURIUKI M’MUTHAKA ..... 1<sup>ST</sup> DEFENDANT  
SUSAN NKATHA ..... 2<sup>ND</sup> DEFENDANT  
PATRICK KAMENCU ROBERT ..... 3<sup>RD</sup> DEFENDANT  
ESTATE OF M’IMIRONGO M’MUTHAKA (THROUGH THE  
ADMINISTRATORS)**

**RULING**

1. By an application dated April 26, 2023, the court is asked to set aside and review its order dated April 26, 2023, reinstate and hear this suit on merits. The application is premised on the grounds set out on the face of the application and in the supporting affidavit sworn on the even date by Vivian Locie Aketch, advocate representing the plaintiffs. The applicants aver that they erroneously filed a list of



documents and witness statements in compliance with court directives on April 24, 2023. Further, the applicants aver that they have lived on the suit land for over 20 years, mistakes of their counsel on record should not be visited upon them, are prepared to comply with order 11 of the Civil Procedure Rules fully, mistakes are excusable, there will be no prejudice to the opposite party and shall henceforth endeavor to expedite the hearing of the suit.

2. The 2<sup>nd</sup> defendant opposed the application through a replying affidavit sworn by Susan Nkatha on May 19, 2023 because the same was incompetent; an abuse of the court process, a waste of the court's precious judicial time, and lacks merits. The 2<sup>nd</sup> defendant-respondent took the view that a notice to show cause was lawfully issued for March 21, 2023, which was not complied with by April 26, 2023, unlike her, and to exercise discretion in favor of the applicants would prejudice her since she would be unable to enjoy her property as decreed to her in Meru High Court succession cause No 308 of 2010 since February 2019. The 1<sup>st</sup> and 3<sup>rd</sup> defendants, through Mr Njindo's advocate, indicated to the court on May 25, 2023 that they were not opposed to the application.
3. By written submissions dated or filed on May 10, 2023, the applicants relied on Mohamed A. Issack v Garissa Maize Millers (2021) eKLR, where the court cited with approval DT Dobbie & Co. (K) Ltd v Joseph Mbaria Muchina c/A No 31 of 1978, on the proposition that a suit should not be summarily dismissed without being heard on merits if it can be injected with real life.
4. Further, the applicant relied on Philip Chemwolo another v Augustine Kubede (1982-1988) KAR 103, on the proposition that blunders or mistakes by parties should not result in sanctions unless they were intentional or fraudulent. Similarly, the applicant relied on Belinda Murai & 9 others v Amos Wainaina (1979) eKLR, on the proposition that the doors of justice should not be closed out of mistakes that could be forgivable or condoned in the interest of justice since the court also errs in its interpretation of laws. Additionally, the applicant relied on Mohamed Munir Chavdnri v Musa Hassan Bulhan & 2 others (2016) eKLR, where the court found it prudent to save the suit if justice was to be done to the parties.
5. So, the question is whether the application deserves a second chance to be heard. This court was approached by the plaintiff on September 8, 2020 through a certificate of urgency application for temporary injunction and an originating summons dated September 8, 2020, which application was fixed for hearing on May 17, 2021.
6. A scene visit was ordered as requested by the application on May 17, 2021. It could not take place for reluctance by the parties until the Deputy Registrar placed the file before this court on July 19, 2022. The court directed that the application dated September 8, 2020 be canvassed through written submissions to be filed within 60 days. A mention date for July 28, 2022 was fixed to the taking a ruling date.
7. The parties failed to appear on September 28, 2022, and a ruling date was fixed for November 30, 2022.
8. The court dismissed the application in the presence of counsel for the applicants and set a case conference date for January 16, 2023, during which the counsel sought seven more days to comply. A further mention for February 9, 2023 was taken. On February 9, 2023, none of the parties appeared or complied with the earlier directives, and therefore, the court issued a notice to show cause why the suit should not be dismissed for non-compliance or prosecution for March 21, 2023. The 2<sup>nd</sup> defendant asked the court to dismiss the suit for non-compliance, non-prosecution, and the prejudice occasioned since there was already a confirmation of grant in the probate cause alluded to above.
9. Counsel for the applicants refuted the applications and blamed the 2<sup>nd</sup> defendant for the delay. She requested more time to paginate the bundle and fully comply with order 11 of the Civil Procedure



- Rules. The court granted the parties a last chance to fully comply with order 11 of the rules within 21 days from the date thereof, in default of which the suit would stand dismissed for non-compliance.
10. A mention date for April 26, 2023 was fixed for further directions. On April 26, 2023, counsel for the applicants insisted there had been compliance with the court directives, whereas counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants insisted that they were not opposed to the originating summons. On the other hand, there was no legal representation for the 2<sup>nd</sup> respondent. In the absence of non-compliance with court directives for the third time, the court dismissed the suit for non-compliance.
  11. The applicants now base non-compliance on mistakes of counsel for not filing the compliance documents, which errors should be pardoned and ought not to drive the plaintiffs from the seat of justice. 21 days from March 21, 2023 was to elapse on April 15, 2023 or thereabout. As of April 15, 2023, none of the parties had complied with the court directives. When the parties appeared before the court on April 26, 2023, none possessed copies of the filed compliance documents received, stamped, and filed by April 15, 2023. So, if they had been filed and court stamped, the easiest thing would have been to virtually display them or pass a physical copy to the court in the open court.
  12. None was available, and the applicants have given no affidavit or explanation that, indeed, the court registry had received them and or misfiled them.
  13. Similarly, if the parties, especially the applicants, had complied on time or at all, one wonders why the rest of the parties to the suit had not been served on the morning of April 26, 2023. It is true that going by the caselaw of *Belinda Murai* (supra), *Philip Chemwolo* (supra), and *Mohamed Munir Chavdhri* (supra), mistakes and blunders by parties and counsels are bound to happen and should not drive parties out of the seat of justice.
  14. Through very erudite and persuasive written submissions, Miss Aketch learned counsel for the plaintiffs has implored this court to pardon her clients and hear this matter on merits. The discretion to set aside and reinstate suits dismissed is to be exercised judiciously and not whimsically. In the case of *Mbogo v Shah* (1968) E.A 93 the court observed that it is not aimed at assisting a party who has deliberately, fraudulently, and intentionally caused the delay or who was out to derail, delay, and obstruct the cause of justice.
  15. Looking at the record before this court, the court has gone out of its way not once but thrice to allow all the parties to fast-track the hearing of the suit.
  16. The applicants were aware of the confirmed certificate of grant dated February 14, 2019 and the ruling by Lady Justice A. Onginjo on February 14, 2019.
  17. Christine W. Mururu, the 1<sup>st</sup> plaintiff, in her affidavit sworn on September 8, 2020, admitted that the plaintiffs were parties to the succession cause, but the court failed to find them as actual beneficiaries to the estate and, by extension, dismissed their claim to the land. The ruling and the confirmation of the grant were not appealed against. After failing to succeed; the applicants came to a court of concurrent jurisdiction instead of appealing to the Court of Appeal, this time round on account of adverse possession but not on enforcement of an alleged sale agreement.
  18. Counsel who has sworn the affidavit in support has raised matters on occupation, which ideally, she should not raise for and on behalf of her clients under order 19 of the Civil Procedure Rules since they are contentious in nature, the Oath and Statutory Declarations Act and the Advocates Act, decry this. The reasons why she had to descend to the arena of facts instead of allowing her clients to swear to the facts remain unclear.



19. To my mind, the prejudice, the delay, the abuse of the court's process, and indifference to this court's directives and orders from September 16, 2020 to date, as expressed by the 2<sup>nd</sup> defendant, has not been challenged at all. This court cannot sit back and watch a party to use its discretion the way it wants and turn the court into a parking lot. Under sections 1A, 1B, 3A of the *Civil Procedure Act*, sections 13 *Environment and Land Court Act* and article 159 of the *Constitution*, the court has the overriding objective to dispense justice to the parties expeditiously. The power to control, direct, and undertake its mandate on compliance with procedural and substantial law ensures that the sword of justice cuts both ways.
20. Balancing the scales of justice in this application, the plaintiffs have had more than enough bite of the cherry. They cannot complain after three chances to fast-track the hearing of the suit were disregarded. They can only blame themselves for squandering the opportunity to have their day in court.
21. The upshot is that I find no merit in setting aside the orders made on April 26, 2023. The application is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023**

**In presence of**

C.A Kananu

Aketch for applicant

Njindo for Mbubanga for 2<sup>nd</sup> defendant and also appearing for 1<sup>st</sup> & 3<sup>rd</sup> defendants

**HON. CK NZILI**

**ELC JUDGE**

