



Njoroge & another v Gicheha & 3 others (Environment & Land Case 85 of 2020) [2023] KEELC 21124 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 85 OF 2020**

JG KEMEI, J

OCTOBER 31, 2023

BETWEEN

JULIUS KURIA NJOROGE 1ST PLAINTIFF

PAUL MACHARIA BANGA 2ND PLAINTIFF

AND

MAINA GICHEHA 1ST DEFENDANT

JOHNSON GICHEHA 2ND DEFENDANT

SARA MUTHONI 3RD DEFENDANT

DAVIS GICHEHA 4TH DEFENDANT

RULING

1. On 28/9/2020 the plaintiffs filed suit against the defendants seeking title by adverse possession.
2. On 28/3/2022 the suit was dismissed for want of prosecution / non-attendance.
3. Following the said dismissal the plaintiffs/applicants filed the instant notice of motion under section 3A of the [Civil Procedure Act](#) order 12 rule 7 and order 51 rule 1 seeking orders of reinstatement of this suit.
4. The application is supported by affidavit of Karuga Wandayi learned Counsel in conduct of this suit on behalf of plaintiffs/applicants.
5. He explained that the delay in prosecuting the suit was occasioned by the time taken to serve the 1st defendant. That he managed to serve the said defendant on 29/9/2020 as per the Affidavit of Service on record sworn on 7/10/2020. That upon managing to serve all the defendants he caused the Process Server to file the affidavit of Service on 22/6/2022 whereupon he discovered that the suit had been dismissed on 22/3/2022.



6. The deponent is emphatic that notice to show cause was not served on the applicants/plaintiffs nor his law firm. Moreover, he argues that the suit was dismissed prematurely. Further that reinstatement of the suit will not prejudice the defendants who are yet to enter their appearance and file their responses to the plaintiff's claim. The court was therefore urged to reinstate the suit so that it may be heard on merit.
7. On 25/11/2022 the 1st and the 4th defendants entered appearance and appointed the firm of T. M. Njoroge & Co. Advocates to act for them in the suit.
8. Consequently the 1st and the 4th defendants/respondents opposed the plaintiffs' application vide their replying affidavit sworn on 21/11/2022. They averred that the application is fatally defective on grounds that the affidavit has been sworn by the learned Counsel and not the applicants. In addition, they added that the applicant is guilty of laches seeing that the suit was dismissed on 28/3/2022 and the application filed four months thereafter. That the delay in filing the application has not been sufficiently explained by the applicants. In addition, the Applicants have not disclosed any cogent reasons to warrant the reinstatement of the suit. That the application is therefore devoid of merit and deserves dismissal with costs.
9. On 10/5/2023 parties elected to file written submissions with respect to the application of 28/7/2022.
10. As at the time of writing this ruling none of the parties have complied with directions of the court issued on 10/5/2023. It is therefore left to the court to determine the application based on the material placed before it.
11. The singular issue for determination in this application is whether the applicants are entitled to orders of reinstatement of the suit.
12. The court has carefully considered the application in totality. The court has also considered the provisions of order 17 rule 2 (1), (5) & (6) are applicable to this application. The said provisions are replicated here for emphasis:-

“2.

(1) 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.

5. A suit stands dismissed after two years where no step has been undertaken.

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

13. In this case, it has not been disputed that the suit was filed in 28/9/2020 and dismissed on 28/3/2022, a period of 18 months. Clearly there is no evidence of any action taken by either party for a period of one year towards prosecution of the suit. That being the case, the provision set out above states that 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 it may go ahead to dismiss the suit.
14. The Court has perused the record and finds no notice issued to the parties to show cause why the suit should not be dismissed. Although the provisions of order 17 rule 2(1) uses the permissive language to the effect that the court may give notice to the parties it is an acceptable principle of natural justice that



notice ought to be given to parties before an action is taken which adversely affects them. It is therefore the view of the court that notice having not been given it is in the best interest of justice that the suit is reinstated so that it may be heard on merits.

15. For the reasons above this suit be and is hereby reinstated on the following terms:-
- a. That the applicants/plaintiffs to fix the matter for hearing within a period of sixty (60) days in default the suit shall stand dismissed.
 - b. Costs shall be in the cause.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st & 2nd Plaintiffs – Absent

T. M. Njoroge for 1st, 2nd, 3rd and 4th Defendants

Court Assistants – Phyllis & Lilian

