



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 58 OF 2014**

**FORMERLY EMBU HCC 168 OF 2014**

**NDATU**

**KARIGI.....APPLICANT**

**VERSUS**

**THE SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA.....1<sup>st</sup> RESPONDENT**

**THE GICHUGU LAND DISPUTES TRIBUNAL.....2<sup>nd</sup> RESPONDENT**

**THE LAND REGISTRAR – KIRINYAGA DISTRICT..... 3<sup>rd</sup> RESPONDENT**

**THE ATTORNEY GENERAL..... 4<sup>th</sup> RESPONDENT**

**JOHN MURIITHI BENSON..... 5<sup>th</sup> RESPONDENT**

**RULING**

**Introduction**

Mr Ndathu Karigi, the applicant has through his counsel filed a notice of motion dated 4<sup>th</sup> July, 2014 in which he has sought the following orders from this court:

1. That the orders issued on 16<sup>th</sup> September, 2013 be reviewed and set aside and the application dated 18<sup>th</sup> December, 2006 which was dismissed thereon for want of prosecution be reinstated and the same do proceed for hearing and determination on merits.
2. That costs be in cause.

He has annexed a supporting affidavit in which he has set out the reasons why his notice of motion should be reinstated.

Mr John Muriithi Benson who is the 5<sup>th</sup> respondent in the main suit has filed a replying affidavit. Additionally, he has filed a notice of preliminary objection in which he has alleged that the application for reinstatement is scandalous, vexatious, frivolous and an abuse of the court process.

**The Case for the Applicant (Ndathu Karigi)**

According to the applicant, he has sought an Order 45 review of the Order which dismissed the notice of motion for an Order 53 Judicial Review. He had been granted leave to apply for judicial review of the order that directed the suit land to be sub-divided.

He also has stated in his supporting affidavit that he is a lay man who is not conversant with the court proceedings. Furthermore he has stated that the notice of motion is meritorious because it affects his land parcel number Baragwe/Kariru/644 in which he is registered as the owner.

Furthermore, the respondent had instituted legal proceedings in Gichugu Land Disputes Tribunal in which the applicant was not a party. The tribunal awarded the respondent ½ an acre of the above parcel of land which was adopted as judgement by the court of the Senior Resident Magistrate at Kerugoya in that court's land disputes tribunal case number 21 of 2005.

As far as the applicant is concerned, the respondent is a stranger to him and was never at any one time dependent for his livelihood on the suit land. And for these reasons, he urges this court to reinstate the dismissed notice of motion to be heard on merits.

### **The Case for the Respondent (John Muriithi Benson)**

The respondent has filed a replying affidavit. He has stated in that affidavit that the application for reinstatement of the dismissed notice of motion is an abuse of the court process. According to him, the notice of motion remained in the court file un-prosecuted from the year 2006 until its dismissal on 16<sup>th</sup> September, 2013.

The respondent also has stated that the application has been overtaken by events because the award of the Land Disputes Tribunal award has been adopted as a judgement of the court in Kerugoya Senior Principal Magistrate's Court case number 21 of 2005.

Furthermore, the respondent has stated that the application does not qualify to be reviewed in terms of Order 45 of the 2010 Civil Procedure Rules. The reason for this is that it does not raise any new important matter. Additionally, it does not disclose any mistake or error on the face of the record that warrants review. In response to the claim of the applicant that he is a lay man, the respondent states that the applicant had the benefit and advantage of his advocates on record namely Messrs Njanja and Co Advocates.

According to him, the real intention of this application is to delay the execution of the court decree. He has therefore stated that the applicant registered himself as the owner of the suit land without the knowledge of any family member. In the circumstances, he has urged the court to dismiss the application.

### **The Applicable Law:**

In view of the affidavit evidence of both parties, the law applicable in this case is ***Order 45 of the 2010 Civil Procedure Rules***. According to the provisions of Order 45, an applicant for review has to meet the following conditions:

1. The applicant must show the discovery of new and important matter which after the exercise of diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
2. The applicant has to show that there is some mistake or error apparent on the face of the record that warrants review.
3. The applicant may also show that there is sufficient good reason to warrant a review of the decree or order complained of.

4. In all the stated situations, the applicant is required to prosecute his application without any reasonable delay.
5. He has also to show that he has not lodged an appeal against the order complained of or there is no right of appeal against the order complained of.

According to the case of *Mukhisa Biscuits C. Ltd v. West End Distributors 1969 (EA) 697*, the provisions that give the court jurisdiction to dismiss a suit for want of prosecution which are set out in **Order 17 of the 2010 Civil Procedure rules** are not exhaustive. That case went further to state that the court has inherent powers to dismiss suits in circumstances that are not specified in Order 17 rule 2. According to that court, the purpose of the inherent powers is to prevent injustice or an abuse of the court process. This is a sound principle of law.

I have also perused the dismissal order handed down by the High Court (*H.I. Ong'udi, J*) of 16<sup>th</sup> September 2013. According to the High Court in that application, the applicant took no steps to prosecute his application for well over 5 years. The court also stated that the matter of his advocates' failure to prosecute the case was a matter between the applicant and his counsel. And for these reasons, she dismissed the application that is sought to be reinstated.

### **Issues for Determination:**

In the light of the affidavit evidence and the applicable law, I find the following to be the issues for determination:

1. Whether or not the applicant has satisfied the requirements of Order 45 of the 2010 Civil Procedure Rules.
2. Whether or not this court should exercise its discretion in reinstating the dismissed application.
3. Who should pay for the costs of this application.

### **Evaluation of the Evidence, Findings and the Law:**

I have considered the affidavit evidence of both parties and submissions of the applicant's counsel. I find that the applicant has not disclosed any new important matter that warrants a review of the ruling that dismissed his application. I also find that there is no error or mistake that is apparent on the face of the record that warrants review.

Finally, the applicant has not shown any other sufficient cause that may warrant the review of the order dismissing his application that is now sought to be reinstated.

### **Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. An order dismissing the applicant's application.
2. There will be no orders as to costs as the applicant and respondent are members of one family.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 23<sup>rd</sup> day of April 2015**

**In the presence of Ms Twili for the petitioner and in the absence of the Respondents**

**Court clerk Mr. Muriithi**

**J.M. BWONWONGA**

**JUDGE**