



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 18 OF 2021

FREDRICK WEKESA MWANJA PLAINTIFF

VERSUS

PHILIP MUCHAI MWASAME..... DEFENDANT

RULING

1. This is a fairly old matter which was initially filed in the High Court at Bungoma on 12th March 2004 as Bungoma HCCC No. 34 of 2004. It was later transferred to Environment and Land Court at Bungoma on 10th March 2021 thereby becoming Bungoma ELC No. 3 of 2021. Hardly had the matter landed at Bungoma ELC when it was again transferred, this time to Kakamega ELC, on account of location of the suit property.

2. This ruling is in respect of the plaintiff's Amended Notice of Motion dated 22nd June 2021 and filed on the same date. Its unamended version is the Notice of Motion dated 10th February 2021 and filed on 23rd February 2021.

3. The following orders are sought in Amended Notice of Motion dated 22nd June 2021:

1. *[Spent]*

2. *That the order of this honourable court made on 20th July 2011 dismissing the applicants suit for want of prosecution be set aside and the suit be reinstated.*

3. *The costs be in the cause.*

4. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that when he filed this suit, the defendant immediately filed an objection seeking revocation of a grant which had been issued to him through High Court Succession Cause No. 45 of 1998 and that on various occasions when he fixed this matter for hearing, the defendant applied that the succession cause be concluded first before this matter could proceed. He added that on 9th November 2009, the defendant sought that this matter be stood over generally until the proceedings in succession cause be concluded and the case was stood over generally. That on the 20th July 2011, without any notice to him or his advocates, this matter was placed before the Deputy Registrar who proceeded to dismiss the suit for want of prosecution. He further deposed that had the notice of dismissal been served upon him or his advocates, he would have attended court to explain and give reasons why the suit should not be dismissed. That on 3rd February 2021, a ruling was delivered in the succession cause dismissing the defendant's objection and further that since the proceedings in succession cause have been concluded, it is fair and just that the suit herein be reinstated for hearing and final determination.

5. The defendant opposed the application through grounds of opposition filed on 22nd June 2021 in which he took the position that the decree and the entire suit that was dismissed are now statute barred under the Limitation of Actions Act which gives 12 years as the maximum lifetime of a decree and that the suit if any concerns an eviction which is similarly not capable of re-instatement as the 12-year period has lapsed and no action can be sustained on a suit that has died a natural death. The respondent further maintained that the plaintiff had slept on his own rights since the year 2008 and cannot purport to point fingers at the succession cause as it was a totally different action with no bearing or order staying proceedings herein. That the delay of over 12 years is inordinately long and that the defendant has now acquired statutory rights of adverse possession as he has remained in open, uninterrupted and continuous occupation of the suit land for over 12 years thereby defeating any title or proprietary interests of the plaintiff. He therefore urged the court to dismiss the application with costs.

6. The application was canvassed through written submissions. The applicant submitted that through the plaint herein dated 12th March 2004, he sought eviction of the defendant from land parcel number Kakamega/Lwandeti/1291 and that the defendant filed a defence at paragraph 4 of which he averred that this suit was brought to counter the proceedings that had been initiated in the succession cause seeking revocation of the grant. The applicant further relied on **Order 17 Rule 2(1)** of the **Civil Procedure Rules** and argued that when the matter

was dismissed on 20th July 2011, there was no notice issued to the parties. Relying on the Ugandan case of **Isadru Vicky –vs- Perina Aroma & 6 Others, High Court of Uganda Civil Appeal No. 0033 of 2014**, he submitted that the court has discretion to set aside the order of dismissal.

7. He went on to argue that the delay was excusable, since the proceedings in the succession cause hindered the prosecution of this suit, that the respondent contributed to the delay and that there will be no prejudice suffered by the respondent if the suit is reinstated for hearing and final disposal.

8. The respondent argued that the applicant never prosecuted his suit which was filed in 2004 and that notices were issued requiring parties to show cause why the dormant suit should not be dismissed upon which the suit was dismissed for want of prosecution. He further submitted that the dismissal order is a decree in the form of a judgement which the applicant cannot seek to set aside now after an inordinate delay of 16 years. He further submitted that there is no nexus between the succession cause and the instant suit and that there was no order staying this suit or any order to the effect that the succession cause be heard first. He therefore urged the court to dismiss the application with costs.

9. I have considered the application, the affidavit filed, grounds of opposition and the submissions. The record herein shows that this suit was dismissed for want of prosecution on 20th July 2011. On that occasion, no of the parties appeared before the court. From the date of dismissal, there was absolutely no action taken in the file until 23rd February 2021 when the initial version of the present application was filed. There was thus a delay of about nine years and five months in bringing the application for setting aside.

10. The applicant's explanation that the delay was occasioned by the succession proceedings is not supported by the record. There was no order staying proceedings in this matter pending the outcome of the succession proceedings. In any case, a perusal of the ruling delivered on 3rd February 2021 in the succession proceedings shows that a grant was issued on 14th May 2001 and that it was confirmed on 28th June 2002. The confirmation marked the end of the succession proceedings. What came later by way of an application for revocation of the grant, and which application was ultimately dismissed on 3rd February 2021, cannot possibly be said to mean that the proceedings were yet to be concluded. If the applicant focused of the succession proceedings to the detriment of this case, he can only have himself to blame. Equally, the applicant has not candidly disclosed to the court the date when he learnt of the dismissal. I consider the delay to be inordinate and inexcusable.

11. The applicant has maintained that no notice was issued to parties prior to the dismissal. **Order 17 Rule 2 (1)** of the **Civil Procedure Rules** grants the court power to dismiss a suit in which no step has been taken for one year. The rule is permissive as regards issuance of notice. It provides:

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.

12. In **Fran Investments Limited v G4S Security Services Limited [2015] eKLR**, F Gikonyo J sated as follows in regard to the rule:

... this order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "sword of the Damocles". But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. ...

13. The applicant has clearly not been a vigilant litigant. Equity aids the vigilant and not the indolent. The applicant should not be allowed to reap from his indolence. Amended Notice of Motion dated 22nd June 2021 lacks merit. I dismiss it with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Manyoni holding brief for Mr Onyando for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma