



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION NO. 19 OF 2013**

**SIMON GACIATA**

**(suing as the legal representative of**

**THURANIA ANJURI (Deceased).....PETITIONER**

**VERSUS**

**ROBERT THIANE.....1<sup>ST</sup> RESPONDENT**

**MUKETHA NKIRITI.....2<sup>ND</sup> RESPONDENT**

**ISAAC MUGAMBI IBAYA.....3<sup>RD</sup> RESPONDENT**

**KENNETH MUGAMBI IBAYA.....4<sup>TH</sup> RESPONDENT**

**CHARLES GITONGA IBAYA.....5<sup>TH</sup> RESPONDENT**

**JOSEPH KINYUA IBAYA.....6<sup>TH</sup> RESPONDENT**

**DLASO TIGANIA WEST/EAST DISTRICT.....7<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT**

**RULING**

**A. The Application**

1. By an application dated 2.8.2021 the court is asked to set aside the orders issued on 13.3.2018 dismissing this matter for want of prosecution and reinstate the petition for hearing. The application is supported by the affidavit sworn on the even date by Simion Gaciata.

2. The reasons given for the application are that the dismissal was out of fault by the previous advocates on record and lack of communication; the suitland is the only known homestead and if evicted the applicant shall be rendered homeless and that there would be irreparable loss and damage if the application was not allowed.

**B. Grounds of Opposition**

3. The application is opposed through a replying affidavit by Naitili for the 1<sup>st</sup> respondent sworn on 9.12.2021 and the response sworn on 9.12.2021, 3<sup>rd</sup> respondent sworn on 16.12.2021, 4<sup>th</sup> respondent sworn on 16.12.2021, 5<sup>th</sup> respondent sworn on 16.12.2021, 6<sup>th</sup> respondent sworn on 16.12.2021, and the 7<sup>th</sup> and 8<sup>th</sup> respondents through written submissions dated 25.1.2022.

4. The main grounds by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are that the A/R cases were heard and determined; each was issued with a parcel number as per the attached decision; there has been inordinate delay which is not explained; the applicant is on the land illegally; title deeds were issued after the dismissal of the petition hence it was overtaken by events and that the attached map showed the correct parcel numbers.

**C. Written Submissions**

5. On their part the 7<sup>th</sup> & 8<sup>th</sup> respondents submitted the mission to salvage the petition did not hold any water and rely on **Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2015) eKLR Ruga distributors Ltd vs Nairobi bottlers Ltd.**

6. Secondly it was submitted by the 7<sup>th</sup> & 8<sup>th</sup> respondents there was laxity on the part of the petitioner who had a duty to follow up his matter hence an attempt to seek sympathy on his own faults should not be entertained as held in **Rajech Rghan vs Fifty investment Ltd and another (2005) eKLR and Bains construction co. Ltd vs John Mzaze Ogowe (2011) eKLR.**

7. On the inordinate delay and reasons for the same, the 7<sup>th</sup> & 8<sup>th</sup> respondents relied on **Donald vs Rabalk vs JSC and another (2018) eKLR, Trusters of the Archdiocese of DarAsalm vs The chairman Bunju Village Good and others vs Bildad Wachira and another (2016) eKLR, water painters international vs Benjami Kogoo t/a group and Women in Agriculture Kodieny (Gwako) ministries (2014) eKLR.**

#### **D. Determination**

8. The petition here was filed on 20.9.2013 and a certificate of urgency application dated 19.9.2013 filed alongside it seeking for interim orders which were granted on 23.9.2013.

9. The petition was opposed by the 7<sup>th</sup> and 8<sup>th</sup> respondents through grounds of opposition dated 22.5.2015.

10. On 3.10.2013 interim orders were extended and directions given for parties to file replies by 5.12.2013. It appears there was no action until 29.6.2015. Eventually on 24.1.2018 a notice to show cause was issue for 13.3.2018.

11. On 13.3.2018 the court dismissed the petition for non-compliance with its directions of 28.6.2015 and for non-prosecution.

12. Looking at the court record the petitioner came to court and obtained interim orders in 2013 and took no action to prosecute the petition up to 2018, despite clear court directives in 2015.

13. Similarly between 2018 and 2021 there only explanation for the delay given that there was non-communication with the counsel previously on record and or was given misleading information that the matter was yet to be allocated a date.

14. The court record is clear that the petitioner's lawyers were always present between 2013 and 2018. The petitioner was always absent in court. The petitioner has not stated when he last visited his lawyer's offices then on record between 2013 and 2018. If indeed the petitioner was diligent enough between 2013 and 2017 and was following up his matter, he would have known its progress.

15. The case belongs to the petitioner and not his lawyers then on record. The petitioner has also not disclosed what else he did after obtaining the interim orders so as to set down the hearing of his petition particularly being aware he had stopped a statutory process of land adjudication.

16. The respondents have opposed the application on the basis that it was now overtaken by events since title deeds have been issued in favor of 2 – 6<sup>th</sup> respondents. The 1<sup>st</sup> respondent has also passed on.

17. In **Nileh Preunchand Mulji Shah and another T/A Ketan Emporium vs M.D Papat and others and another (2016) eKLR** the court held inaction of nearly five years was an indication of lack of interest and was prejudicial to defendant.

18. In this case there has been inordinate delay in seeking for the setting aside. Title deeds have also been issued due to the delay and inaction. It will therefore be prejudicial and unjust to the respondents to reinstate the petition in the obtaining circumstances as held in **John Nahashon Mwangi vs Kenya Finance Bank Ltd (in Lianslord) (2018) eKLR and Patrobas Awino vs Directors of Public prosecution and another (2021) eKLR.**

19. The upshot is the application dated 2.8.2021 lacks merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 6<sup>TH</sup> OF APRIL, 2022**

**In presence of:**

Mutuma for respondents

Miss Kiyuki holding brief for Kithinji for applicant

**HON. C.K. NZILI**

**ELC JUDGE**