



**Chemweno v Mburu (Environment & Land Case 315 of 2017)
[2022] KEELC 2401 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 315 OF 2017**

EO OBAGA, J

MAY 18, 2022

BETWEEN

HOSEA BARNO CHEMWENO PLAINTIFF

AND

SIMON KIMANI MBURU DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 26th October 2021 in which the Plaintiff/Applicant seeks setting aside of the orders of court given on 22nd January, 2019 dismissing the Applicant's suit for non-attendance.
2. The Applicant contends that his suit was dismissed without notice to him. He states that his previous lawyer became incapacitated and stopped coming to court. He further stated that he is aged and sickly and was residing in Nakuru but was not informed of the hearing date. The Applicant only became aware that his suit had been dismissed when he was served with notice to show cause. He argues that he was never served with pleadings which culminated to the notice to show cause. He pleads that mistakes of his previous lawyer should not be visited upon him.
3. The Applicant's application was opposed by the 1st Defendant/Respondent based on a replying sworn on 8th November, 2021. The Respondent contends that the Applicant was duly served with all court processes through his advocate who never bothered to come to court. The Respondent further contends that the Applicant should have been in contact with his advocate and that the Applicant's advocate was not incapacitated as he is operating his law firm today.
4. The Respondent further argues that the Applicant will not suffer any prejudice if the application is disallowed as he has no prima facie case and that in any case, the Applicant can lay blame on his lawyers who should bear the consequences and further that the status of the land has changed.



5. Though the Attorney General on behalf of the 2nd and 4th Defendant filed written submissions, there is nothing on record to show if they either filed grounds of opposition or replying affidavit.
6. I have carefully considered the Applicant's application as well as the opposition to the same by the 1st, 2nd and 4th Respondents. I have also considered the submissions filed herein. The only issue for determination is whether the Applicant has demonstrated that he deserves exercise of discretion in his favor.
7. A brief background is necessary to enable the court to determine whether there is need to set aside the dismissal order. The Applicant filed this suit on 19th September, 2017 in which he sought nullification of an allotment letter in favour of the 1st Respondent and for a declaration that he had acquired the suit property by way of prescription as well as permanent injunction against the Respondents.
8. The suit property had been allotted to one Monicah Mugure Kariuki by the settlement Fund Trustee (SFT). The allottee failed to meet the conditions of allotment and the plot was re-possessed and re-allocated to the 1st Respondent who proceeded to meet the conditions and obtained title.
9. The Applicant filed an application for injunction against the 1st Respondent on 19th December, 2017. This application was heard and was dismissed in a ruling delivered on 31st May, 2018. The Applicant's lawyer took a mention date for directions which was set for mention on 4th October, 2018. Come this date, the Applicant's advocate was not in court. It is only the counsel for the 1st Respondent who was present. The 1st Respondent's counsel took a hearing date for 22nd January, 2019. The Applicant's Advocates were duly served but they received hearing notice under protest on the ground that they had no instructions and that the Applicant was on his own. The 1st Respondent's counsel applied for dismissal of the suit which request was granted.
10. Thereafter, all court processes were served upon the Applicant's erstwhile advocates who received the same but never attended court. The 1st Respondent taxed his bill and thereafter a notice to show cause was issued which was personally served upon the Applicant. It is after this that the Applicant engaged his present lawyers who made the present application.
11. It is important to note that the application to set aside the dismissal order was made after three (3) years. The reason given is that the Applicant's erstwhile lawyer was incapacitated. There was no evidence shown that the lawyer was incapacitated as alleged. The Applicant's lawyer has a law firm at Eldoret where the 1st Respondent's lawyer also practices. The 1st Respondent denied that the Applicant's lawyer was incapacitated arguing that he is well and operates his firm to date.
12. In receiving all court processes, the Applicant's erstwhile lawyer did not indicate that he was incapacitated. Instead, he used to indicate that he had no instructions from the Applicant. It is therefore clear that the Applicant was not being candid.
13. Though it is clear that the Applicant's erstwhile lawyer never bothered to inform him, the Applicant had a duty to follow upon his case. There is no evidence that he ever inquired about the progress of his case. He claims that he resides in Nakuru and was sickly. This is not true as at the time he was served with notice to show cause, he was in his hardware in Rongai and promptly instructed another lawyers to take up the matter. In the case of *Peter Kiplagat Rono -vs- Family Bank Limited* (2018) eKLR, Justice Mumbi Ngugi (as she then was) quoted from the case of *The Council, Jomo Kenyatta*



University of Agriculture and Technology -vs- Joseph Mutura Mbeere & 3 others (2015) eKLR where Justice Waki J. A stated as follows:-

“In this case, however, the Applicant’s advocates simply plead ignorance and consequential inaction which cannot avail them.

This court said so in *Rajesh Rughani -vs- Fifty Investment Ltd & another* (2005) eKLR:-

“If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy:-

In the case of *Bains Construction Co. Ltd -Vs- John Mzare Ogowe* 2011 eKLR this court also observed:-

“it is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it equally true when counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences.”

14. Though it is a fundamental right of a party to be heard, a party cannot be given an opportunity to be heard when there is nothing to be heard. In the instant case, the Applicant is claiming that when the first allottee Ms. Monicah Mugure Kariuki died, he moved into the suit property and fenced it and started using it. He claims that he has been utilizing the land for over 13 years and therefore has acquired it by adverse possession.
15. The court record shows that the SFT cancelled the allotment to Ms. Monicah Mugure Kariuki on 11th January, 2017. On 25th August 2017 the SFT offered the same plot to the 1st Respondent who accepted the offer. A title in his favour was processed and issued on 16th November, 2017. It is therefore clear that the suit property prior to 16th November, 2017 was property of SFT and the Applicant could not claim any right of adverse possession against land held by a government institution. This being the case and given that the Applicant slept on his rights for long, it will be a waste of judicial time to set aside the dismissal order. I therefore find that the Applicant’s application is devoid of merit. The same is dismissed with costs to the 1st, 2nd and 4th Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF MAY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Ms. Khayo for 1st Defendant.

Court Assistant -Albert

E. OBAGA

JUDGE

18TH MAY, 2022

