



**Ndeti v Gatekeeper Limited (Environment & Land Case  
186 of 2017) [2022] KEELC 2413 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2413 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 186 OF 2017**

**CA OCHIENG, J**

**MAY 11, 2022**

**BETWEEN**

**GREGORY MUTHEKE NDETI ..... APPLICANT**

**AND**

**GATEKEEPER LIMITED ..... RESPONDENT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 6<sup>th</sup> October, 2021 brought pursuant to Order 51 Rule 15 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A and 63(E) of the *Civil Procedure Act* as well as Article 159 of *the Constitution*. The Plaintiff seeks the following orders:
  1. Spent.
  2. That the Honourable Court do grant leave to the firm of Nzilani Muteti & Co. Advocates to come on record and act for the Plaintiff/Applicant in place of Alphonse Mutinda & Co. Advocates.
  3. That the Honourable Court be pleased to set aside the Ruling of this court dated the 2<sup>nd</sup> day of October, 2019 dismissing this suit for want of prosecution and reinstate the same for full hearing and determination.
  4. That the Honourable Court be pleased to temporarily reinstate the restraining order issued on the 13<sup>th</sup> day of April, 2018 restraining the Defendant, either by itself, its agents, its servants or any person acting on its behalf from trespassing, constructing, demolishing or in whatever manner whatsoever interfering with the Plaintiff's peaceful occupation and possession of all the property identified as Land Reference Number 377/4772 (formerly Drainage Area No. 3AA, Grid Ref, 745405, Map No. 148/4 General Map) pending the hearing and determination of this Application.



5. That the Honourable Court be pleased to reinstate the orders issued by this Honourable Court on 13<sup>th</sup> April, 2018 granting an injunction restraining the Defendant, either by itself, its agents, its servants or any person acting on its behalf from trespassing, constructing, demolishing or in whatever manner whatsoever interfering with the Plaintiff's peaceful occupation and possession of all the property identified as Land Reference Number 377/4772 (formerly Drainage Area No. 3AA, Grid Ref, 745405, Map No. 148/4 General Map) pending the hearing and determination of the suit.
  6. That this Honourable Court do give further orders that it may deem necessary.
  7. That cost of this Application be provided for.
2. The application is supported by the affidavit of Gregory Mutheke Ndeti and premised on the grounds that the Plaintiff is the bona fide and beneficial owner in possession and occupation of Land Reference Number 377/4772 (formerly Drainage Area No. 3AA, Grid Ref, 745405, Map No. 148/4 General Map), hereinafter referred to as the 'suit land', by virtue of adverse possession. Further, that the Plaintiff has been in continuous use of the suit land for more than 40 years, has developments thereon and the Respondent has no legal justification to interfere with it. He contends that
    3. Defendant has threatened and continues threatening him with forceful eviction using the order of dismissal and if not restrained he shall suffer irreparable loss and damage. Further, that he has demonstrated a *prima facie case* with a probability of success and the Defendant will not suffer any prejudice if the Application is allowed.
    4. The Defendant opposed the application and filed a replying affidavit sworn by one Nancy C. Kirui its Director where she confirms that vide their application dated the August 2, 2019, which was duly served upon messrs Alphonse Mutinda & Company Advocates, they sought to dismiss this suit for want of prosecution. She explains that the plaintiff through his erstwhile advocates never filed any replying affidavit to oppose the said application which was scheduled for hearing on October 2, 2019, on which date this suit was dismissed for want of prosecution. She insists the Plaintiff had never been keen on prosecuting this suit as he did not take any steps to set the matter for trial since the delivery of the Ruling to his application dated the April 24, 2017. She avers that the plaintiff has failed to prove that he is in actual possession of the suit land but insists it is the defendant who has been and is still in possession of the said suit land. Further, there are no structures on the suit land which belong to the plaintiff. She reiterates that the defendant shall be greatly prejudiced if the orders sought are granted as it is the legal owner that is in occupation of the suit land and has fenced the same including constructed access roads in readiness for development. She reiterates that the application lacks merit, is fatally defective and should be struck out.
  6. The application was canvassed by way of written submissions.

### **Analysis and Determination\*\***

Upon consideration of the Notice of Motion application dated the October 6, 2021 including the respective affidavits and rivaling submissions, the following are the issues for determination:

Whether the firm of messrs Nzilani Muteti & Co. Advocates should come on record and act for the Plaintiff in place of Alphonse Mutinda & Co. Advocates.

Whether the Ruling of this court dated the October 2, 2019 dismissing this suit for want of prosecution should be set aside and the suit reinstated for full hearing and determination.



Whether the orders of temporary injunction issued on April 13, 2018 should be temporarily reinstated pending the outcome of this suit.

7. The Plaintiff in his submissions provided a background of the dismissed suit and reiterated the averments as per his supporting affidavit. He contended that since 2018, he was unaware of the status and proceedings herein until he was served with the order dated the October 2, 2019 and immediately instructed his Advocates to file the instant Application. He further submitted that there has been no inordinate delay and this clearly demonstrates his seriousness. Further, that mistakes of counsel should not be visited upon an innocent litigant. He reiterated that he has no intention of abusing the court process and neither is he seeking to obstruct the cause of justice. He relied on article 50 of the Constitution of Kenya and Order 51 Rule 15 of the Civil Procedure Rules. To buttress his averments, he relied on the following decisions: HCCC NO 340 of 1971 – (NAIROBI) Ivita v Kyumbu; HCCC No 109/1998 (EMBU) J.G. Builders v Plan International Philip Chemowolo & anor v Augustino Kubede; Ghehona v SDA of East Africa Union (2013) eKLR; Mwangi Kimenyi v Attorney General & anor (2014) eKLR; Tana and Athi Rivers Development Authority v Jeramiah K Mwakio & 2 others (2015) eKLR, where the court cited the case of Ketterman & others v Hansel Properties Ltd 1 ALL ER 38 and Limited v Nzioki (2004) KLR 173
8. The Defendant in its submissions stated that the Plaintiff has failed to give convincing reasons on why the matter was not set down for hearing in good time. Further, that directions had been given in the matter but the list of witnesses including list of documents were filed when the matter had already been dismissed and are therefore of no effect. It submitted that the Plaintiff was enjoying injunctive orders and hence saw no need to prosecute the matter. Further, that he only started reacting after he noticed some activity on the suit land occupied by the Defendant. It reiterated that it is trite law that cases filed before the court belong to the litigants and not their advocates. Further, that litigants have a duty to constantly follow up on the progress of their cases and ensure that they are prosecuted and take appropriate steps to defend any application filed against them. To buttress its averments, it relied on the case of Tirth Construction Limited v Orion Hotels Limited (2020) eKLR.
9. As to whether the firm of messrs Nzilani Muteti & Co. Advocates should come on record and act for the plaintiff in place of Alphonse Mutinda & Co. Advocates.
10. I note the plaintiff's erstwhile advocate and the firm of messrs Nzilani Muteti & Co. Advocates entered into a consent for the said firm to come on record for the plaintiff. Order 9 Rule 9 of the Civil Procedure Rules stipulates thus:
  1. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
    - a. upon an application with notice to all the parties; or
    - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
11. Since the Advocates entered into a Consent, and in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, I will proceed and allow the firm of messrs Nzilani Muteti & Co. Advocates, to come on record for the Plaintiff herein.
12. As to whether the Ruling of this court dated the 2nd day of October, 2019 dismissing this suit for want of prosecution should be set aside and the suit reinstated for full hearing and determination.



13 From a perusal of the proceedings herein, I note this suit was dismissed for want of prosecution on 2<sup>nd</sup> day of October, 2019. From a cursory look at the proceedings herein, it indicates the Plaintiff filed the dismissed suit contemporaneously with an Application seeking for injunctive orders on April 25, 2017 through the firm of messrs Alphonse Mutinda & Co. Advocates. Further, orders of temporary injunction were granted on the 13<sup>th</sup> day of April, 2018 wherein the Defendant was directed not to interfere with the suit land pending the outcome of the dismissed suit. From April 13, 2018, the plaintiff never complied with Order 11 of the *Civil Procedure Rules* by filing Witnesses Statements including List and Bundle of Documents and only did so when the suit had been dismissed. Further, the Plaintiff never took any steps to set the suit down for hearing but blames the erstwhile advocates for failing to update him on the progress of the dismissed suit. I note the said Advocates were served with the application seeking to dismiss the suit for want of prosecution but failed to even file any response to oppose it. It is the plaintiff's explanation that after the orders of injunction were issued, he waited for communication from his Advocates to update him on the steps taken to fix the case for hearing and even visited the Advocate's Chambers in the year 2019 but was still unaware of the progress of his case. The instant application has been vehemently opposed by the defendant. In the case of *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

14 Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

15 While in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 it was held that:

In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

16 Based on the facts before me while associating myself with the decisions cited, I find that the plaintiff except for blaming his erstwhile advocates has not provided plausible reasons for delay in prosecuting his suit. Further, as held in the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi HCCS No 397 of 2002 that a case belongs to a litigant and not the Advocate and a litigant has a duty to pursue the prosecution of his case. Further, that the court cannot set aside a dismissal order only on the sole ground of a mistake to Counsel; I opine that the Plaintiff had a duty to follow up on his case and ensured the same was set down for hearing. It seems to me that once the Plaintiff obtained injunctive orders on April 13, 2018 he did not see any reason why he should hasten the matter, as he failed to comply with Order 11 of the *Civil Procedure Rules* within the requisite time nor file a response to oppose the application that sought to dismiss his suit for want of prosecution that had been filed in 2019. It is my considered view that this application which has been filed after two years has been brought after an inordinate delay and is an afterthought as it was only brought, when the Plaintiff



had seen a tractor on the suit land in January 2021. To my mind, the Plaintiff has not demonstrated sufficient cause why this suit should be reinstated. In the circumstance, I will decline to grant this prayer as sought.

- 17 As to whether the orders of temporary injunction issued on April 13, 2018 should be temporarily reinstated pending the outcome of this suit. Since I have declined to reinstate this suit, I will not deal with this issue.
- 18 It is against the foregoing that I find the Notice of Motion Application dated October 6, 2021 unmerited and will dismiss it.
- 19 Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF MAY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

