



REPUBLIC OF KENYA



**Gatobu & another v Kinuthia & another (Petition 44 of 2014)
[2022] KEELC 3873 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 44 OF 2014
CK NZILI, J
JULY 27, 2022
IN THE MATTER OF THREATENED CONTRAVENTION
FUNDAMENTAL RIGHTS UNDER ARTICLE 40 OF THE
CONSTITUTION OF KENYA
IN THE MATTER OF NATIONAL LAND COMMISSION**

BETWEEN

MERCY NGUTA GATOBU 1ST PETITIONER

CYPRIAN KAUME 2ND PETITIONER

AND

LEONARD KIARIE KINUTHIA 1ST RESPONDENT

THE COUNTY GOVERNMENT OF ISIOLO 2ND RESPONDENT

RULING

A.The Application

1. By an application dated March 2, 2022 the court is asked to set aside or vacate the orders made on February 17, 2022 dismissing the petition for want of prosecution and hear the case on merits. The application is supported by a sworn affidavit of Mercy Gatobu on the even date. The reasons given are that the suit was fixed for a mention on February 17, 2022 but counsel on record could not link up with the court virtually on time due to some other suit he was handling in a Nanyuki court. It is averred that the applicants eventually got online some minutes after 10 am only to establish that the suit had been dismissed for non-prosecution.
2. Further the applicants aver that it was out of mistake and appearance of counsel in other suits and that both plaintiffs were engaged in Nanyuki Court, Tigania law court and elsewhere hence they were



unable to attend court in person. It is averred there would be no prejudice to the defendants if the suit is reinstated for hearing on merits and in order to protect their rights as to fair hearing under *the Constitution* otherwise they would be exposed for irreparable loss.

B. Grounds of Opposition

3. The application is opposed through a replying affidavit of Dr. Ahmed Galgalo Guyo on behalf of the 2nd respondent sworn on May 21, 2022 on the basis that it is a non-starter, legally defective, frivolous and an abuse of the court process.
4. It is averred that the petitioners were the ones who served a mention notice for February 17, 2022 upon the respondents advocates on record but failed to attend court and that the court had no option but to dismiss the petition, given there has been several court notices to show cause as per the attached annexures marked AG "1" which the petitioners have ignored in the past despite indulgence by the court.
5. The respondents aver the petitioners have been guilty of indolence and that there has been inordinate delay, laxity and or lack of interest in prosecuting the petition, going by the many mention notices served upon them by the respondents yet despite receipt thereof the petitioners have never appeared before court for hearing.
6. Lastly, the respondents averred that equity aids the vigilant and not the indolent, and given the petitioners are disinterested in the prosecution of the petition, the explanation given was not plausible and hence the court's discretion should not be exercised in their favour.
7. In brief oral submissions before the court, the 1st petitioner reiterated the contents of her affidavit and urged the court to find that the replying affidavit had not specifically responded to the issues raised in the application, since she was the one who had taken the mention date for February 17, 2022 and counsel for the respondents was deliberately misleading the court.
8. The 1st petitioner reiterated that they were keen to prosecute the suit hence prayed for its reinstatement so that they could get a fair hearing and substantive justice.

C. The Petition

9. The petitioners filed the petition on December 18, 2014 claiming that as the owners of 2 acres of land within Mwangaza B Isiolo Town with effect from 1990 the 1st respondent in 1992 had through secrecy, fraud and or collusion with the 2nd respondent's defunct county council, subdivided the suit land into plots and despite that protests the 2nd respondent, the latter allowed the 1st respondent to illegally acquire and or permitted him to start developments thereon.
10. The petitioners sought for; a declaration that they were the legal owners of the suit land, cancellation of the purported ballots, allotments, allocations and or registration of the suit land, demolition and eviction of the 1st respondents from their land and a permanent injunction restraining the respondent taking possession, allocating, alienating or issuing any ownership documents or interfering with their peaceful occupation of the suit land.
11. Alongside the petition, the petitioners brought an application dated December 18, 2014 under certificate of urgency and obtained interim orders on December 19, 2014.
12. The 2nd respondent entered appearance on 16.1.2015. Likewise the petitioners by a notice dated July 4, 2018 withdrew the services of their lawyers on record M/s Mbogo & Muriuki advocates and started to in person.



13. The 2nd respondent made a reply to the petition through a replying affidavit sworn on July 2, 2018, claiming the suit land belonged to it and that the petitioners had failed to attend a publicly announced balloting process otherwise there was no secrecy, nepotism or favoritism as alleged or at all during the balloting and the awarding of the plots to the successful ballottees.
14. Further, the 2nd respondent averred that their role was to collect rates from plot owners and that the petitioners were some of the people holding the county at ransom by keeping their plots undeveloped for speculative purposes hence denying it rates and taxes.
15. Additionally, the 2nd respondent averred that it had a duty to plan the Isiolo town for its effective management and utility. Lastly, the 2nd respondent averred the petition raised no constitutional question.
16. The petitioners failed to attend court until their application dated December 18, 2014 was dismissed for lack of prosecution on November 7, 2018 and the matter listed for pretrial conference.
17. The petitioners sought and were granted leave to amend the petition on November 7, 2018 to reflect the correct parcel numbers. No such amendment has ever made in compliance with those orders.
18. A notice to show cause for January 30, 2019 was issued on May 22, 2019 but again there was no appearance. The same case applied on January 20, 2020, October 15, 2020, February 4, 2021, February 3, 2021, April 6, 2021, August 13, 2021 and November 11, 2021.
19. In most if not all these instances, the 2nd respondent and the court itself has served mention notices upon the petitioners and affidavit of services filed.
20. Following the several non-appearances before the Deputy Registrar on various dates alluded above, the matter was placed before the court on February 17, 2022 for directions.
21. It is therefore not true therefore that the petitioners are the ones who took out the date for February 17, 2022. since they did not appear before the Deputy Registrar on November 11, 2021.
22. With the above background in mind the petitioners pray for the setting aside of the dismissal orders made on February 17, 2022 and for the reinstatement of the petition for hearing on the basis that there was a mistake on the said date and that they have been keen on prosecuting the petition.

D. Determination

23. In *Shah vs Mbogo & another* (1967) E.A 116, the court held the discretion to set aside orders is intended to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not intended to help a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
24. In *Johanna Muturi Njoro vs Joseph Njoro Mathenge & 2 others* (2018) eKLR the court held it could decline an application for reinstatement where it is shown that both the advocate and the plaintiff were indolent.
25. In *Peter Kiunjuri Kubumba vs Gladys Wanjiru Migwi & another* C.A Civil Application No. Nairobi 121 of 2005 the court held that the applicant and his counsel were to blame for the casual attitude and that even in land matters there must be an end to litigation since a land matter should be handled with the sensitivity and diligence. The court held that the applicant and his advisers on record had instead exhibited undesirable nonchalance which the court could not countenance.



26. In *Utalii Transport Co. Ltd & 3 others vs NIC Bank & another* (2014) eKLR the court held it was the primary duty of the plaintiff to take steps to prosecute its claim as it was the one which dragged the defendant to court.
27. Applying the above principles to this application, there is no dispute that the petitioners have been casual and sometimes shown a lot of indifference and/or inaction in prosecuting, the petition for the last 7 years. The inaction has not been explained at all in the supporting affidavit.
28. Rule 4 & 5 of *the Constitution* of Kenya (Fundamental Rights and Freedoms) Procedure and Practice Rules 2013 requires the court to facilitate the just, expeditious, proportionate and affordable resolutions of all cases through timely disposal of proceedings at a cost affordable manner by the parties. Rule 6 thereof requires parties to comply with court directives. Rule 7 thereof requires the court to pursue access to justice for all persons including the exercise of its inherent power to make orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court.
29. The petitioners have not attempted to explain out why the petition has remained unprosecuted since 2014. No special circumstances exist why there has been delay and or non-compliance with court directions on amendments and on case conference.
30. The court has bend backwards to accommodate the petitioners. Unfortunately, they seem to have taken a back seat and let the respondents attend court and try to fast-track the listing of the matter for directions and or hearing on their behalf. One would have expected the petitioners to have been at the driving seat in protecting their interest if at all the land in issue is dear to them.
31. Ideally, the court would find the application lacking merits (see *Barbanas Maritim vs Manywete Korgoren & another* (2016) eKLR. However, an issue has been raised by the petitioners as to the right to fair hearing and the need to have the matter determined on merits so as to achieve substantive justice.
32. In *Ivita vs Kyumbu* (1984) KLR 441, the court held that the test is whether the delay is prolonged and inexcusable and whether justice can still be done despite such an inordinate delay.
33. In *Mwangi Nedangi S. Kimenyi vs A.G & another* (2014) eKLR it was held when the delay is prolonged and inexcusable, the court may in its discretion dismiss the suit straight away but nevertheless it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties lest justice should be placed too far way from the parties.
34. The court held there must be considerations on whether the delay has been intentional or contumelious; if it amounts to an abuse of the court; if it is inordinate or inexcusable; whether it gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or it is likely to cause serious prejudice to the defendant and lastly what prejudice will the dismissal cause to the plaintiff, in which case the court will not be assisting the indolent but rather it will be serving the interest of justice or substantive justice on behalf of all the parties.
35. In response to this application, the 2nd respondent has not specified what prejudice it will suffer if the petition was to be reinstated for hearing on merits. It has not said the suit premises do not exist or have been alienated in favour of other third parties such that the substratum no longer exists.
36. Similarly, the respondents have not stated that justice may not be attained since perhaps out of the inordinate delay their witnesses are no longer available or the documents to be relied upon cannot be procured without unnecessary cost or delay.
37. In *Nixon Andati vs Moses Mudaki Ndeya & another* (2019) eKLR the court held the nature of the action should be considered, the defence if any should also be considered and the question as to whether



the defendant can reasonably be compensated by an award of costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.

38. In my considered view as much as the petitioners are to blame for the delay Articles 48 & 50 (1) of *the Constitution* provides that access to justice should not be impeded as well as the right to fair hearing.
39. My view is that prejudice will be more on the petitioners if the court were to shut them out of the seat of justice and who will bear for ever the consequences of not having their day in court to agitate for their constitutional rights over the land ownership allegedly unjustly impeded or breached by the respondents.
40. In the premises, I find the application with merits. The same is allowed with costs of Kshs.20,000 to be paid to the 2nd respondent's counsel on record within 14 days from the date hereof.
41. The suit land being situated in Isiolo town within the jurisdiction of the Isiolo Environment and Land Court Isiolo county, I hereby transfer the file to ELC Isiolo court for directions and for final disposal. There will be a mention before the Presiding Judge Hon. Justice P.M Njoroge on October 5, 2022. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Petitioner

Mbote for respondent

HON. C.K. NZILI

ELC JUDGE

