



**Ngatia & 58 others v Wambui & another (Environment & Land Case
184 of 2016) [2022] KEELC 15682 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 184 OF 2016
EC CHERONO, J
JULY 15, 2022**

BETWEEN

CRISPUS KARIMI NGATIA & 58 OTHERS PLAINTIFF

AND

HANNAH WAMBURA WAMBUI 1ST DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 9th November 2021, the Plaintiffs/Applicants moved this Honourable Court seeking the following orders; -
 1. That the firm of Arimi Kimathi and Company Advocates be granted leave to come on record for the Plaintiffs/Applicants.
 2. That this Honourable Court be pleased to set aside the orders made on the 26th of July 2018 dismissing the Plaintiffs suit herein for want of prosecution and be further pleased to reinstate the suit herein on such conditions as it shall deem just.
 3. That the cost of this application be in the cause.
2. The application is supported by grounds shown on the face of the said application and an affidavit sworn by Patrick Kimathi Muchena Advocate the same date. The application is also supported by an affidavit sworn by David Mwai Munene, the 2nd Plaintiff/Applicant the same date.
3. According to the 2nd plaintiff/Applicant, this suit was dismissed on 26th July, 2018 for want of prosecution and that the said dismissal was due to sickness which is unforeseen event and not the negligence of either the plaintiffs/Applicants or their former advocates.



4. The Applicants further contend that they instructed their hitherto firm of Gacheru & Company Advocates to institute these proceedings on 9th November, 2016 and in the year 2017, the said advocate fell ill and in 2019, he passed away. He further stated that after their lawyer passed on, they visited the firm and carried away their file.
5. The said application is opposed by Hannah Wambura Wambui, the 1st defendant/Respondent vide a replying affidavit sworn on 8/2/2022.
6. The 1st defendant stated that the plaintiffs have no justified cause to be on peoples' private land without any colour of right at all. She further stated that the plaintiffs suit was dismissed justifiably since they refused to prosecute the same and that it is not justifiable to keep on troubling her by trying to acquire her land through courts of law when the law is not in their favour.
7. I have considered the Notice of Motion application, the supporting affidavit and the replying affidavit by the 1st defendant/respondent. I have also considered the rival submissions and the applicable law.
8. The application under review is brought for the setting aside of the suit dismissed under Order 12 Rule 2 CPR. Order 12 R 7 CPR which is the applicable law and provides as follows: -

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”

9. It is trite that the power to set aside and/or vary a judgment or order dismissing a suit for want of prosecution under Order 17 Rule 2 is discretionary and can be exercised judicially. The superior courts have rendered themselves on the guiding principles. In the case of Abdirabman Muhumed Abdi v Safi Petroleum Products Ltd & 6 Others, Civil Application No. Nairobi 173 of 2010, quoted with approval in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] e KLR, the Court of Appeal stated as follows;

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay, and to focus on substantive justice -----

In the days long gone the court never hesitated to strike out a notice of Appeal or even an Appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of section 3A and 3B of the Appellate Jurisdiction Act, CAP. 9 Laws of Kenya, 2010, and later, Article 159 (2) (d) 2010, changed the position. The former

provisions introduced the overriding objective in Civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interest of justice before coming to a decision one way or the other. Article 159(2)(d) of the constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

6. The Applicants/plaintiffs have stated that the advocate who was acting for them previously Mr Gacheru became sick sometime in the year, 2017 and passed away in 2019. This court takes judicial notice that the late Mr Gacheru advocate who was practising in the name and style of Gacheru & Co. Advocates who was an officer of this Honourable Court had become sick for a while and most cases he



was handling had to be adjourned before he passed away in 2019. I find that the plaintiffs have taken unreasonable delay to file this application. However, it is my view that any prejudice suffered by the respondents can be compensated by way costs. Having taken that view of this matter, I therefore allow the application dated 9th November, 2021 on the following terms-;

1. That the firm of Arimi Kimathi And Company Advocates are allowed to come on record for the Plaintiffs/Applicants.
2. That the order by this Honourable Court issued on 26th July, 2018 dismissing this suit for want of prosecution be and is hereby set aside upon payment of thrown away costs of KSHS 20,000/= within 14 days from today.
3. That the Plaintiffs/Applicants to take prudent steps to prosecute this case within twelve (12) months failing which the same shall stand dismissed.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 15TH JULY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence/absence of-;

- 1. Applicant/Advocate - absent**
- 2. Respondent/Advocate - absent**
- 3. Kabuta, Court Assistant - present**

