



**Ndungu v Waigi & another (Environment & Land Case 659 of 2013)
[2022] KEELC 13516 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 659 OF 2013
LC KOMINGOI, J
SEPTEMBER 30, 2022**

BETWEEN

HUMPHREY NJUGUNA NDUNGU PLAINTIFF

AND

JAMES MWAGO WAIGI 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. This is the notice of motion dated 29th August 2021 brought under order 51 rule 1 of the [Civil Procedure Rules](#) 2010, section 1A, 1B and 3A of the [Civil Procedure Act](#), Cap 63, Laws of Kenya and all other enabling provisions of the law.
2. It seeks orders:-
 1. That this honourable court's orders given on 29th July 2021 by Honourable Lady Justice L. Komingoi be set aside and this suit be marked dismissed per the earlier orders given by Honourable Lady Justice L. Komingoi on 19th September 2021.
 2. That costs of this Application be granted to the 1st Defendant/Applicant.
3. The grounds are on the face of the application and are set out in paragraphs (1) to (18). The application is supported by the affidavit of James Mwago Waigi sworn on the 19th August 2021.
4. The application is opposed. There is a replying affidavit sworn by Humphrey Njuguna Ndungu, the Plaintiff/Respondent herein sworn on the 11th February 2022.
5. On the 22nd November 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.



The 1st Defendant's /Applicant's Submissions.

6. They are dated 25th March 2022. It is counsel's submissions that the 1st Defendant was not given a chance to be heard over the Plaintiff's/Respondents application dated 20th July 2020. He has raised two issues for determination. They are:-
 1. Whether it is in the best interest of justice and fairness that the 1st Defendant's/Applicant's application be allowed.
 2. Whether the court order made on 29th July 2021 reinstating this suit should be set aside.
7. Counsel submits that the Plaintiff's notice of motion dated 20th July 2020 is res judicata as the suit was dismissed on 19th September 2019. He relied on section 7 of the *Civil Procedure Act* and the cases of *In Re-Estate of Mungiria M'Runguchi (Deceased)* [2022] eKLR when the court cited the case of *IEBC vs Maina Kiai & 5 Others* [2017] eKLR; *Stephen Mugao Nkundu vs Julia Wanja Muchege* [2021] eKLR when the court cited the case of *John Florence Maritime Services Transport and Infrastructure & 3 Others* [2015] eKLR.
8. Counsel further submits that the 1st Defendant/Applicant was not given a chance to be heard over the Plaintiff's/Respondent's notice of motion dated 20th July 2020. The application was served very late, on 12th April 2021 (via email) a day prior to its hearing on 13th April 2021. A ruling rendered by this honourable court on 29th July 2021 contends that the 1st Defendant/Applicant did not oppose the Plaintiff/Respondent's application dated 20th July 2020. It is clear that the Plaintiff/Respondent stole a march on the 1st Defendant/Applicant. He has put forward the case of *Mbaki & Others vs Macharia & Another* [2005] 2 EA 206.
9. Counsel further submitted that the 1st Defendant's/Applicant's legitimate expectation that the case against him had been closed was violated by the reinstatement of the suit on 29th July 2021.
10. He prays that the orders sought in the application be granted with costs in the cause.

The Plaintiff's/Respondent's submissions

11. They are dated 21st April 2022. They raised two issues for determination;
 - i. Whether the Plaintiff's application dated 20th July, 2020 was res judicata.
 - ii. Whether 1st Defendant/Applicant herein was given a chance to be heard?
12. The Plaintiff filed the application dated 20th July 2020 after the matter was dismissed for want of prosecution on 19th September 2019. This honourable court found the application to be merited and the orders of 19th September 2019 were set aside. The application was not res judicata.
13. Counsel further submitted that the 1st Defendant misled the court on the 8th March 2021, when the advocate informed court that they had not received the application. The hearing date for 13th April 2021 was taken by consent hence the 1st Defendant was given a chance to be heard. He prays that the application be dismissed with costs.
14. I have considered the notice of motion and the affidavit in support. I have considered the response thereto, the written submissions and the authorities cited. The issue for determination is whether this application is merited.



15. The court record is very clear. On the 19th September 2019, this matter came up for notice to show cause as to why the suit should not be dismissed for want of prosecution. Ms Nganga who was holding brief for Mr. Kanyi for the Plaintiff was present. Mr. Nganga for Mr. Wanyoike for the 1st Defendant was also present. Upon considering the rival submissions, the court dismissed the Plaintiff's suit for want of prosecution.
16. The Plaintiff subsequently filed the notice of motion dated 20th July 2020 to reinstate the suit. The same came up for mention on 8th March 2021. The application was slated for hearing on 13th April 2021. The date was taken in the presence of Mr. Nganga for the 1st Defendant but on the absence of the 2nd Defendant. Mr. Nganga informed the court that he had not been served with the application. The court directed that the application be served on the Defendants and the same was fixed for hearing on 13th April 2021.
17. On the 13th April 2021, Mr. Gitari for Mr. Mbaabu for the Plaintiff told the court that the 1st Defendant had been served. He also told the court that there was no response to the application. The court then gave a ruling date for the application on the 29th April 2021.
18. In its ruling dated 29th July 2021 this court reinstated the Plaintiff's suit and directed him to set down the suit for hearing within ninety (90) days from the date of ruling failure to which the suit stood dismissed.
19. In the ruling, I noted that the application was not opposed. I now see in the court file grounds of opposition dated 13th April 2021 but it is not clear when the same was filed.
20. This court's position is that the grounds of opposition were not on record by the time of writing of this ruling and its delivery on 29th July 2021.
21. I have considered the oral submissions and find that the Plaintiff's Notice of Motion dated 20th July 2020 was not res judicata.
22. Upon delivery of the ruling parties went before Honourable D. Orago (DR) on the 21st October 2021 with a view of taking a date before one of the newly appointed Judges. Mr. Gitari for the Plaintiff was present. He was aware of the court's ruling of 29th July 2021.
23. On that date mention date was fixed before Wabwoto J on 15th November 2021. Mr. Gitari ought to have sought an earlier date given that the ninety (90) days were about to lapse.
24. On the 15th November 2021, the matter was mentioned before Hon. Wabwoto J but the Plaintiff's counsel did not appear.
25. In summary, going by the ruling of 29th July 2021, the ninety (90) days lapsed on 29th October 2021 hence the suit stood dismissed by that date. Court orders are not made in vain.
26. In conclusion, I find that the notice of motion dated 19th August 2021 lacks merit and the same is dismissed. Each party to bear own costs.
27. As stated hereinabove this suit stood dismissed on 29th October 2021 and the position has not changed.
It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2022.

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L. KOMINGOI



JUDGE

In the presence of:-

Mr. Gitari for Mr. Mbaabu advocate for the Plaintiff

Ms Nzilani for Mr. Nganga advocate for the 1st Defendant

No appearance for the 2nd Defendant

Steve – Court Assistant

