



Keter & another (Both Suing as the Legal Representatives and beneficiaries of the Estate of the Late Kipketer Arap Ngeny - Deceased) v Matwa & 22 others (Environment & Land Case 78 of 2018) [2022] KEELC 14968 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 78 OF 2018
MC OUNDO, J
NOVEMBER 24, 2022**

BETWEEN

ZAKAYO KIMUTAI KETER 1ST APPLICANT

WILSON KIPKORIR KETER 2ND APPLICANT

**BOTH SUING AS THE LEGAL REPRESENTATIVES AND BENEFICIARIES OF
THE ESTATE OF THE LATE KIPKETER ARAP NGENY - DECEASED**

AND

KIPKORIR ARAP MATWA AND 22 OTHERS DEFENDANT

RULING

1. Before me for determination is the notice of motion dated January 24, 2022 brought under section 3A of the *Civil Procedure Act* and order 12 rule 1 and 7 of the *Civil Procedure Rules*, order 51 of the *Civil Procedure Rules* and all enabling provisions of the law where the Applicants seeks to set aside the orders of December 8, 2021 that dismissed the applicant's suit for want of prosecution.
2. The applicant's application was supported by the grounds therein as well as on the supporting affidavit of Advocate Desmond Leitapa Silei sworn on January 24, 2022.
3. There was no response from the respondents despite there having been service upon them
4. Directions were issued on the March 24, 2022 to the effect that the said application be conversed by way of written submissions and the respondents were granted further leave to file their respective responses to the application and their submissions.
5. As I write this ruling, despite compliance by the Applicant, there has been no compliance of the court's directions by the respondent.



6. The applicant's submission although not opposed was to the effect that indeed the applicant suit was dismissed for want of prosecution on December 8, 2021 after their counsel failed to attend to the matter. That the mistake of counsel previously on record whether deliberate or by mistake shows clearly that a grave injustice would be meted to the applicants who would be condemned unheard contrary to the rules of natural justice. That the applicants seek a form of limelight for the order of the court dismissing the suit for want of prosecution to be set aside and the suit be reinstated for hearing on its merit.
7. That the powers granted to the court under order 17 rule 2 of the *Civil Procedure Rules* are discretionary and have to be exercised, judicially, fairly and capriciously. That substantial progress had been made by Counsel previously on record and the matter had been ripe for hearing and disposal. That upon learning of the dismissal of the matter, the applicants had moved with speed and filed an application to reinstate the same. The indolence, inadvertent or otherwise on the part of the previous learned Counsel ought not to be visited upon the innocent applicants who were willing to have the matter set down for hearing for the ends of justice to be met. Reliance was placed on the decided case in *John Nahashon Mwangi vs Kenya Finance Bank Limited (in liquidation)* [2015]eKLR to submit to that dismissal of a suit ought to be the last resort where the party concerned is totally complacent and deliberate of inaction.
8. That the interest of justice must look at both sides and in this case the applicants would be prejudiced as they were the ones trying to find justice. That denial of a fair hearing would be a denial of their constitutional rights pursuant to article 50 of *the Constitution*. That their suit was meritorious and ought to be reinstated. That the action of the Applicants to change their advocates indicated the seriousness of their intention to honestly and faithfully prosecute this case to its conclusion. They sought for this application to be allowed.

Determination.

9. The application dated the January 24, 2022 although not having been opposed, I find that the same ought to be decided on its merit.
10. I note that indeed this is a matter that had been filed via a Plaint way back on the October 18, 2018 by the law firm of M/S Nyaata & Company Advocates wherein the Applicants had sought for orders declaring that the subdivision to land parcel LR Kericho/Kyogong/60 and LR Kericho/Kyogong/68 had been done fraudulently and in contravention of the law of succession. The applicants also sought for compensation for damages and loss suffered. Alongside the plaint the Applicants had filed a Notice of Motion dated October 18, 2018 seeking interim orders wherein on the October 25, 2018 they had obtained interim inhibitive orders and the application had been set down for hearing.
11. Subsequently the application was compromised via the court order of April 18, 2019, seeking that the District Land Registrar Bomet and the District Surveyor Bomet do visit the suit parcels of land to mark the boundaries and/or re-survey the land parcels therein. The matter then stalled while awaiting the filing of the Surveyor's report dated the August 19, 2019. Thereafter, the Applicants sought to amend their plaint which was then amended on the October 22, 2019 and filed on the October 23, 2019 wherein they now sought a declaration that the subdivision and current boundaries to land parcel LR Kericho/Kyogong/60 and LR Kericho/Kyogong/68 had been done fraudulently and in contravention of the Law of Succession.
12. The hearing of the suit was scheduled for the February 9, 2020 wherein parties went to slumber until the February 9, 2021 when the court was informed that they had not complied with the provisions of order 11 of the *Civil Procedure Rules*. A Notice to Show Cause was thereafter issued for the December



8, 2021 on which day there was no appearance by the either parties or their Counsel and the matter was dismissed for want of prosecution giving rise to the present application.

13. From the court record, it is clear that despite the matter having been filed in the year 2018, the record speaks for itself that the applicants had not been keen to prosecute the same. This may be attributed to the lack of diligence by his counsel, but it is nevertheless a mistake for which the applicants should not be blamed. In this regard I would restate the words of Apaloo, JA in the case of *Philip Chemowolo & another v Augustine Kubende*, [1982-88] 1 KAR 103 that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

14. The foregoing being my view of the matter, I will allow the application dated January 24, 2022 and set aside the dismissal order of December 8, 2021 with no costs. The suit shall and is hereby reinstated for hearing and determination on the merit. Parties shall comply with the provisions of order 11 of the Civil Procedure Rules within 30 days from the delivery of this ruling so that the matter can be expeditiously set down for hearing.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 24TH DAY OF NOVEMBER 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

