



REPUBLIC OF KENYA



KENYA LAW
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**Shikoliko v Musalia & 5 others (Environment & Land Case 24 of 2021)
[2022] KEELC 15046 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 24 OF 2021
DO OHUNGO, J
NOVEMBER 22, 2022**

BETWEEN

WYCLIFFE SHIKOLIKO PLAINTIFF

AND

SETH B MUSALIA 1ST DEFENDANT

NOAH IKOSANGWA 2ND DEFENDANT

MARGARET MUGOMATI 3RD DEFENDANT

ESNAS PANYOLA 4TH DEFENDANT

BETTY ALUNGA 5TH DEFENDANT

EDITH TOO 6TH DEFENDANT

RULING

1. This suit was filed on 21st September 2011, in the High Court at Kitale, as Kitale HCCC No 77 of 2011. It was later transferred to High Court at Kakamega and became Kakamega HCCC No 125 of 2011. Finally, it was transferred to this court on 4th November 2021, hence its current number.
2. As at the date of the last transfer, the plaintiff's Notice of Motion dated 23rd May 2018 was pending. This ruling is in respect of the said application. The following orders are sought in the application:
 1. That this Honourable Court be pleased to set aside the orders made on 7th July 2013 dismissing this suit for want of prosecution and have the suit reinstated.
 2. Costs be provided for.
3. The application is supported by the affidavit sworn by Wycliffe Shikoliko who deposed that when this suit was filed, the deponent sought and was granted restriction orders preserving the suit property and



- that his advocate on record upon the applicant's instructions sought to have the restriction removed. Pursuant thereto, an application was prepared in March 2018 and when the applicant proceeded to have the application filed, the applicant's advocate was informed that the application could not be filed because the matter had been dismissed for want of prosecution. The applicant therefore prayed that the suit be reinstated so that he can move the court to have the restriction vacated.
4. In response to the application, a replying affidavit sworn by the first respondent was filed. He deposed that the subject matter of the suit herein is Kakamega/Kongoni/2405 (suit property) and that the suit property is registered in the names of the applicant and the first respondent's mother one Loice Imali Shikolikho and further averred that whereas the applicant is entitled to his share out of the suit property, the first respondent's mother is also entitled to her share and that the dispute on which party is entitled to what share of the suit property has not yet been resolved to date. The respondent therefore prayed for this suit to be re-opened so that the issue of apportionment is determined, and the restrictions remain on the land.
 5. The parties relied entirely on the material on record and urged the court to render a ruling. I have considered the application, the affidavits, and the material on record. The only issue that arises for determination is whether the orders sought should issue.
 6. Although the application refers to an order of dismissal made on 7th July 2013, there is no such order on record. Instead, the record shows that this suit was dismissed on 9th of July 2015, for want of prosecution.
 7. The plaintiff is seeking setting aside of the order of dismissal of the suit for want of prosecution. When dealing with such an application, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogoh & another v Shah* [1968] EA 93 which were more recently reiterated in *James Kanyitta Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to prosecute the case, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to grant setting aside.
 8. In the grounds of the application, the applicant stated that the parties are family members and the plaintiff/applicant sought to attempt an out of court settlement and that this court had issued restrictive orders which cannot be lifted unless this suit is reinstated. The respondent has however stated that the issue of apportionment of the suit property has not yet been determined and only requested for the suit to be reinstated for purposes of apportionment and that the restrictions to remain on the land. Beyond the bare statement in the grounds of the application that parties sought to attempt an out of court settlement, the applicant has not offered details in by way of affidavit as to such attempts and the manner in which they would excuse non-prosecution of the suit. The respondent has not corroborated his assertions as to such negotiations. I find that no valid reason has been given for the failure to prosecute the case.
 9. The suit was dismissed on 9th of July 2015 while the present application was filed on 24th May 2018, almost three years later. Even after filing the application, the applicant went to slumber and did not fix it for hearing. Even the present ruling is as a result of an order made by the court suo moto on 5th May 2022, that the application be heard. Clearly, the applicant is guilty of inordinate delay.
 10. The motivation for seeking setting aside seems to be only for purposes of seeking removal of the restriction registered against the suit property on 7th March 2012. No intention to prosecute the suit has been demonstrated. It has not been shown that the restriction was registered pursuant to any order issued in this matter. On the contrary, it is apparent from paragraph 3 of the affidavit of Wycliffe



Shikoliko filed herein on 24th May 2018 that the said restriction was registered pursuant to his own instructions to the Land Registrar. In those circumstances, and in view of Section 78 of the [Land Registration Act](#), I do not see why an order of the court is required to remove the restriction. As regards the issue of apportionment, I note that it was being addressed in the succession cause. Parties should deal with it there.

11. In view of the foregoing discourse, the applicant has not laid a basis to warrant to exercise discretion in his favour. I find no merit in Notice of Motion dated 23rd May 2018. The application is dismissed with no order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma

