



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**E.L.C. NO. 131 OF 2017**

**MARTIN MAINA NDUNG’U & 14 OTHERS.....PLAINTIFFS**

**VERSUS**

**JOHN KING’ORI MWANIKI.....1<sup>ST</sup> DEFENDANT**

**RICHARD MWANGI GAKUNJU.....2<sup>ND</sup> DEFENDANT**

**ANN WATHIEGENI MWANGI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 29<sup>th</sup> November, 2019 expressed to be brought under **Article 159 (1) (d) of the Constitution of Kenya, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act (Cap. 21), Order 12 Rules 7, Order 45 Rule 1 and Order 51 Rules 1 and 15 of the Civil Procedure Rules (the Rules), and all other enabling provisions of the law**, the Plaintiffs sought a review or setting aside of the order made on 30<sup>th</sup> October, 2018 dismissing the suit for want of prosecution under **Order 17** of the Rules.
2. The said application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Plaintiff, Martin Maina Ndung’u, on 29<sup>th</sup> November, 2019. It was contended that when the instant suit was transferred from Nakuru Law Courts to Nyahururu Law Courts in 2017, the Plaintiffs were not notified of the transfer. The Plaintiffs further contended that they were not served with a notice to show cause prior to the dismissal of the suit.
3. The Defendants did not file any response to the said application and neither did they appear at the hearing thereof.
4. When the said application was listed for *inter-partes* hearing on 27<sup>th</sup> May, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days within which to file their respective submissions.
5. The record shows that the Plaintiffs filed their submissions on 3<sup>rd</sup> September, 2020 but there was no indication of the Defendants having filed any submissions by the time of preparation of the ruling.
6. The court has considered the Plaintiffs’ notice of motion dated 29<sup>th</sup> November, 2019, the Plaintiffs’ written submissions as well as the material on record. The Plaintiffs submitted that since the Defendants had failed to file any response to the application then the same should be allowed as unopposed. It was further submitted that the Defendants would not suffer any prejudice if the application was allowed and that the Plaintiffs have always been ready and willing to prosecute the suit to its logical conclusion.
7. The court has noted from the material on record that the Plaintiffs’ suit was filed on 24<sup>th</sup> October, 2013 before the High Court at Nakuru. The record further shows that simultaneously with the finding of the plaintiff, the Plaintiffs filed an application for interim orders under certificate of urgency dated 17<sup>th</sup> October, 2013.
8. The record also reveals that the said application was certified urgent and the Plaintiffs were granted 10 days within which to serve the Defendants for *inter-partes* hearing. However, there is no indication on record to demonstrate that the Plaintiffs ever served the Defendants as directed. There is no affidavit of service to demonstrate service of the application. There is equally no evidence on record to demonstrate that the Plaintiffs ever extracted and served summons to enter appearance upon the Defendants at any given time. The Plaintiffs also appear to have abandoned their application for interim orders for over 4 years.
9. The court has noted from the application and supporting affidavit that the Plaintiffs have attempted to explain a delay of only one year in the prosecution of the suit. They stated that they spent one year between 2017 and 2018 looking for the court file at Nakuru Law Courts

without success. The record shows that the suit was about 4 years old at the time of its dismissal on 30<sup>th</sup> October, 2018. No attempt was made to explain the delay of the other 3 years. No single letter was exhibited by the Plaintiffs to demonstrate that they had written to the Deputy Registrar of Nakuru Law Courts seeking to know the whereabouts of the court file.

10. Although there is no evidence to show that a notice to show cause was served upon the Plaintiffs under **Order 17 Rule 2 of the Rules**, the Plaintiffs have failed to satisfactorily explain the delay of over 4 years in prosecuting the suit. They have not explained why they failed to prosecute their application for interim orders which was certified urgent way back in 2013. They have not explained why they did not serve summons to enter appearance upon the Defendants.

11. All the material on record indicates that the Plaintiffs were not diligent litigants at all. It was their duty to diligently and expeditiously prosecute the suit which they filed in 2013. See **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. The mere fact that the Defendants did not enter appearance and they did not oppose the application cannot excuse the Plaintiffs' indolence. The court is thus not satisfied that the Plaintiffs have made out a case for review or setting aside of the dismissal order made on 30<sup>th</sup> October, 2019.

12. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 29<sup>th</sup> November, 2019. Accordingly, the same is hereby dismissed with no order as to costs.

It is so decided.

**RULING DATED and SIGNED** at NYAHURURU and **DELIVERED** via Microsoft Teams Platform this **21<sup>st</sup>** of **January, 2021**.

**In the presence of:**

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant - Carol

**Y.M. ANGIMA**

**JUDGE**

**21.01.2021**