



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 321 OF 2011

1. JOHN NDUVA MULEI
2. PHILIP MULI MUNYAKA
3. SAMUEL MAKAU MUSYOKI
4. MBUVA MATIVO
5. DAVID MUSILA KITUKU
6. KASEE ILELI
7. MARTIN KIOKO MUTUA
8. BARRY MANZA MACKENZIE (*among others*)....**APPLICANTS/PLAINTIFFS**

VERSUS

1. FRANCIS MANZA KISINI
2. DICK KITELE KISINI
3. MUSEMBI KISINI
4. ROMAN MUTUKU KISINI
5. ELIJAH KAMAU KISINI..... **THE KISINI FAMILY**
6. PIUS KISINI
7. RAEL KISINI
8. ISAAC MUNYAO KISINI
9. MUTISYA KISINI
10. KITUA KISINI
11. MICHAEL KISINI
12. MASILA MULWA
13. PHILIP NZUKI MULWA
14. MUISYO MULWA
15. BEATRICE MULWA..... **THE MULWA FAMILY**

16. MWANZIA MULWA
17. ANTON MAKAU MULWA
18. JOHN MUTUA MULWA
19. MANZA MULWA
20. MBALI MULWA
21. PIUS NTHEI MULWA
22. MUEMA KILONZO
23. ROBERT MUTUA KILONZO
24. JOB KILONZO..... THE KILONZO FAMILY
25. MARY KILONZO
26. MUSYOKA KILONZO
27. PATRICK KITHUKU
28. SILA KITHUKU
29. MUTUKU KITHUKU
30. KISINI KITHUKU
31. KAKOVU SILA THE SILA FAMILY
32. KITUKU SILA
33. KIOKO SILA
34. WAMBUA SILA
35. TOM SILA
36. MUONZI SILA
37. NYERERE SILA
38. DIRECTOR OF LAND ADJUDICATION
39. CHIEF LAND REGISTRAR
40. COMMISSIONER OF LANDS.....DEFENDANTS

RULING

Introduction:

1. This Ruling is in relation to a Notice of Motion Application dated 6th March, 2019, in which the Plaintiff/Applicant is seeking for following orders:

- a) *Spent.*
- b) *Spent.*
- c) *That the Order of this Honourable Court given on 20th day of November, 2018 be set aside or reviewed with costs.*
- d) *Costs of the Application be provided for.*

e) That such further or other orders or reliefs as this Honourable Court may seem just and expedient in the circumstances of this case.

2. The Application was supported by the Affidavit of Philip Muli Munyaka, the 2nd Plaintiff who deponed that he has the authority of all the surviving Plaintiffs to swear the Affidavit; that the suit was filed as a representative suit on behalf of over 1200 clan members and that the apparent delay in disposing of the suit was mainly caused by the lack of establishing a Land Court Division in Machakos until 2018.
3. It was deponed that during the pendency of the suit, two of the Plaintiffs passed away, that is John Nduva Mulei (*deceased*) and Kasee Ileli (*deceased*); that some of the Defendants also died, that is Rael Kisini, Muema Kilonzo, Patrick Kithuku and Mutuku Kithuku and that while they were still involved in the issue of substitution of the deceased Plaintiffs and Defendants, their advocates on record were issued with a Notice of Dismissal under Order 17 Rule (2) of the Civil Procedure Rules.
4. The 2nd Plaintiff deponed that on 28th September, 2018, their counsel addressed the court on the issue of substitution; that they were given 45 days within which to seek leave to substitute the deceased parties and that it was eventually agreed on who should substitute the deceased Plaintiffs.
5. The 2nd Plaintiff deponed that on 20th November, 2018, when the matter was listed for mention to confirm substitution, their counsel was still on his way to court; that the suit was dismissed for non-compliance with the orders of the court and that their Advocate later on explained the cause of his absence in court and that the dismissal order could not be set aside in the absence of the Defendants' Advocates who was present when the order was made.
6. It was also averred that while the Plaintiffs were making every effort to substitute the deceased parties, the Defendants' Advocates made no effort to substitute the deceased Defendants and that the suit involves a clan of over 1200 people excluding wives, children and other dependents who stand to lose if the suit remains dismissed.
7. It was averred that it would be in the best interest of justice to allow the substitution of the Plaintiffs so that the real issues in the suit may be heard and that the Plaintiffs stand to suffer irreparably unless the Application herein is allowed.
8. The Respondents filed a Replying Affidavit sworn on 16th August, 2020 by the 8th Defendant/Respondent under the authority of the other Respondents. The 8th Defendant/Respondent deponed that the Application was without merit, frivolous, vexatious, scandalous, an abuse of the court process, bad in law and merely intended to delay the course of justice and ought to be dismissed.
9. The 8th Defendant/Respondent deponed that the Applicants are guilty of laches as they failed to prosecute the suit after filing it way back on 4th November, 2011 and that in event, the suit was lawfully dismissed by the Court on 20th November, 2018 upon issuance of a Notice of Dismissal and Show Cause Notice dated 25th July, 2018 and served on all the parties requiring them to attend court on 28th September, 2018 to show cause why the suit should not be dismissed for want of prosecution.
10. The deponent averred that the Applicants herein on the said date of 28th September, 2018 sought time to put their house in order; that the court gave them 45 days to file an Application for substitution and that upon expiry of that period, neither the Applicant nor their advocates attended court.
11. The 8th Defendant/Respondent deponed that before the dismissal of the suit, the Respondents had invited the Applicants to take a hearing date vide a letter dated 28th August, 2018; that Applicants' advocate failed to appear and an *ex parte* date was taken and that the Applicants ignored and indeed frustrated the Respondents' efforts to prosecute the matter.
12. It was deponed that the Defendants' advocate filed a Bill of Costs on the dismissed suit; that the current Application was filed five (5) months after dismissal of the suit and was never served to the Respondents' advocate and that the Respondents' advocate learnt about the Application on the Taxation date which was nearly one (1) year after the dismissal of the suit.
13. It was deponed by the 8th Defendant that the Applicants persisted in their failure to serve the Application and that while their advocate was attending court on a different matter, he was shocked to hear the matter being called out for hearing of the said Application, yet neither the Application nor the hearing notice had been served upon them.
14. The deponent averred that the conduct of the Applicants is inexcusable and a clear case of gross abuse of the court process; that in any case, the suit property was subject to the proceedings of the Land Adjudication Act and that all the motions were followed conclusively nearly 30 years ago where some of the Respondents were registered as owners of parts of the suit land and that ownership of the land has since changed.
15. The 8th Defendant/Respondent deponed that contrary to the Plaintiffs' Supporting Affidavit, the Environmental and Land Court has always been stationed at Machakos and that Title Deeds were issued to the Respondents' various deceased fathers and to some of the Respondents over the land described in the suit, which description is in any case non-existent and the orders sought would be in vain.
16. The Application was canvassed vide written submissions and on record are the Applicants' submissions as well as those of the Respondents.

Submissions:

17. Counsel for the Plaintiffs/Applicants submitted that at the time of filing of the present suit, which was served upon the Defendants via substituted service in the newspaper, no titles based on the illegal sub-division scheme had been issued and that on the day the matter was dismissed, they were on their way to court but were involved in an accident and could not make it to court.

18. Learned counsel submitted that the Defendants' counsel was only keen to be paid their purported costs of Kshs. 123,212,257 by the poor Plaintiffs who have been robbed of their inheritance and that the Application should be reinstated and set down for hearing and disposal.

19. The Defendants' counsel submitted that the matter is *res judicata* as it had already been determined in Kangundo L.C. No. 53 of 1979; that there are no sufficient reasons to warrant the court to exercise its discretion to set aside the orders dismissing the suit and that it is also not in doubt that the Respondents have a right to an expeditious and effective trial.

Analysis and findings:

20. I have considered the Application, the submissions by counsel and the authorities cited. This suit was commenced by way of a Plaint dated 28th September, 2011. The record shows that on 23rd October, 2012, the Defendants filed their Statement of Defence. When the matter came up for the hearing of a Notice to Show Cause why the suit should not be dismissed for want of prosecution on 28th September, 2018, the Plaintiffs' advocates informed the court that the 6th, 7th, 22nd and 27th Plaintiffs were deceased.

21. On the said date, the court directed the Plaintiffs' advocate to file the Application to substitute deceased Plaintiffs within 45 days, and if not, the suit would stand dismissed. The matter was then slated for mention on 20th November, 2018.

22. When the matter came up for mention on 20th November, 2018, the Plaintiffs' advocate was not in court. The Defendants' advocate informed the court that the Plaintiffs had not filed an Application to substitute the deceased Plaintiffs with the stipulated 45 days.

23. The court proceeded to dismiss the matter for want of prosecution. When the Plaintiffs' advocate appeared in court later in the day, he informed the court that he was held up on his way to court. The court fixed the matter for mention on 11th February, 2018. However, counsel for the Plaintiffs did not serve the Defendants' advocate with a mention notice for 11th February, 2018.

24. After fixing the matter for mention for 28th February, 2019, the Plaintiffs' advocate did not appear in court. The court made the following order: "*The matter stands dismissed.*" The Plaintiffs and their advocate did not file the current Application immediately they were made aware by the court that the matter had been dismissed on 20th November, 2018.

25. The Defendants took more than five (5) months to file the current Application which they did not serve on the Plaintiffs. Even after taking a date for the Application, they again failed to appear in court. Indeed, up to now, there is no indication that they are in possession of the Letters of Administration in respect to the deceased's Plaintiffs.

26. The Plaintiffs' conduct, and that of their advocate, clearly shows that they have never been interested in prosecuting their claim. Indeed, the Plaintiffs have not shown any good reason why this suit, which stood dismissed way before 20th November, 2018 when the court simply confirmed that the '*suit stood dismissed*', should be reinstated.

27. In the circumstances, the Application dated 6th March, 2019 is unmeritorious. The said Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE