



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 1264 OF 2005**

**JOHN KIRAGU GICHURI.....1<sup>ST</sup> PLAINTIFF**

**MARGARET NJAMBI KINGARU.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**FUNCORN LIMITED.....DEFENDANT**

**RULING**

**Background:**

1. This is a Ruling in respect of a notice of motion dated 18<sup>th</sup> February 2019 which seeks reinstatement of the suit which was dismissed on 30<sup>th</sup> March 2017 after parties who had been served failed to attend court to prosecute the case. The dismissed suit was filed on 9<sup>th</sup> October 2005. The Defendant filed defence on 16<sup>th</sup> January 2006. On 3<sup>rd</sup> August 2006, the Defendant filed an application seeking to strike out the Plaintiff's suit on grounds that it did not disclose a reasonable cause of action. The application for striking out the suit was dismissed in a Ruling delivered on 22<sup>nd</sup> June 2007.

2. On 14<sup>th</sup> January 2009, the Plaintiffs filed an application seeking to enjoin Muirigo Housing Development Company Limited as a Defendant. This application was allowed on 23<sup>rd</sup> March 2009 but the Plaintiff never amended the Plaint to bring on board the company which had been allowed as a defendant.

3. The Court issued Notice to show cause why the suit should not be dismissed for want of prosecution. The Notice was duly served but on the date of hearing of the Notice to show cause, the parties did not attend. The suit was dismissed for want of prosecution on 8<sup>th</sup> February 2012. On 29<sup>th</sup> August 2012, the Plaintiffs made an application for reinstatement of this suit. This application was allowed on 20<sup>th</sup> November 2012. The court directed that the suit be fixed for hearing within 45 days with a rider that if there was no compliance with the directions of the court, the court was going to vacate the orders reinstating the suit.

4. The directions of the court given on 20<sup>th</sup> November 2012 were not complied with. This suit remained dormant until 23<sup>rd</sup> December 2016 when the court on its own motion fixed a mention for 8<sup>th</sup> February 2017. When the matter came up for mention on 8<sup>th</sup> February 2017, the Court noted that there was no service of mention notice upon the parties by the court. The court fixed the suit for hearing on 30<sup>th</sup> March 2017 and directed the court officials to serve the parties with a hearing notice.

5. On 30<sup>th</sup> March 2017 when the case came up for hearing, the parties did not turn up for hearing despite being served with a hearing notice. The Court proceeded to dismiss the suit observing that this was an old case and parties were not keen to prosecute it.

**Applicant's contention**

6. The Applicants contend that they reside in the United Kingdom and that they had entrusted their former advocates M/s Harrison Kinyanjui & Co. Advocates to prosecute the suit on their behalf to its logical conclusion. The Applicants state that they have been seeking update on their case from the United Kingdom and that they were informed that the case could not be fixed for hearing as the diary was full. When the Applicants came back to the country, they sought for update on their case from their previous lawyer who did not give them satisfactory answers. They decided to engage their current Advocates.

7. The Applicants state that their Advocate tried to locate the court file without success. The court file was finally traced after numerous attempts and writing to the Deputy Registrar who informed their Advocate that the suit had been dismissed for want of prosecution on 30<sup>th</sup>

March 2017. The Applicant therefore plead that the dismissal order be set aside as they cannot suffer for a mistake of their Advocate.

### **Response by Respondent.**

8. The Respondents opposed the Applicant's application based on grounds of opposition filed on 1<sup>st</sup> August 2019 and a further affidavit sworn on 18<sup>th</sup> May 2020. The Respondent contends that the Applicants' claim that they could not fix their suit for hearing because there were no dates is not true. The Respondent argues that it has been the practice of the court that even when the diary is full, the courts gives dates for the following year. On the contention that the file could not be readily traced, the Respondent argues that there is no evidence in form of letters written to the Deputy Registrar asking for the file to be traced.

9. The Respondent further argues that the Applicants and others had filed HCCC No.3527 of 1991 (OS) which was later withdrawn and that the Applicants attempted to turn this civil dispute into a criminal case by reporting the Respondent's director to the Criminal investigations officers who made the Respondent's director to record a statement. The suit property was sold to the Respondent pursuant to minutes of Muirigo Housing Development Company Limited where one of the Applicants was in attendance and that this suit should therefore be let to lie dismissed by the court dismissing this application.

10. The Respondent argues that the Applicants have been coming in and out of the country on several occasions and that there is no reason why they could not prosecute their case.

### **Analysis**

11. I have carefully considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. The only issue for determination is whether this court should exercise its discretion to set aside the dismissal order.

12. It is now 16 years since this suit was filed. The Applicants do not state when they went to the United Kingdom. From the background hereinabove, it is clear that the Applicants have been given opportunity to prosecute their case but they have clearly failed to seize that opportunity. When the Respondent applied to strike out this suit, this application was dismissed on 22<sup>nd</sup> June 2007. In that Ruling, the Judge observed that it was necessary for the case to be heard so that the directors of Murigo Housing Development Company Limited could testify and shed light on the dispute herein.

13. It is the Judge's observation in the ruling of 22<sup>nd</sup> June 2007 which informed the filing of the application for joinder of the company as a defendant. When the application for joinder of the company was allowed, the applicants never bothered to amend the Plaint to include the company and serve summons on the company. The case remained dormant until the same was dismissed.

14. The court allowed the reinstatement of the suit and gave specific directions that the suit was to be disposed of expeditiously and a date for hearing was to be fixed within 45 days. The court stated that if the directions were not followed, the court was going to consider vacating the orders reinstating the suit. Despite these clear directions, the Applicants never bothered to fix the suit for hearing.

15. The Court on its own motion fixed the case for hearing and took the initiative to serve the Applicants to come for hearing. Despite the parties being served, there was no attendance leading to dismissal of the suit on 30th March 2017. The application for reinstatement was made almost two years after the dismissal. The Applicants contend that the delay in bringing the application for reinstatement was because the file was missing. There is not even a single letter written to the Deputy Registrar asking the court to look for the file.

16. The argument that there were no dates available is just an excuse. Dates were available and the practice in the Environment and land Court Nairobi is that parties are given dates continuously, such that if there are no dates on a particular year, the parties are given in the following year. There is therefore no basis in the Applicants claiming that there were no dates available.

17. As can be seen, the Applicants have not been keen to prosecute their case. The fact that they reside out of the country is no excuse not to prosecute their case. The Applicants should have even given someone a power of attorney to prosecute their case. We have seen instances where parties take their time to come into the country to prosecute their cases.

18. In the instant case, the Applicants have been given at least three chances to prosecute their case but they have failed to do so. This is a case where the Applicants have been indolent. This court cannot exercise its discretion to set aside the dismissal order. Litigation has to come to an end.

### **Disposition**

19. It is clear that the Applicants have been treated kindly before but they have not seized the kindness of the court to prosecute their case. There is absolutely no merit in the Applicants' application which is hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2021.**

**E.O.OBAGA**

**JUDGE**

In the Virtual presence of:-

Mr Mbaabu for Applicant

M/s Macharia for Mr Mungai for Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**