# Kimugul Self Help Group (Suing through the Chairman Richard Martim) v Karia & another (Environment & Land Miscellaneous Case 4 of 2017) [2025] KEELC 1322 (KLR) (4 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1322 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ENVIRONMENT & LAND MISCELLANEOUS CASE 4 OF 2017**

**LN GACHERU, J**

**MARCH 4, 2025**

**BETWEEN**

**KIMUGUL SELF HELP GROUP ............................................................ APPLICANT**

**SUING THROUGH THE CHAIRMAN RICHARD MARTIM**

**AND**

**PARSAPAET OLE KARIA ............................................................ 1ST RESPONDENT**

**DISTRICT LAND REGISTRAR, NAROK COUNTY ............. 2ND RESPONDENT**

## RULING

1. The matter for determination is an alleged Notice of Motion Application dated 29th April 2014, filed through a Certificate of Urgent dated 8th July 2024, wherein the Mr Henry Omwega, advocate for the alleged Applicant demonstrates the urgency of the above referred Application.
2. In the Application dated 29th April 2024, the Applicant has sought for various prayers among them; that the Court be pleased to set aside its orders of 24th June 2021, which dismissed the suit for want of prosecution; that the court be pleased to reinstate this suit; costs of the Application be provided for.
3. The said Application is supported by a number of grounds, among them that since the institution of the said suit, the Plaintiff has diligently prosecuted the matter by abiding to all the directions of the court; further as provided by Articles 159 of *the Constitution*, and Sections 1A and 3A of the *Civil Procedure Act*, it would be fair and in the interest of justice to reinstate this suit; further that there are persons accessing the suit land trying to alter the beacons to subdivide the land for sale.
4. The Application is also premised on the Supporting Affidavit of John C. Towett, the Chairman of the Plaintiff Self Help Group, who averred that the suit was dismissed by the Court on 24th June 2021, via a Notice to Show Cause, without their knowledge.

5. He also averred that since the filing of this Misc. Application in 2017, the Applicant had tried to fix the matter for hearing, but were unsuccessful as the Defendant/Respondent had passed on, and they could not serve him. He alleged that the family of the Defendant frustrated them, as they did not take out Letters of Administration for estate of the 1st Defendant.

6. The deponent also averred that their Advocate, Boniface Njiru fell ill during Covid 19 pandemic, and could not attend court, and he later passed on in 2023. It was his averments that he only discovered about the dismissal of the suit on 24th June 2024, while on routine Court business.

7. Therefore, failure to attend court on the date of the hearing was not their mistake, but an error on the part of their advocate, which should not be visited upon them as his client. The Deponent also averred that it is in the interest of Justice that their Application for reinstatement of the suit should be allowed, and the mistake of their counsel for non-attendance should not cause them to be penalised, and that their explanation is sufficient, and thus the instant Application is merited.

8. The instant Application was filed on the background of another dismissed Application dated 13th February 2024, which had also sought for reinstatement of the suit. The above referred Application was slotted for hearing on 22nd February 2024, which date the Applicant and/ or his advocate were absent, and thus the said dismissal for want of prosecution.

9. The Respondents did not file any Replying Affidavit to the Application, but a Mr Ole Yenko appeared for the 1st Respondent, who was allegedly deceased. The Counsel sought time to file a response to the Application, but by the time of writing this Ruling, there was no Response.

10. However, on 5th December 2024, the court directed that the instant Application be canvassed by way of written submissions with a mention date for 20th January 2025. From the court record, the written Submissions dated 13th January 2025, were filed by A.J Chesiyna & Co Advocates, which submissions on the face of it show that they were in respect of a Notice of Motion Application dated 5th May 2022, which certainly is not the instant Application.

11. Assuming the date indicated of 5th May 2022, was an error, the court has considered the body of the written submissions, and it indeed refers to the dismissed Application dated 24th June 2021, and therefore, this court holds and finds that the instant written submissions are in respect of the instant Application under consideration.

12. The Respondents did not file their Response to the Notice of Motion and/ or their written Submissions, and thus on the face of it, this instant Application is not opposed, and the Court could be tempted to allow it for not being opposed.

13. However, this is an Application seeking to reinstate a suit that was dismissed by the court on its own motion on 24th June 2021, under Order 17 Rule 2 of the Civil Procedure Rules, which provides;

> " in any suit in which no application has been made or step taken by either party for one year, the court may giver Notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to the satisfaction, may dismiss the suit"

14. Given that the suit was dismissed on 24th June 2021, and the Application for reinstatement were filed in 2024, this specific one is dated 29th April 2024, and the Certificate Urgency is dated 8th July 2024, then the said Application can only be allowed on merit, but not on the basis that the Respondent did not attend court to oppose it.

15. Before delving into the merit of this Application, the court will glean through the history of this matter, as is available from the court record. In doing so, the court will determine whether the Applicants have been keen in prosecuting the instant matter, and whether they are just victims of the mistakes of their Advocates.

16. From the court record, it is evident that this Misc Application No.4 of 2017, was filed on 28th February 2017, wherein the Applicant vide aa Notice of Motion Application dated 22nd Feb 2017, sought for; Withdrawal of Narok SPMCC Misc Land Case No. 3 of 2011, from the Chief Magistrates' Court and to have the same transferred to this Court for trial and disposal of the same.

17. The above referred Application came up for hearing on 12th April 2017, but the same was not heard, and was adjourned to 4th May 2017; and the court also noted that since the application sought to transfer the lower court file to the ELC, there were practice directions issued by the Chief Justice, on the fact that all matters touching on land before the lower courts were to remain in the said courts, pending the outcome of the Appeal on Jurisdiction of Magistrates Courts on land matters.

18. Therefore, the matter was given another mention date for 5th July 2017. However, on 5th July 2017, the Court was not sitting, and the matter was fixed for mention on 12th July 2017, before the Judge. Thereafter, the matter was given a mention dated for 26th July 2017.

19. From the Court record, on 26th July 2017, there was no Appearance for the Applicant/ and their advocate. Mr Ole Yenko for the 1st Respondent sought for dismissal of the suit/ Misc Application for non -attendance of the Applicant. Consequently, the Court dismissed the Notice of Motion Application dated 22nd February 2017, for having been filed unprocedurally as there was a suit pending before the SPMC Narok, which the Applicants were directed to conclude.

20. This Misc. Application having been initiated through the said Notice of Motion Application dated 22nd February 2017, which was dismissed, it meant that the whole suit stood dismissed, and after 26th July 2017, there was no suit pending. However, on 25th September 2017, the Applicant filed a Notice of Motion Application, seeking for review and Setting Aside of its Orders of 26th July 2017, of dismissing the Misc Application by the Applicant dated 22nd Feb 2017. The Applicant alleged that the said Application was dismissed in the absence of their advocate, and without their knowledge.

21. The Above application was fixed for hearing on 30th October 2017, and which date the said Application was not prosecuted, but was fixed for hearing on 16th November 2017. Again on this 16th November 2017, the Application was not heard, but was fixed for hearing on 14th December 2017, wherein the Court record does not show any court action for 14th December 2017.

22. The matter came up again in court on 14th Feb 2018, and there was no Appearance by any of the parties. Again, the matter was fixed for mention on 15th March 2018, wherein the parties were absent and the file was returned to the Registry without any date for further action.

23. All the above dates of action were given to the suit herein, but which suit had been dismissed on 26th July 2017, and the suit was non- existent, but there was a pending application for setting aside the dismissal orders of the main Misc Application. The said application for setting aside was never prosecuted nor heard, and therefore the filed application for setting aside of dismissal order was never allowed. Therefore, this suit stands dismissed to date.

24. Further, the court on its own motion dismissed the suit under Order 17 Rule 2 of the Civil Procedure Rules. However, by then, the whole suit had been dismissed, and maybe what ought to have been dismissed was the application dated 21st September 2017, for setting aside the earlier dismissal order.

With the said dismissal of the suit for want of prosecution under Order 17 Rule 2 of CPR, it meant that the Application for reinstatement of the suit, and or setting aside the dismissal Order was also dismissed. Thus, the application dated 21st September 2017, stood dismissed and the suit was never reinstated.

25. When this Misc. Application was filed the Plaintiff/ Applicant was represented by the Law Firm of Njiru Bonface & Co. Advocates. on 14th Feb 2024, Catherine Muriuki & Co Advocates filed a Certificate of Urgency allegedly by Bonface Njiru Advocate, dated 13th February 2024, wherein the said advocate averred that the suit was dismissed for want of prosecution on 24th June 2021, and sought for the accompanying Application to be certified urgent as the applicant was earnestly trying to reinstate the suit, and sought for the said Notice of Motion Application dated 13th February 2024, to be allowed.

26. The said Application sought for setting Aside the orders dated 24th June 2021, and reinstatement of the suit on the ground that the Plaintiff/ Applicant had diligently prosecuted the matter and did abide to all the directions of the court. However, the suit was dismissed without their knowledge.

27. The above application for reinstatement was filed by Catherine Muriuki & Co Advocates, without having filed any Notice of Change of Advocates. therefore, the said Catherine Muriuki Advocate was not properly on record. However, the said application dated 13th Feb 2024, was given a hearing dated for inter-parties hearing on 22nd February 2024, wherein on the material date the Applicant failed to turn up in court. Consequently, the Application was dismissed for want of prosecution.

28. After the above dismissal, on 8th July 2024, Henry Omwenga & Co Advocates filed a Certificate of urgency accompanying a Notice of Motion Application dated 29th April 2024, which application sought for setting aside of the Court Orders of 24th June 2021, and reinstatement of the suit. Further, it was evident that this Application dated 29th April 2024, was similar to the application dated 13th Feb 2024, which had earlier on been dismissed.

29. Again the Law Firm of Henry Omwenga Advocates did not file a Notice of Change of Advocates, and the Applicant could not certainly not file a similar application to an already dismissed one.

30. The instant Application which is due for Ruling, was canvassed through written submissions, which submissions indicate that they are in respect of a Notice of Motion Application dated 5th May 2022, which Application of 5th May 2022, is not in existence.

31. The said written submissions are drawn by Phoebe Komen of A.J Chesiyna & Co Advocates, and the said Advocate did not file a Notice of Change of Advocates. it is not clear why the Application was drawn by a different Advocate, and the written submissions are by a different advocate, without Notice of Change of Advocates. This is an anomaly, and goes against the known procedure of advocates coming on record for a party.

32. Its is clear that the whole suit was dismissed on 26th July 2017, and the Application to set aside the dismissal order was also dismissed on 24th June 2021, for want of prosecution. Further the Application herein is for setting aside the dismissal order of 24th June 2021, and for reinstatement of the suit.

33. There is no doubt that on 24th June 2021, when the suit was allegedly dismissed for want of prosecution, there was no suit pending, and thus no suit can be reinstated by setting aside the dismissal order of 24th June 2021. The suit herein was dismissed on 26th July 2017, for Want of prosecution, and on 24th June 2021, and the suit was not in existence, and there was no suit to dismiss. What was probably dismissed was the application dated 21st September 2017, for reinstatement, as it had not been prosecuted. Therefore, there is no suit to reinstate!

34. Further, this Application was filed by an advocate who was not properly on record, and further this Application is similar to the Application dated 13th February 2024, which was also filed by an advocate not properly on record. The filing of a similar application to the one dismissed is trying to have a second bite at the cherry, and is thus an abuse of the court process. If an advocate is not properly on record, they do not have the legal standing to move the court on behalf of the party and any pleadings filed by them may be struck out.

35. Order 9 rule 9 of the Civil Procedure Rues provides; -

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

36. Further, Order 9 Rule 6 provides as follows:

> "The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)."

The counsels who subsequently came on record did not adhere to the above requirements.

37. In the case of Romane Agencies LTD vs. Tanathi Water Services Board Civil Appeal No. 159 of 2013, the court held thus: -

> "The requirement for service of a Notice of Change must when understood in the context of its purpose and object be taken to require notification rather than validation of the change of advocate. The parties in the suit and previous counsel are notified of the change of advocates by service upon them as required by the rule. Service of the notice of change does not validate the change of advocate. The object of change of advocates is to promote the right of counsel, with the freedom of a litigant to appoint an advocate of his own choice. To hold otherwise would be to subjugate a party's right of counsel to a notification requirement."

38. Therefore, it is not in doubt that the Application was un procedurally filed by an advocate who is not properly on record. Further, the main suit was dismissed on 26th July 2017, and the said suit was never reinstated, and therefore, the Applicant cannot seek for reinstatement of the suit through setting aside of the orders of dismissal dated 24th June 2021. By this date, the main suit was already dismissed.

39. Since the Application dated 29th April 2024, is similar to the Application dated 13th February 2024, which was dismissed, and thus dealt with finality, then this Application is Res-judicata, and is an abuse of a court process for seeking similar orders with an Application that is already dismissed. The doctrine of "res judicata" means a matter that has already been decided by a competent court of law, cannot be relitigated. It prevents parties from bringing the same claim or issue before the court again after a final judgment/order has been rendered.

40. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. The Applicant's application dated 13th February 2024, was dismissed by the court for none attendance. Instead of filing a similar application to the dismissed one, the applicant should

have applied for review or setting aside of those orders instead of filing a similar application to the dismissed one.

41. Further, this court finds that there was inordinate delay in filing this Application, as the suit was dismissed on 26th July 2017, and the Orders sought to be set aside were issued on 24th June 2021. This Application was filed in July 2024, and there was a delay of 3 years, which was not explained satisfactorily. Therefore, with the said inordinate delay, the instant Application cannot be allowed.

42. The Applicant had averred that the delay in prosecuting the matter was occasioned by their advocates. However, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the Civil Procedure Acts, are very clear on the overriding objective of the Act, and provides as follows;

Section 1A

(1) ) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Further Section 1B of the said Act provides;

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

43. In Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004] eKLR the court held: -

> " I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders"

44. Further in the case of Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others [2018] eKLR , the court said: -

> " It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from

the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation."

45. Consequently, having analysed the instant Application as above and the history of this case, the court finds and holds that the instant Application dated 29th April 2024, brought vide a certificate of urgency dated 8th July 2024, is not merited, and the same is dismissed entirely with no orders as to costs since the said Application was not opposed.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 4TH DAY OF MARCH 2025.**

**L. GACHERU**

**JUDGE**

**4TH MARCH 2025**

Delivered online in the presence of

Elijah Meyoki - Court Assistant

N/A for the Applicant though aware of the Ruling date

N/A for 1ST Respondent.

N/A for 2ND Respondent

4th March 2025.

**L. GACHERU**

**JUDGE**

**4TH MARCH 2025**