



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MACHAKOS

ELC. PETITION NO. 9 OF 2019

MUTINDA MUSILA MALUA.....PETITIONER

VERSUS

NGUNGA YATTA.....1ST RESPONDENT

THE DEPUTY COUNTY COMMISSIONER, KITUI WEST- SUB COUNTY.....2ND RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT, KITUI.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. In the Notice of Motion dated 25th November, 2020, the Petitioner has prayed for the following reliefs:

a) That the court order dismissing the Petition on 25th November, 2020 herein be set aside and the Petition be reinstated and all orders hitherto granted to remain in force and the Petition be fixed for hearing unconditionally on merit.

b) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Petitioner's advocate who has deponed that this suit was commenced by way of a Petition dated 14th June, 2019; that later, an Application was made seeking for preservatory orders stopping the implementation of the impugned Minister's decision pending the hearing and determination of the suit and that the said Application was allowed.

3. The Petitioner's advocate deponed that the matter was set down for hearing of the main Petition on 26th November, 2019 before Justice Angote but on the said date, the Court was not sitting and the parties were directed to fix new dates at the registry.

4. Counsel deponed that on 30th July, 2020, the matter came up for hearing but the same was taken out of the cause list by consent; that the Petition was slated for hearing on 25th November, 2020; that prior to the hearing, the Petitioner's advocates formally wrote to the court and the 1st Respondent's counsel indicating that the Petitioner had attended a graduation party where he was exposed to the global pandemic virus and that as such, he had been advised to isolate himself for fourteen (14) days under quarantine.

5. The Petitioner's advocate deponed that on 25th November, 2020, they noted that the matter had been listed as a hearing before the Judge and upon inquiry from the registry and the 1st Respondent's advocates, they were informed that the same would be mentioned before the Judge and that she logged in the court's session virtually and that unfortunately, before the matter was called out, her internet connection failed and efforts to get reconnected were futile.

6. It was deponed by the Petitioner's advocate that she immediately tried to contact the 1st Respondent's advocate through text messages informing him that she was facing technical hitches in relation to internet connectivity and that immediately internet was reconnected, she sought the court's indulgence to mention the matter but was informed that the same had already been called out and dismissed for want of prosecution.

7. Counsel deponed that the 1st Respondent's oral Application to dismiss the suit was ill driven, malicious and uncalled for as she had already communicated their intention to adjourn the matter and the reasons for so doing, and that the court had already indicated that the matter would be placed before the Deputy Registrar for directions. The Petitioner's counsel finally deponed that the Petitioner is keen to

prosecute the Petition and as such, should be accorded an opportunity to be heard and the court to make its final determination.

8. In reply, the 1st Respondent's counsel deponed that he did not accede to the Petitioner's advocate's request for an adjournment but advised her to attend court and make her intended Application since he was under firm instruction from his client to proceed with the hearing and that since the time the Applicant lodged his Petition in Court, he has never demonstrated any desire to prosecute the same.

9. The 1st Respondent's counsel deponed that the pendency of the Petition coupled with the unexplained indolence on the part of the Applicant to prosecute it is prejudicial to the 1st Respondent's rights *vis-à-vis* the parcel number 186 – Nzalae/Mutungoni and that once a litigant files a matter in Court and abandons it, he should not be heard groaning under the weight of his self-inflicted distress once the matter is dismissed for want of attendance or prosecution as is the case here.

10. The 1st Respondent's counsel finally deponed that on 25th November, 2020, when the Petition came up for hearing, neither the Petitioner nor his counsel attended court; that the 1st Respondent's counsel, in pursuance of his client's instructions, properly moved the court for dismissal of the Petition and that the 1st Respondent cannot be faulted for acting in the interest of justice.

11. The 1st Respondent's counsel deponed that the hearing date of 25th November, 2020 had been fixed by consent and one wonders why the Applicant's counsel chose to mislead the Deputy Registrar vide the letter dated 24th November, 2020 and that directions on the matter were taken on 26th November, 2019 wherein the parties agreed to have a *viva voce* hearing.

12. Finally, the 1st Respondent's advocate deponed that the allegations by Advocate Evalyne Wambui Mburu that she could not successfully log in the court's online system are just that, allegations, that there is no scintilla of evidence to prove that she ever attempted to join the virtual session on 25th November, 2020 and that a decision on whether or not a matter scheduled for hearing will be adjourned rests with the court and not the counsel appearing for parties.

13. That being so, it was deponed, it is unethical and absolutely unacceptable for Advocate Wambui to hold the view that he acted maliciously or with an ill motive when he obeyed his client's instructions and that there is no sufficient or concrete grounds placed before the court to warrant the setting aside of the dismissal order made on 25th November, 2020. Both parties relied on their respective Affidavits.

14. The record shows that this suit was commenced by way of a Petition dated 14th June, 2019. On 3rd July, 2019, an Application was made by the Petitioner seeking for preservative orders stopping the implementation of the impugned Minister's decision pending the hearing and determination of the Petition. The said Application was allowed by the consent of the parties on 17th July, 2019.

15. On the same day the Application for conservatory orders was allowed, directions on the hearing of the Petition were given. The Petition was then slated for mention on 24th September, 2019, on which date the Petition was fixed for hearing on 26th November, 2019. On 26th November, 2019, the court was not sitting and the parties were directed to fix new dates in the registry.

16. When the matter came up for hearing on 30th July, 2020, neither the Petitioner nor the Respondents were in court. The matter was stood over generally. The 1st Respondent's advocate fixed the matter for hearing on 25th November, 2020 and duly served the Petitioner's advocate with a hearing notice.

17. The record shows that vide a letter dated 23rd November, 2020, the Petitioner's advocates formally wrote to the court and the 1st Respondent's counsel indicating that the Petitioner had attended a graduation party where he was exposed to the global pandemic virus and that as such, he had been advised to isolate himself for fourteen (14) days under quarantine. In the said letter, the Petitioner's advocate intimated that they will not be ready to proceed with the hearing of the Petition on 25th November, 2020.

18. The Petitioner's advocate deponed that on 25th November, 2020, she logged in the court's session virtually and that unfortunately, before the matter was called out, her internet connection failed and efforts to get reconnected were futile. Indeed, the record shows that on the same day, and after the matter had been dismissed for want of prosecution, the Petitioner's advocate managed to access the court virtually and informed the court about her frustration with the internet that morning.

19. Considering that the session under which the matter was dismissed for want of prosecution was conducted virtually, and in view of the fact that the Petitioner's advocate was unable to access the court due to the failure of internet connectivity, she cannot be blamed for logging in late. Indeed, having addressed the court albeit after the Petition had been dismissed, it shows the efforts she made to address the court.

20. Indeed, it is clear that the Petitioner was not ready to proceed with the hearing of the Petition for reasons that she had communicated to the 1st Respondent and the court. The reasons given in the letter dated 23rd November, 2020 as to why the matter could not proceed on 25th November, 2020 are reasonable considering the challenges that the country, and the Judiciary in particular, went through in the year due to the Covid 19 pandemic.

21. For those reasons, it is my finding that the Petitioner should be given a chance to prosecute his Petition. However, the 1st Respondent having prepared for the hearing of the Petition on the date the Petition was dismissed, the Petitioner will have to pay him thrown away costs.

22. In the circumstances, the Application dated 25th November, 2020 is allowed as follows:

a) The order dismissing the Petition on 25th November, 2020 is hereby set aside.

b) The Petitioner to pay to the 1st Respondent thrown away costs of Kshs. 10,000 before the hearing of the Petition.

c) Each party to pay its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 23RD DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE