



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 38(A) OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE SPECIAL DISTRICT COMMISSIONER KITUI.....RESPONDENT

AND

MUTAVE KYAITHA.....INTERESTED PARTY

MULEI MULILIEX-PARTE APPLICANT

RULING

1. In the Notice of Motion dated 2nd December, 2019, the Applicant has prayed for the following orders:

a. That this Honourable Court be pleased to review/set aside the orders made on 5th December, 2018 dismissing the suit for want of prosecution.

b. That upon grant of prayer 1 herein above this Honourable Court be pleased to reinstate the suit.

2. The Application is supported by the Affidavit of the Ex-parte Applicant's advocate who has deponed that on 13th April, 2005, the Ex-parte Applicant filed an Application seeking leave to apply for prerogative orders of certiorari and mandamus against the Ruling of the District Commissioner, Kitui in the Appeal to the Minister Case Number 13 of 1989.

3. The Ex-parte Applicant's advocate deponed that they could not trace the file; that they later discovered that the matter had been placed before Kemei J, a High Court Judge, who dismissed the matter for want of prosecution and that they were never served with the notice to show cause why the matter should not be dismissed for want of prosecution.

4. The Interested Party filed Grounds of Opposition in which he averred that the Application is made in bad faith, frivolous, vexatious and amounts to an abuse of the due process of the court. The Interested Party averred that the Ex-parte Applicant and his advocate have not demonstrated in the Application the efforts they made in following up the matter to have the same set down for trial.

5. In his submissions, the Ex-parte Applicant submitted that Article 162(2) of the Constitution ousted the jurisdiction of the High Court to deal with land matters; that this matter was dismissed by Kemei J who did not have the requisite jurisdiction and that the Ex-parte Applicant's advocate was not served with a notice to show cause why the suit should not be dismissed for want of prosecution.

6. The record shows that on 4th May, 2005, the High Court granted to the Ex-parte Applicant leave to commence Judicial Review for prerogative orders of certiorari. The said leave was also to operate as stay of execution of the Decree in Appeal to the Minister Land Case No. 423 of 1989.

7. On 19th May, 2005, the Ex-parte Applicant filed the substantive Notice of Motion seeking for the order of certiorari to issue for the purpose of quashing the undated Judgment of the Special District Commissioner delivered on 31st December, 2004. The record shows that the last time the matter was in court was on 8th June, 2010 when the same was stood over generally. On the said date, none of the parties were present in court.

8. The copy of the notice to show cause why the suit should not be dismissed for want of prosecution was served on the Ex-parte Applicant's court clerk on 22nd May, 2018. The said court clerk has not sworn an Affidavit denying that he was served with the notice to show cause why the suit should not be dismissed for want of prosecution.

9. Despite being served with the notice to show cause, neither the Ex-parte Applicant nor his advocate was in court on 5th June, 2018, the matter was dismissed for want of prosecution.

10. Although counsel for the Ex-parte Applicant has deposed that the suit was not fixed for prosecution between the years 2010 and 2018 because the court file was missing, there is no evidence to show that the Ex-parte Applicant's counsel made efforts to have the file traced.

11. Indeed, the Ex-parte Applicant's advocate did not exhibit any letter addressed to the Deputy Registrar of the court alluding to the fact that they could not trace the court file, if at all the said file was missing. The issue of not tracing the file for the purpose of fixing the matter for hearing does not therefore arise.

12. Although the Ex-parte Applicant has submitted that Kemei J did not have the requisite jurisdiction to dismiss this suit for want of prosecution, the evidence before this court shows that this suit was filed in the High Court in the year 2005.

13. Despite the establishment of the Environment and Land Court vide Article 162(2) (b) of the Constitution in the year 2012, the Ex-parte Applicant did not make any effort to have the matter transferred from the High Court to the Environment and Land Court.

14. Having not caused the suit to be transferred to the Environment and Land Court, the Ex-parte Applicant cannot be heard to complain that the matter was dismissed by a court without jurisdiction. Indeed, this matter having been filed in the High Court, and the suit having remained in that court until the year 2018, the same was dismissed by the court with the requisite jurisdiction as at 5th June, 2018.

15. In any event, the Ex-parte Applicant has not given any reason as to why the suit was not prosecuted for more than thirteen (13) years. The court in whose registry the file lay dominant had no other recourse other than dismissing it for want of prosecution.

16. For those reasons, I disallow the Application dated 2nd December, 2019 with no order as to costs. For avoidance of doubt, the suit stands dismissed as ordered by the court on 5th June, 2018.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF APRIL, 2021

O. A. ANGOTE

JUDGE