



**Gikanga (Suing as Administrator of the Estate of the Late Gikanga Gachagwa) v Njoroge & another (Environment & Land Case E007 of 2021) [2023] KEELC 20560 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20560 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E007 OF 2021**

**JG KEMEL, J  
OCTOBER 5, 2023**

**BETWEEN**

**JACKSON KAGECHE GIKANGA (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE GIKANGA GACHAGWA) ..... PLAINTIFF**

**AND**

**ALICE NJERI NJOROGE ..... 1<sup>ST</sup> DEFENDANT**

**BETH NYAKIO NJOROGE (BEING SUED AS THE ADMINISTRIX OF THE ESTATE OF FRANCIS NJOROGE MUCHERU) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant moved the court vide the Motion dated the 7/4/2021 seeking the following orders;
  - a. That the order dismissing the suit dated 15/3/2022 be and is hereby set aside.
  - b. That costs of the application be provided for.
2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Mwangi Chege sworn on the 7/4/2022. The deponent states that the Notice to Show Cause was not served upon the applicant. Secondly that one year had not expired by the time the Notice to Show Cause was issued and thirdly the Plaintiff has raised triable issues in the pleadings and it is met to reinstate the suit for full trial on merit and fourthly that the respondents stand to suffer no prejudice if the suit is heard on its merits.
3. The application is opposed by the respondents through the Replying Affidavit sworn on the 25/5/2022 by Alice Njeri Njoroge who deponed that the applicant has filed other proceedings in Court against her and her co-Defendant in ELC 848 of 2016 which suit was dismissed for want of prosecution; the subject matter of the suit is the current suit land herein. The respondents faulted the



applicant for filing a fresh suit herein instead of seeking to reinstate the previous suit. That interalia there is a pending succession cause in Court involving the same suit land.

4. With respect to service the respondents stated that the applicant is to blame for the dismissal of the suit for want of prosecution. That the applicant has been filing multiple suits and failing to prosecute them hence delaying the resolution of the dispute for a period of over 30 years. That the applicant should be held accountable on account of the indolence hence disentitling it of the Court's discretion.
5. Parties filed written submissions which I have read and considered.
6. It is trite that setting aside dismissal orders is a discretionary remedy. The guiding principle in the exercise of this jurisdiction was laid down in *Mbogo & Another Vs. Shah* EALR 1908 whereby it was stated that the Court's discretion to set aside an order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a litigant who deliberately seeks to obstruct or delay the course of justice.
7. The germane issue for determination in the application is whether the application is merited.
8. Order 17 rule 2(1) of the *Civil Procedure Rules* provides as follows;  

“Notice to show cause why suit should not be dismissed;

(1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”
9. The background of this suit is necessary. This suit was filed on the 28/1/2021. Upon being served with summons to enter appearance the respondents filed their Memorandum of Appearance on the 25/2/2021. From the record it is clear that the applicant took no steps to prosecute the case for a period close to one year prompting the Court to issue a Notice to Show Cause on the 25/1/2022 in accordance with Order 17 rule 2(1) of the Civil Procedure Rules.
10. The applicant avowed that he was not served with the notice and therefore was not aware of the hearing of the notice to show cause. The Court has perused the record and save for the respondents' Counsel there is no evidence that the Notice to Show Cause was served upon the applicant.
11. The court finds that the applicant was not served with the notice to show cause. That whether notice is issued or not, it should be the business of a party to prosecute his case as diligently as possible. It should not be left to the court to monitor the prosecution of the suit. That is not the mandate of the court.
12. That said for the above reasons the application is allowed. The suit be and is hereby reinstated on terms that unless the applicant takes steps to fix the matter for hearing within the next 60 days the orders shall lapse automatically.
13. The costs shall be in favour of the respondents and payable by the applicant.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**



**Delivered online in the presence of;**

Chege for applicant/Plaintiff

Mitiambo for 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Defendant

Court Assistants – Phyllis/Lilian

