



REPUBLIC OF KENYA



KENYA LAW
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**Murimi & 4 others v Mbithi & another (Environment & Land Case
28 of 2015) [2023] KEELC 20448 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 28 OF 2015
CA OCHIENG, J
OCTOBER 3, 2023**

BETWEEN

**WINNIE NYAMBURA MURIMI 1ST PLAINTIFF
NAHASHON MUNGAI 2ND PLAINTIFF
EPHANTUS MWANGI 3RD PLAINTIFF
PRISCILLAH NYAMBURA MWAURA 4TH PLAINTIFF
JACKTON NYENDE OBUYA 5TH PLAINTIFF**

AND

**PENINAH MBITHE MBITHI 1ST DEFENDANT
MBUKONI HOLDINGS LIMITED 2ND DEFENDANT**

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 21st September, 2020 where they seek the following Orders:
 1. Spent
 2. That this Honourable Court's Order made on 21st September, 2018 dismissing this suit for want of prosecution be set aside.
 3. That leave be granted to the firm of MS J.K Mungania & Company Advocates to come on record for the Plaintiffs.
 4. That the suit be reinstated and set down for hearing on its merits.
 5. That this Honourable Court do make any other Order as may be necessary to meet the ends of justice.



6. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and Supporting Affidavit of Winnie Nyambura Murimi where she provides a background of this suit and deposes that on 27th September, 2018, this suit was dismissed for want of prosecution. She denies knowledge of the dismissal of the suit, until they engaged the services of the current advocates. She explains that after inquiring from J.M Mutua & Company Advocates about the status of the case, they were informed that there was no Environment and Land Judge at the Machakos Law Courts and until one was posted, nothing much could be accomplished. Further, that after the said information, they were unsuccessful in contacting her as their telephone calls went unanswered. She states that during the month of August 2020, they were shocked to see people coming into the suit premises, clearing the same and commencing construction. She confirms that their Advocates informed them that on 25th July, 2018, the Court issued a Notice of Dismissal under Order 17 Rule 2 of the Civil Procedure Rules asking parties to show cause on 21st September, 2018 why the Case should not be dismissed for want of prosecution. Further, that it is clear from the Notice of Dismissal on the Court file that J M Mutua & Company Advocates were served with the said Notice of Dismissal on 3rd August, 2018. She reiterates that the Plaintiff's case is replete with merits and hence seeks the Court's discretion to set aside the Order dismissing the suit for want of prosecution. Further, that no prejudice will be suffered by the 1st Defendant as she will also have a chance to prosecute her Counter-claim especially considering they are in situ.
3. The 1st Defendant opposed the instant Application and filed Grounds of Opposition dated the 29th May, 2023. She contends that the instant Application is *res judicata*. Further, that there has been unreasonable and inordinate delay in making this Application. She insists that the Application is frivolous, vexatious and an abuse of court process as no sufficient reasons have been advanced to warrant the orders sought.

The Application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, Grounds of Opposition and rivalling submissions, the following are the issues for determination: Whether the firm of messrs J K Mungania & Company Advocates should come on record for the Plaintiffs to replace the firm of messrs J M Mutua & Company Advocates. Whether the Orders issued on 21st September, 2018 dismissing this suit for want of prosecution should be set aside.
5. The Plaintiffs in their submissions have reiterated their averments as per the Supporting Affidavit and contend that mistake to Counsel should not be visited upon them. To support their arguments, they have relied on the following decisions: Philip Chemwolo & Another v Augustine Kubede (1982-1988) KAR 103 at 1040 and DT Dobie & Company (K) LTD v Joseph Mbaria Muchina CA 37 of 1978.
6. The 1st Defendant in her submissions contends that the instant Application is *res judicata* since the Court had already dealt with an Application dated the 7th October, 2020 where an intended Plaintiff Jackton Nyende Obuyu sought to set aside orders dismissing this suit for want of prosecution. Further, that the Plaintiffs have not provided an explanation as to why their erstwhile Advocate did not appear in court on 21st September, 2018. She insists that the Plaintiffs have also not explained why it took them two years after this suit was dismissed to file the instant Application. Further, that for the last two and half years since the instant Application was filed, the Applicants never took a step to prosecute it. She reiterates that the instant Application is similar to the one the Court determined on 7th March, 2022.



7. As to whether the firm of messrs J K Mungania & Company Advocates should come on record for the Plaintiffs to replace the firm of messrs J M Mutua & Company Advocates.

On Change of an Advocate post Judgment, Order 9 Rule 9 of the [Civil Procedure Rules](#) stipulates that:

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.”

8. In this instance the firm of messrs J K Mungania & Company Advocates have sought to replace the firm of messrs J M Mutua & Company Advocates that previously acted for the Plaintiffs at the point the suit was dismissed for want of prosecution. Since this prayer is unopposed and in relying on Order 9 Rule 9(a) of the [Civil Procedure Rules](#), I will proceed to allow the said firm to come on record for the Plaintiffs.

As to whether the Orders issued on 21st September, 2018 dismissing this suit for want of prosecution should be set aside.

9. It is not in dispute that this suit was dismissed for want of prosecution on 21st September, 2018. From a perusal of the Court Record, I note the Plaintiffs instituted this suit in 2015, but never set it down for hearing until September, 2018 when it was dismissed for want of prosecution. In the case of *Shah v Mbogo & Another* [1967] EA 116 the Court of Appeal of East Africa while dealing with setting aside of an order of court, observed that:

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

10. While in [Wachira Karani v Bildad Wachira](#) [2016] eKLR Mativo J (as he then was) held that:

Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

11. See also the case of [DT Dobie & Company \(K\) LTD v Joseph Mbaria Muchina](#) CA 37 of 1978.

In the current scenario, the Plaintiffs have sought to set aside orders dismissing this suit for want of prosecution and insist that mistake to Counsel should not be visited upon them. The Plaintiffs have not disputed that the Notice to Show Cause why the suit should not be dismissed for want of prosecution was served upon their erstwhile advocates on 3rd August, 2018 but they failed to attend court. I note there was a previous similar application filed by an intended Plaintiff Jacktone Nyende Obuyu dated the 7th October, 2020 seeking to set aside orders dismissing this suit for want of prosecution, joinder as well as amendment of the Complaint, which was determined on 7th March, 2022. Further, I note the Plaintiffs filed the instant Application more than two years after the suit had been dismissed for want of prosecution, took another two years to set it down for hearing and have not provided any plausible explanation for this delay. The Plaintiffs have further not furnished court with an affidavit from the



erstwhile advocates on why they failed to attend court after receiving the impugned Notice to Show Cause.

12. Based on the facts before me while associating myself with the decisions cited above, I find that the Plaintiffs have brought this Application after an inordinate delay. Further, they have not demonstrated sufficient cause why this suit should be reinstated. Insofar as they seek to blame their erstwhile Advocates, it is trite that equity aids the vigilant and not the indolent and, in the circumstances, I find that the instant Application has been brought too late in the day without any plausible explanation to enable this court exercise its discretion. It seems to me, the Plaintiffs were waiting for the intended Plaintiff to prosecute his Application dated the 7th October 2020 first and thereafter ride on the any positive orders emanating therefrom but this was not to be.

It is against the foregoing that I find the Notice of Motion Application dated 21st September, 2020 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

