



Republic v Lands Dispute Tribunal Ololunga Division; Nowoi (Exparte Applicant); Ngerechi (Interested Party) (Environment and Land Judicial Review Case 4 of 2018) [2023] KEELC 20596 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2018
CG MBOGO, J
OCTOBER 12, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

LANDS DISPUTE TRIBUNAL OLOLUNGA DIVISION RESPONDENT

AND

DAVID NOWOI EXPARTE APPLICANT

AND

ALICE CHERUTO NGERECHI INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Motion Application dated 16th May, 2023 filed by the Interested Party/Applicant on even date and is expressed to be brought under Sections 1A,1B,3 and 3A of the Civil Procedure Act seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to dismiss the application by way of notice of motion dated 7th August 2009 for lack of service, and in the alternative.
 4. That this honourable court be pleased to dismiss the application by way of notice of motion dated 7th August 2009 for want of prosecution.
 5. That consequently, the orders given by this honourable court on the 24th July 2009 be vacated.



2. The application is premised on the grounds on the face of it and more particularly as set out in the affidavit. The application is supported by the affidavit of the Interested Party/Applicant sworn on even date. The Interested Party/Applicant deposed that she recalls that on 5th August, 2009, the Ex-Parte Applicant served her with the orders of the court issued on 24th July, 2009 which was clear that the Ex Parte Applicant do serve her with the substantive motion within 15 days from the date of the issue of the order. The Interested Party/Applicant further deposed that she filed a Notice of Motion dated 20th July, 2010 seeking the court to vacate the orders given on 24th July, 2009 since the Ex Parte Applicant had not complied with the orders of the court for almost one year since being granted. Further, that on 4th November, 2013 she appointed the law firm of A.M. Murindi & Company Advocates to represent her in this case but she never appeared before the court either personally or through an advocate.
3. The Interested Party/Applicant further deposed that she was surprised to learn that this file had been transferred from Nakuru and was before court on 24th April, 2023. Further, that upon perusal on 24th July, 2023, counsel for the Ex Parte Applicant had informed court that the Ex Parte Applicant intended to record a consent with the Respondent through the Attorney General without her knowledge. Further, that on 3rd May, 2023 she appeared in court through her advocate where it came out clearly that there was intention of recording a consent which on the same date (3rd May, 2023) she maintained that she has never been served with the substantive motion as ordered by the court.
4. The Interested Party/Applicant deposed that in the absence of service of the substantive motion, she cannot make any move though this court directed that she should reply to the substantive motion. She maintained that the orders of service were very specific and 13 years later, the Ex Parte Applicant has refused to effect service of the substantive motion which is abuse of court process. Also, that even if the said orders had been served which is still denied, the Ex Parte Applicant has failed to prosecute the Notice of Motion within reasonable time causing unnecessary anxiety.
5. On 22nd June, 2023, the Ex Parte Applicant filed a replying affidavit sworn on 19th June, 2023 in response thereto. The Ex Parte Applicant deposed that upon being granted leave to file judicial review proceedings, his advocates were on 24th July, 2009 granted leave to file and serve the substantive motion within 21 days which was to operate as stay of proceedings in Narok CMCC Misc Land Case No. 4 of 2018. Further, that the substantive motion dated 7th August, 2009 was served upon the applicant and the Interested Parties and thereafter, the Interested Party/Applicant instructed the firm of L. Kipsang & Company Advocates who wrote requesting for proceedings on 3rd March, 2010.
6. It was further deposed that the court file thereafter went missing and was traced in the month of March 2022 and that the court in allowing his application dated 23rd February, 2022 and filed in court on 15th March, 2022, the matter was transferred to Narok and allocated the current file number. He further deposed that they made efforts to trace the Interested Party/Applicant and had serious challenges which he had to seek leave to serve by way of substituted service which application was allowed and an order issued to that effect.
7. The Ex Parte Applicant further deposed that the Interested Party/Applicant was all along aware of the proceedings in this matter and it would be dishonest for her to deny the knowledge of the proceedings as it has been active in court all through. With regard to the consent, the Ex Parte Applicant deposed that the consent sought to be recorded was between his advocates and the Attorney General if at all to the judicial review application pending in court and it had nothing to do with the Interested Party/Applicant.
8. The Ex Parte Applicant filed a further supplementary affidavit sworn on 11th July, 2023 which contained annexures which were not filed in the replying affidavit.



9. On 24th July, 2023 the Interested Party/Applicant filed a supplementary affidavit in response thereto which was sworn on 20th July, 2023. The Interested Party/Applicant deposed that there have been two mentions over the issue of affidavit of service as indeed there was none and reiterated that she has never at any one time been served with the substantive motion and all the averments are an attempt to hoodwink this court into believing that there was service. Also, that she cannot challenge the affidavit of service on record or cross examine the process server since at the time it is alleged to have been filed, they used to be paid for and the receiving stamp cannot suffice now.
10. It was further deposed that the judicial review proceedings were brought more than five months after the tribunal had given its verdict and as at the time the orders were given, the tribunal findings had been executed.
11. On 17th July, 2023, this court directed that the application be canvassed by way of written submissions. None of the parties filed their written submissions. Be that as it may, I have considered the application and the replies thereto and the issue for determination is whether this court ought to or can dismiss the notice of motion dated 7th August 2009 for want of service and prosecution.
12. I have perused the record in this file and I do note that on 27th September, 2018, the court sitting in Nakuru allowed the Ex Parte Applicant's prayers to transfer the matter from Nakuru to Narok. From thereon, no activity took place until 14th February, 2020 when the matter was fixed for mention for directions on several dates with no much activity taking place on the said dates save for request of another mention date.
13. On the issue of affidavit of service, a perusal of the pleadings shows that the orders issued on 24th July, 2009 were collected on 31st July, 2009 as can be seen from the signature appended on the flip side of the last page of the order issued on 28th July, 2009. The substantive motion was filed on 7th August, 2009 which was within the timelines stipulated and the only contention being service of the substantive notice of motion.
14. The Interested Party/Applicant filed a Notice of Motion Application dated 20th July, 2010 seeking that the court vacates the orders issued on 28th July, 2009 for non-compliance. However, it appears that the Interested Party/Applicant did not take steps to prosecute the application as from the proceedings, the first activity on record seems to have been provoked by the Ex Parte's Applicant letter dated 11th October, 2011 which matter was mentioned in court on 1st December, 2011.
15. Indeed, from the pleadings in the file, there is no record of any affidavit of service filed to confirm service of the substantive notice of motion upon the Interested Party/Applicant save as what has been annexed in the Ex Parte's Applicant supplementary affidavit. However, on 6th December, 2021, counsel for the Ex Parte Applicant informed the court that they had tried tracing the Interested Party/Applicant in vain and it is on this premise that the Interested Party/Applicant woke up from slumber and remembered that she had filed a similar application to the instant case seeking vacation of the orders issued on 28th July, 2009.
16. The Interested Party/Applicant also argued that it was not easy for her to move with filing a reply in the absence of service of the substantive motion. The Interested Party/Applicant has alluded to the directive of the court issued on 3rd May, 2023 directing her to file a replying affidavit and it is my belief that it defeats logic for this court to dismiss the substantive motion filed on 7th August, 2009 for want of prosecution yet there is an order given to the Interested Party/Applicant to respond to the substantive motion within 14 days.



17. With regard to the consent, on 27th March, 2023, the counsel for the Ex Parte Applicant informed the court that together with counsel for the Attorney General, they had agreed on the terms of the consent and what they needed to do is to sign the same for purposes of filing. The matter was further mentioned on 24th April, 2023 and a further date of 3rd May, 2023 given as the consent was yet to be executed.
18. On 3rd May, 2023, the counsel for the Attorney General informed the court that the consent between the Ex Parte Applicant and their office would probably affect the Interested Party/Applicant as it would make the application unopposed. From this narration, it can be seen that this court never had an opportunity to see the consent as no consent was entered into by the Ex Parte Applicant and the Attorney General.
19. This court is well aware that the primary duty to prosecute a case rests with the person who presented it. See *Barnabas Maritim –vs- Manywele Korgoren & Another* (2016) eKLR (per Sila Munyao). This court is also aware that the decision to dismiss a case for non-prosecution or for lack of service is discretionary and must be exercised judiciously based on the justification given by either party.
20. Upon careful consideration of all the circumstances of this case, this court is not persuaded that the Interested Party/Applicant has proffered sufficient reasons to persuade this court to dismiss the suit for want of prosecution or for lack of service and as such, this court declines to grant the orders sought.
21. Arising from the above, the Notice of Motion Application dated 16th May, 2023 is dismissed. The Ex-Parte Applicant is hereby ordered to serve the Interested Party/Applicant afresh with the substantive Notice of Motion Application dated 7th August, 2009 within seven days from the date hereof. Each party to bear its own costs. This matter is fixed for mention on 26th October 2023 to confirm compliance and for further directions.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 12TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

