



**Muthara v Wachira (Environment and Land Case Civil Suit
699 of 2017) [2022] KEELC 3241 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE CIVIL SUIT 699 OF 2017**

JG KEMEI, J

JUNE 2, 2022

BETWEEN

ERNEST NJAGI MUTHARA PLAINTIFF

AND

NDERITU WACHIRA DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Motion dated the 3/12/2018 in which the Applicant sought orders reinstating the suit that was dismissed on the 8/11/2018.
2. The application is based on the grounds annexed thereto and the Supporting Affidavit of Peter Mwenda Njagi, counsel for the Applicant who deponed that the he is conduct of the matter for the Applicant. He stated that this suit was transferred from ELC Milimani to Thika ELC without notice.
3. That he learnt from his learned colleague from the law firm of T M Kuria that the matter was coming up on the 8/11/2018 having been served with the notice to show cause, that arising from the said notice, his firm was not served and yet he had conduct of the matter on behalf of the Applicant. That the non-attendance was because of lack of service. Further that the Applicant has been keen to prosecute the matter and that the Defendant stands to suffer no prejudice if the matter is reinstated so that the same may be heard on its merits.
4. On the 23/2/2022 parties took directions and Mr Mburu Learned Counsel for the Respondent informed the Court that the application was opposed and sought leave to file a Replying Affidavit together with written submissions. As at the time of writing this Ruling none of the parties had complied. The Respondent neither complied and for that reason the application is unopposed. That being the case I shall determine the application based on the material on record and on its merits.
5. The key issue is if the application is merited.



6. Order 17 Rule 2 (1) of the *Civil Procedure Rules* grants the Court power to dismiss a suit in which no step has been taken for one year. The Order also requires the Court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the Court, the Court may dismiss the suit.

7. In the case of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR the Court stated as follows;

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of *the Constitution* and the overriding objective which demands of Courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of *the Constitution*, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff. This is the test I shall apply here.”

8. Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice. It uses the word “give notice”. The Court may give notice of dismissal through its official website or through the cause-list.

9. According to the Applicant the notice to show cause was served upon the firm of TM Kuria and not the current firm of Mwenda Njagi and that is why they were unable to attend Court. Though he states that he learnt from the learned colleague from the firm of T M Kuria that the firm had been wrongly served with the notice to show cause, the counsel did not give the time when he learned of the wrong service. I have perused the impugned notice to show cause issued on the 30/10/2018 and note that it was served upon the firm of TM Kuria for the Applicant and that of Kimondo Gachoka & Co Advocates for the Respondents and not the one of Mwenda Njagi Advocates.

10. For that reason, I find that the application is merited. I exercise my discretion and reinstate the suit so that the same may be heard on its merits.

11. Final orders and disposal;

- a. The application is allowed.
- b. The suit is hereby reinstated.
- c. The Plaintiff is ordered to fix the matter for hearing expeditiously within the next 60 days in default the same shall stand dismissed with no further orders from the Court.
- d. Each party to meet its own costs.

12. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 2ND DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE



Delivered online in the presence of;

Munene holding brief for Njagi for Plaintiff/Applicant

Kibaara for Defendant/Respondent

Court Assistant - Phyllis

