

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 77 OF 2010 (OS)

MWANAHAMISI SAID MWAMBODZE & 3 OTHERS.... APPLICANTS

VERSUS

The Estate of the Deceased

MOHAMMED HARIF KHAN..... RESPONDENT

RULING

(Application to set aside an order dismissing suit for want of prosecution;

applicants not served with the notice to show cause; application allowed)

1. The application before me is that dated 20 January 2021. The application basically seeks orders that this suit, which was dismissed on 8 November 2018, be reinstated. Nothing has been filed by the respondent to oppose the motion.
2. By way of background, the applicants commenced this suit through an Originating Summons filed on 17 March 2010. In the Originating Summons, the applicants claimed the land parcel Kwale/Diani/185 through adverse possession. There was an application for injunction that was filed with the suit. The application was placed before Ojwang J (as he then was) on 18 March 2010 and he granted orders of status quo pending inter partes hearing of the said application, with further direction that the parties to take a date in the registry. In the meantime, a response to the Originating Summons was filed on 29 June 2010. I have seen that the matter was next in court on 28 October 2010 and it was stood over generally as there was no appearance on the part of both applicants and respondent. The next entry in the file is of 21 December 2017 when one Samuel, for the 1st applicant fixed a mention date for 9 April 2018. Nobody appeared in court on 9 April 2018 and Yano J, directed parties to take a date in the registry.
3. Due to the inactivity in the matter, a Notice to Show Cause was issued on 12 October 2018, for the applicants to show cause why the suit should not be dismissed for want of prosecution. I can see that the notice was directed at Mwaniki Gitau & Company Advocates and M/s Opolu & Company Advocates. I can also see that a law firm of M/s Mwaniki Gitahi & Partners were served. The firm of Opolu & Company is the law firm that initially acted for the respondent before a notice of change of advocate was filed by the law firm of M/s Mwaniki Gitau & Company Advocates. The show cause was placed before Matheka J, who was visiting the station on service week, on 8 November 2018. Parties were absent and the court dismissed the suit for want of prosecution. Subsequently, this application was filed and as I have mentioned, it seeks that the suit be reinstated. The main ground is that the notice to show cause was not served upon the applicants' counsel.
4. The record shows that it is Okanga & Company Advocates who filed this suit on behalf of the applicants. They were on record when the notice to show cause was issued. I have no evidence that they were served. It was necessary for them to be served before the Notice to Show cause could proceed, otherwise they would not have had the opportunity to give reasons why the suit should not be dismissed. The only proof of service is upon M/s Mwaniki Gitahi & Partners Advocates. That law firm is not on record in this matter.
5. I am therefore persuaded to set aside the ruling of 8 November 2018 which dismissed the case of the applicants for want of prosecution. I make no orders as to costs.
6. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA