



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**CONSTITUTIONAL PETITION NO. 174 OF 2011**

**NZIOKI MBONDO.....PETITIONER**

**VERSUS**

**THE MINISTER FOR LANDS AND**

**SETTLEMENT .....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT ADJUDICATION OFFICER .....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**DANIEL KABERIA .....INTERESTED PARTY**

**RULING**

1. The applicant has moved this court seeking to have the judgment and orders delivered on 29<sup>th</sup> August 2018 set aside.
2. The application is based on the supporting affidavit sworn on **23<sup>rd</sup> January 2020**. In paragraph 6 of the said affidavit the applicant is blaming his former lawyers M/s Muia Mwanzia and Co. Advocates for in-action, lack of updates and failure to adhere to timelines as given by the court.
3. He avers he is an innocent applicant hence the mistakes or misdeeds of his former advocates ought not to be visited upon him. Further he avers this court has unfettered discretion to set aside the orders, have the matter determined on merits and that by re-opening, the matter there will be no prejudice occasioned to the respondents and the interested party.
4. Again the applicant avers he stands to suffer immensely this being a land matter if the orders are not reviewed or set aside.
5. By written submissions dated 7.4.2021 the applicant relies on the Court of Appeal decision in ***Francis Origo and another vs James Kumali Mungala (2005) eKLR, Richard Ndabi Heiyagu vs Independent Electoral and Boundaries Commission and 2 others (2013) eKLR, Mbogo vs Shah, Alimohammed Haji Suleman Body builders Ltd vs Jivraji & another, Unilever Kenya Ltd vs Proctor and Gamble and another (2015) eKLR*** all on the principles attendant to this court exercising its discretion to set aside, vary or review ex parte orders judgments and or decisions.
6. Again the applicant invokes **Articles 50 and 259 of the Constitution** and pleads with this court to come to his rescue from sinking into what he terms as the ocean of injustice.
7. The 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> respondents although duly served have not opposed this application. The interested party opposes the motion through a replying affidavit sworn on 29<sup>th</sup> August 2020.
8. It is averred that the applicant failed to adhere to clear trial directions given by the court in the presence of his advocate on the manner of disposing the case and whose failure to adhere to such timelines resulted to the dismissal of the case for non-prosecution. It is averred by the interested party that the applicant has never been serious in prosecuting his petition, has been indolent, freely changed advocate and chose his legal representative, notices before dismissal were duly served; he is guilty of inordinate delay of 2 years which has not been explained; that the interested party will be prejudiced for he has developed the property in issue and as an old man he need not be unnecessarily dragged and kept in court endlessly.
9. Similarly the interested party avers court directives are not made in vain and should be adhered to and hence the applicant has never been complying with them including amendment, filing of submission on time and payment of adjournment costs orders made on 14.12.2012.

10. Other than the replying affidavit the interested party relies on written submissions dated 7.5.2021 detailing the history of this file, orders made and not complied with since 26.3.2012 followed by those made on 21.2.2018, non-appearance of both the applicant and his lawyers on 26.4.2018 and hence submits before the dismissal there was a delay of 7 years hence the court was justified in dismissing the petition for want of prosecution.

11. The interested party relies on the decision of *Mbogo vs Shah and another (1987) E.A 116*, and later *Mbogo vs Shah and another (1968) E.A 93* on the proposition that even though the court has discretion, in the instant case the applicant was indolent and hence does not deserve such discretion in his favour.

12. It is further submitted the petition was not heard exparte, the court is **functus officio**, application is incompetent as is brought under the wrong provision of the law, is confusing as is framed for setting aside but the submissions are as if the application is for review and lastly the application lacks grounds as required under **Order 51 Rule 4 of the Civil Procedure Rules**.

### History of this petition

13. It is not in doubt that the applicant came to court on **8.12.2011** under certificate of urgency and obtained some conservatory orders, following which there was an order for service leading to the interested party filing a replying affidavit sworn on **14.12.2011**.

14. On **27.3.2012** the applicant sought to amend the petition and the orders were granted on **8.10.2012** to file the amended petition within 14 days.

15. Directions were given on **21.6.2017** by consent in which written submissions were to be filed within 30 days and parties to appear on **16.8.2017** to fix a judgment date.

16. On **21.2.2018** by the consent on directions made on **27.6.2017** was again adopted and extended by parties, its effective date became **21.2.2018**, with a rider that should there be default the petition shall stand dismissed for want of prosecution.

17. The parties were directed to appear on 26.4.2018 before the deputy registrar to ascertain compliance. Counsel for the petitioner was present while Mr. Kimaita appeared for the interested party and the deputy registrar confirmed non-compliance. The matter was next in court on **29.8.2018** in which the applicant never appeared and a judgment was read dismissing the suit for want of prosecution.

### Legal framework

18. The legal framework for dismissal of suit for want of prosecution is found in Order 17 Rule 4 of the Civil Procedure Rules which provides the court may dismiss the suit for non-compliance with any direction given under the order.

19. The guiding test to be applied was set out in the case of *Ivita vs Kyumbu (1984) KLR 441* as follows:-

*“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay?”*

20. The court therefore exercised that power judiciously and as can be glanced from the court file, the parties consented to that eventuality beforehand and had enough notice for the consequences should they fail to adhere to the set and agreed upon directions and timelines.

21. Now this court is being urged to set aside that order and judgment. The application appears to be brought under **Order xvi rule 5(9) of the Civil Procedure Rules**.

22. That notwithstanding the court will proceed to consider the application on merits and do substantive justice to the parties.

23. **Order 45 of the Civil Procedure Rules** is the section in point for review and setting aside. It gives this court discretionary powers to allow review on three scenarios.. An applicant may bring an application for review upon discovery of new and important matters; where there is a mistake or error on the face of the record or for other sufficient reason. The application herein appears to be hinged on the last ground that there existed sufficient reason or cause to warrant the court not to order dismissal for want of prosecution.

24. Sufficient reasons have been held by the Court of Appeal in *Pancreas T. Swai vs Kenya Breweries Ltd (2014) eKLR* as follows:

*“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act and that the other ground set out the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous”.*

25. The applicant herein blames his then lawyers for misleading him and not taking remedial actions to comply with court orders and directions.

26. The applicant has not disclosed why he did not file an amendment as ordered by the court. He has not told this court what steps he took to ensure his then lawyers complied with the directives given. He has not told the court when he came to know of the dismissal and what actions, if any he took to ensure remedial steps were taken.

27. The applicant took two years to come to this court since the petition was dismissed for non-prosecution. It is either he was not following

up with his lawyers, or he altogether had lost interest in pursuit of his legal rights. Even if it were to be said that his lawyers, as they were, then let him down, the applicant shares that blame and cannot escape it under the circumstances of delay of over two years to come to apply for review, which is by far inordinate and he has offered no explanation for that delay. Courts are slow to visit mistakes of counsel on innocent parties as held in ***Belinda Murai & another vs Amos Wainaina (1978) LLR 2782.***

28. The interested party submits he will be prejudiced in getting a fair trial if the matter is reinstated. It is trite law a party alleging prejudice must prove it as held in ***Ivita vs Kyumbu (supra)***. In the replying affidavit the respondent does not say he has moved into the subject property since the order of dismissal and has made or that he has been issued with a title deed. On the other hand the prejudice to be suffered by the applicant is apparent should be locked out of having his matters heard on merits.

29. In the instant case and this being a land matter this court would be inclined to give the applicant a benefit of doubt, for it to give substantive justice to the parties as per **Article 159 3(d) of the Constitution**. I allow the application with costs to the interested party.

30. The applicant shall prosecute his petition within six months from the date hereon, otherwise it shall stand after six months.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13<sup>TH</sup> DAY OF OCTOBER, 2021 IN PRESENCE OF:**

**GIKUNDA ANAMPIU FOR INTERESTED PARTY**

**AKETCH FOR EXPARTE APPLICANT**

**KIETY FOR 1ST – 3RD RESPONDENTS**

**COURT CLERK: KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**