



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC CASE NO. 96 OF 2021

{Formerly of Environment and Land Court at Kisii Case No. 360 of 2014}

ALEX ATEYA NYAANGA (Suing as the administrator of the estate of the late

NYAANGA NYAKERIGA – deceased).....PLAINTIFF/APPLICANT

- VERSUS -

COUNTY GOVERNMENT OF NYAMIRA.....1ST DEFENDANT/RESPONDENT

JEFF CONTRACTORS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff filed this suit on 24/09/2014 praying for an order of permanent injunction restraining the Defendant from trespassing into or being or remaining in possession of, using or in any manner from interfering with the Plaintiff's land parcel No. **NORTH MUGIRANGO/BOISANGA/3769**. Before Defence was filed on 05/12/14 disputing all the facts in the Plaint, the Plaintiff filed an Application for a temporary injunction restraining the Defendant from trespassing into, damaging, using, occupying, disposing off or developing, entering without permission or in any way interfering with parcel No. **NORTH MUGIRANGO/BOISANGA/3769** until the hearing and determination of this suit. This was on 12/11/2014. The Application was opposed. The same was certified urgent on 13/11/14.

This Application was later dismissed with costs to the Defendant on 29/04/16. I have also noticed an Amended Plaint amended on 22/06/16 and filed in court on 23/06/16. What is not clear is whether leave was ever granted for the said amendments since the Defence had been filed more than 1 ½ years earlier. Thereafter an Application similar to the earlier one for injunction was filed by the Plaintiff on 23/06/16. The same was dated 22/06/16 and an order of maintenance of Status Quo was granted on 06/07/16. The same was opposed but before the same was determined the matter was referred to ADR on 13/07/17. Negotiations then ensued and there seems that not much came out of the negotiations and the same was fixed for pre-trial on 08/04/19 on which date parties were granted leave to amend their pleadings. An amended Plaint dated 24/04/19 was filed on 13/04/19 and nothing seemed to follow that. The matter stalled and the next thing that happened was the court issuing a NTSC to the parties under Order 17 Rule 2 (1) of the Civil Procedure Rules dated 14/12/20 and the same came up for hearing on 29/01/21 when no one appeared in court and the suit was dismissed for want of prosecution.

This chronology of events culminated in the filing of the Application dated 28/05/21 seeking an order for the Review and setting aside of the order of 29/01/21 that dismissed the suit for want of prosecution. In the said Application, the Plaintiff depones that neither he nor his Advocate was present in court when the matter was dismissed on 29/01/21 and that none of them had been notified that the court had issued the NTSC. He also says that the failure to fix a Hearing date ought to be blamed on the Covid-19 pandemic that made the offering of services at the Registry minimal and that normalcy only returned towards the end of the year 2020. In a manner that seems to contradict the above, the Plaintiff/Applicant seems to be blaming his Advocate's mistakes on him. This is an admission that there was a mistake but the same is not attributable to him but to his Advocate. I wish he went ahead to disclose the mistake since the court cannot pardon what it has no idea of.

On his part, Mr. Daniel Orege, the Plaintiff's Advocate depones that he was never served with the NTSC before the suit was dismissed for want of prosecution on 29/01/21 and goes ahead to explain why he never fixed the matter for hearing blaming the whole episode on Covid-19, to wit, that between March 2020 and August 2020 the installation of E-filing System by the Judiciary contributed to the delay in perusal of court files at the registry due to court closures and that there were periodic system failures in the E-filing System. Mr. Orege also depones that there was communication breakdown between his client and his office, since unknown to the Mr. Orege, his client had already retired from the Kenya Defence Forces where he worked at Gilgil and his phone was out of service. Mr. Orege further joins his client by asking the court not to punish his sin of failure to take a date for this case on his client.

This is another confession of a sin whose particulars are again not disclosed. Both the Plaintiff and his Advocate are in the confession box asking for forgiveness for an undisclosed sin and pardon but without saying what sin they committed.

Order 17 Rule 2 provides that: -

- 1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
- 2. f cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
- 3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
- 4. The court may dismiss the suit for non-compliance with any direction given under this Order.**
- 5. A suit stands dismissed after two years where no step has been undertaken.**
- 6. A party may apply to court after dismissal of a suit under this Order**

The Plaintiff has mainly pleaded his failure to fix a hearing date for this suit on Covid-19 pandemic. But the last time the matter came to court prior to the order of dismissal was on 29/05/2019 being before the first case of Covid-19 death was reported in Kenya on 12/03/20 or thereabout. This was close to 1 year of no action by the Plaintiff. The Plaintiff should therefore not give too much credit to the dreaded pandemic.

This prayer made by Plaintiff seeks court's discretion which is an equitable remedy. Unfortunately, the Plaintiff does not want to do equity. He has not disclosed that he is guilty of indolence but stands knocking at the confession window pleading for pardon in a general manner. The court wonders how long it would have taken the Plaintiff to fix a hearing date for this case were it not for the Notice to Show Cause. However, this court's hands are not tied. It has a wide discretion to pardon a remorseful Applicant and/or his Advocate who never received a copy of the N.T.S. C. But the plea of the non-communication between client and counsel being blamed on a phone that was out of service is not acceptable and in any case cannot be true since as soon as the suit was dismissed for want of prosecution, communication between the two was restored. I will therefore exercise my discretion, reinstate the suit and further order that the same be fixed for hearing within the next 30 days' failure to which these orders will lapse.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 10TH DAY OF NOVEMBER, 2021

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Plaintiff/Applicant: N/A

Defendants/Respondents: Mr. Nyagarama for 1st Defendant

N/A for the 2nd Defendant