



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC PETITION NO. 21 OF 2017**

**JEREMIAH LASITI KOIKASH.....PETITIONER**

*(suing as the next friend of Sironka Kotikash)*

**-VERSUS-**

**PARKURITO KUYO & 5 OTHERS.....RESPONDENTS**

**RULING**

By a Notice of Motion dated 27<sup>th</sup> September, 2019 sought for orders to review and set aside the order dismissing the petitioners petition dated 5<sup>th</sup> November, 2013 for want of prosecution. The Application was based on the grounds that the Petitioner's advocate was not served with the hearing notice by either the Deputy Registrar of the court or the 1<sup>st</sup> Respondent. When the petition was fixed for hearing in the absence of both the petitioner and his advocate and further that the petition involves right to a piece of land in which the 1<sup>st</sup> Respondent had attempted to take possession of and evict the petitioner and that this has a merited case.

The application was further supported by the affidavit of the petitioner in which he averred that on 14/8/19 he received information to the effect that the 1<sup>st</sup> Respondent had a copy of a court order dismissing the petition for want of prosecution and when his advocate perused the court record he found that indeed it was true that the petition was dismissed.

It is the petitioner's contention that both him and his advocate were not served with the hearing notice of the petition when the same was fixed for hearing on 26/3/19.

The Application was opposed by the 1<sup>st</sup> Respondent who averred that the said application should not be entertained as the same is defective and is time barred. The respondent further states that the affidavit is not signed by the petitioners. He further contends that the petitioner lacks the capacity to bring the petition as a next friend given the signed friend is alive.

The respondent further contends that the court has a duty not to entertain waste of its time as the failure to serve the hearing notice was not the duty of the 1<sup>st</sup> Respondent but that of the petitioner himself to pursue his case.

Even though parties were directed to file their submissions it seems none of them have done so even though the petitioner had expressed his desire to do so. I must point out that it is the petitioner who is seeking for the order dismissing his petition and once again he is indolent and fails to file and serve his submissions as directed by the court. This being a court of equity a party must come before it with clean hands.

I have considered the application before me and I will determine the same despite the petitioner's failure to file his submissions.

It is the petitioner's contention that his petition was dismissed because when the petition was fixed for hearing both him and his advocate were absent from court and they were not served with a hearing notice. Their absence from court on the day when the petition was fixed for hearing is not explained. From the record it is clear that the 1<sup>st</sup> Respondent has been acting in person, has been attending court dutifully and complied with all directions given by the court to the contrary of the conduct of both the petitioner and his advocate again as shown in the record.

The petitioners are seeking the court's discretion in setting aside the orders of dismissal which is based on lack of service. I will have noted from the record that there was no service effected on them on the date of the hearing and since it is touching on the basis of the right to a fair hearing, I will exercise my discretion and allow the application and I thus set aside the order dismissing the petition dated 5<sup>th</sup> November, 2013. However, I will direct that my orders herein are conditional to the petitioner paying kshs. 15,000/- as costs to the 1<sup>st</sup> Respondent and to have this petition which was filed in court in 2013 be heard within the next 60 days.

Orders accordingly.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **25<sup>th</sup>** day of **February, 2020**

**Mohammed Kullow**

**Judge**

**25/2/2020**

In the presence of: -

CA:Chuma/Kimiriny

Mr Kilele for the petitioner/applicant

1<sup>st</sup> Respondent acting in person-present

**Mohammed Kullow**

**Judge**

**25/2/2020**