



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 219 of 2007**

**N THE MATTER OF THE ESTATE OF KOMBO NDUTO MULAA (DECEASED)**

**BETWEEN**

**NZISA KOMBO NDUTO**

**MATATA KOMBO.....PETITIONERS**

**VERSUS**

**MUKONYO KYOVE NDUTO**

**MONICA WANZA MBEVO NDOLO**

**ALIAS MONICA MUTUKU.....OBJECTORS/ APPLICANTS**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> June, 2019, the Objectors/Applicants herein seek an order that this court be pleased to review and/or set aside the orders issued on the 28<sup>th</sup> day of June, 2017 marking this Cause as closed and/or dismissed for want of prosecution and that the Cause be reopened and be reinstated.
2. According to the applicants, this Cause is related to Makueni ELC No. 122 of 2017 in which the subject matter in dispute is the same being Makueni/Kyaluma/3. It was deposed that the last time the matter was in court was on 30<sup>th</sup> June, 2014 when Jaden, J ordered that the issue of customary trust in the said suit be disposed of first which matter was determined on 3<sup>rd</sup> May, 2019 in which judgement the court stated that case no. 219 of 2017 had been determined.
3. It was deposed that on 7<sup>th</sup> May, the applicants made an effort to peruse the court file in respect of this matter in order to ascertain the position but were informed that the same had been dismissed on 28<sup>th</sup> June, 2017 for want of prosecution. They however lamented that they were not notified of the intention to dismiss the Cause and that the Notice to Show Cause was only served on the Administrator's firm of advocates. They therefore deposed that the failure on their part to appear before the court on that day was not intentional and that had they been notified they would have attended.
4. The applicants explained that the reason why they have not prosecuted the matter is due to the fact that the outcome of this matter depended on the outcome of Makueni ELC Case No. 122 of 2017 in which the judgement was delivered on 3<sup>rd</sup> May, 2019 against which the applicants have lodged an appeal.
5. The applicants averred that they are ready and willing to proceed with the mater since one the Objectors, **Wanza Ndolo**, a daughter in law to the deceased is on the verge of being evicted from the suit land and since the Cause relates to the administration of the deceased's estate, the objectors will be greatly affected if the matter is not reopened. It was their case that this application was made without unreasonable delay after discovery of the dismissal hence it is in the interest of justice that the same be allowed.
6. In reply to the application, the Petitioners/ Respondents through an affidavit sworn by their advocate set out the history of the dispute and stated that by a judgement delivered on 3<sup>rd</sup> May, 2019 the applicants' originating summons being Makueni ELC 360 of 2011 was dismissed with the court holding that there was no proof of customary trust over the subject land parcel
7. According to the Respondents, had the applicants succeeded in the said Originating Summons, they would have come to proceed with

their application for revocation of grant herein based on customary trust. However, since the said case was dismissed, there is nothing to be heard in this suit and it will merely be an academic exercise to do so.

8. According to the Respondents, the notice dated 4<sup>th</sup> April, 2017 was properly served on all the parties hence it is dishonest on the part of the applicants to allege that they were never served.

#### **Determination**

9. I have considered the application, the affidavits in support thereof and in opposition thereto.

10. The decision whether or not to reinstate a cause is no doubt an exercise of judicial discretion and like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

11. In this case the record is clear that this Cause was dismissed on 28<sup>th</sup> June, 2017 by **Chepkwony, J.** The notice listing the matter for dismissal is dated 4<sup>th</sup> April, 2017 and it was addressed to Sila & Co. Advocates, who are the advocates on record for the Respondents herein. There is no indication that the Applicants were served yet what was pending was the Objectors/Applicants' application. The Applicants' case is that their matter was terminated without them being afforded an opportunity of being heard. The general position regarding the right to afford one who stands to be adversely affected by an order an opportunity of being heard was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

**“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...”**

12. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... *A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio.*”** [Emphasis mine].

13. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

**“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”**

14. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

**“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”**

15. However, in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

**“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”**

16. In this case, I have perused the Court file and I have not been able to find any notice to the Applicants or their Counsel intimating that the matter would be dismissed. In the premises the mere fact that the applicants' originating summons had been dismissed did not relieve the Court of the obligation to notify the Applicants/Objectors of the court's intention to terminate the proceedings. In any case the dismissal of the originating summons was not the ground upon which the said proceedings were terminated.

17. In the premises, I find merit in the instant application, set aside the order dismissing the Cause and reinstate the same to hearing. There will be no order as to costs since the dismissal was at the instance of the court.

18. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 9<sup>th</sup> day of October, 2019.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Musyimi for Sila for the Petitioner**

**Mr Kansime Gideon for Muendo for the Objector**

**CA Geoffrey**