



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 7 OF 2010

IN THE MATTER OF ARTICLES 22 (1) & (4), 23 (1) & (3)

AND ARTICLE 40 OF THE CONSTITUTION OF KENYA

BETWEEN

SILAS KINYUA M'MWETI.....PETITIONER

VERSUS

THE LAND ADJUDICATION AND SETTLEMENT OFFICER

IGEMBE DISTRICT.....1ST RESPONDENT

THE DIRECTOR LAND

ADJUDICATION AND SETTLEMENT.....2ND RESPONDENT

THE DEMARCATION OFFICER

AKIRANG'ONDU 'A' ADJUDICATION SECITON.....3RD RESPONDENT

AND

CONSOLATA KABUTIA M'IMWETI.....1ST INTERESTED PARTY

M'MUNJURI THIRAGNE.....2ND INTERESTED PARTY

SILAS MURIUKI KARITHO.....3RD INTERESTED PARTY

THIAURI M'MUKARIA.....4TH INTERESTED PARTY

GEOFFREY MIRITI M'ITHANGATHA.....5TH INTERESTED PARTY

JULIUS 'M'IMPUI M'IMWETI.....6TH INTERESTED PARTY

SILAS MUROUKI M'IMAINGI.....7TH INTERESTED PARTY

HENRY KIBAARA M'IMWETI.....8TH INTERESTED PARTY

DIOCESE OF MERU TRUSTEES

REGISTERED (Thro' Father BENARD MUTHOMI.....9TH INTERESTED PARTY

JOSEPH MUTUMA M'IMWETI.....10TH INTERESTED PARTY

IRUKI M'KAIRIAMA.....11TH INTERESTED PARTY

GEOFFREY MANYORE KOOME.....12TH INTERESTED PARTY

MBAABU M'MWERERIA.....13TH INTERESTED PARTY

MITHIKA MWENDA.....14TH INTERESTED PARTY

KIAMBA MUTUMA.....15TH INTERESTED PARTY

STEPHEN UNGU.....16TH INTERESTED PARTY

KINYUA KARIITHO.....17TH INTERESTED PARTY

TIMOTHY MPEKETHU.....18TH INTERESTED PARTY

JOYCE KANANU PAUL.....19TH INTERESTED PARTY

STANLEY NCURE.....20TH INTERESTED PARTY

RULING

1. Vide the application filed on 19.11.2019, the petitioner/applicant is seeking for the reinstatement of this suit which was dismissed on 7.11.2019 for non-attendance. It is contended that the failure to attend court by the advocate for the petitioner was neither done intentionally nor contumeliously. The counsel for the petitioner was sick.

2. The interested parties have opposed the application through the replying affidavit of the 8th interested party filed in court on 3.2.2020. They contend that the advocate for the petitioner is not properly on record, that the petitioner has conducted this matter in a casual manner and that the matter has been in court a period of over 10 years.

3. It was argued for the interested parties that the counsel for petitioner has been economical with the truth as he says he was hospitalized but he doesn't appear to have communicated this issue to his client (petitioner). The interested parties therefore aver that there are no sufficient grounds to warrant the reinstatement of the suit and the application ought to be dismissed.

4. In the case of **Mwangi S. Kaimenyi vs Attorney General (2014) eKLR** – Gikonyo J. restated the legal considerations on matters reinstatement of suit as follows;

“1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties”.

5. I have keenly considered the circumstances of this case. The matter is quite old having been filed in year 2010. However the hearing finally took off on 9.10.2018. Thereafter, the counsel for petitioner just left without any application to cease acting. The firm of Mutembei & Co. took over the matter with Mr. Mutembei promising to regularize the issue of representation.

6. The records indicate that on the date matter was dismissed, petitioner was actually present in court and he was given sometime by the court to look for his advocate but he was not successful prompting the court to dismiss the matter at 10.50 am on that day of 7.11.2019. I would not term the petitioner as an indolent litigant.

7. In the case of **Martha Wangari Karua vs IEBC Nyeri civil appeal no. 1 of 2017**, the Court of Appeal held that:

“The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without hearing, however weak his or her case may be”.

8. In the present case, I am inclined to find that the petitioner had at least made an effort to be in court on the date of hearing.

9. Turning to the issue of the advocate for the petitioner, no explanation has been advanced as to why the advocate did not communicate his predicament to his client as well as the advocate on the opposite side. Nevertheless, I have no reasons to doubt that Mr. Mutembei was sick. In the case of **Lucy Bosire vs Kehancha Div Land Dispute Tribunal & 2 others (2013) eKLR** the court held that:

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on merits”.

10. On the issue of appointment of petitioner’s advocate, I note that the transition from the previous advocate Uungu & Co to the new advocate was rather unconventional and informal. Mr. Mutembei simply said he was taking over the case. The notice of appointment though dated 18.11.2019, was not filed until 3.2.2020. Article 159 (2) (d) implores this court to administer justice without undue regard to procedural technicalities. Noting that Mr. Mutembei was in court on 1.10.2019, and that he fell sick thereafter, I will consider that the error for not filing the notice of appointment in time was not intentional.

11. In conclusion, I allow the application dated 18.11.2019 on the following terms:

- 1) The suit is reinstated but petitioners will not be granted any adjournment once the matter is set down for hearing.
- 2) Petitioner is to meet costs of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE