

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 15 OF 2018

FRANCIS MUTUNGA.....APPLICANT

VERSUS

KITHUKU MUTYAMUA.....RESPONDENT

RULING

1. In the Notice of Motion dated 15th March, 2018, the Applicant is seeking for the following orders:

a) That the Honourable Court be pleased to set aside the orders made on 22nd July, 2014

b) That the costs of the Application be in the cause.

2. The Application is supported by the Affidavit of the Applicant who has deponed that this Appeal was dismissed by the court on 22nd January, 2018 for want of prosecution; that he only learnt about the dismissal of the suit after the Respondent was registered as the owner of the suit property and was in the process of selling it and that he did not receive a notice of the dismissal of the suit.

3. According to the Applicant, the dispute is yet to be resolved because the Respondent duped him and got registered as the owner of the land; that he is in possession of the land and that it is only fair that the suit be reinstated.

4. In reply, the Respondent deponed that this matter was concluded by the Judgment of the Minister in Appeal Number 242 of 2004 where he was awarded the suit land; that the Applicant has not shown any reason for the grant of the orders sought and that the Application should be dismissed.

5. In the Supplementary Affidavit, the Applicant deponed that the Respondent has not annexed the Judgment that concluded the dispute; that the Respondent is not disputing that the Appeal was dismissed and that the Application should be allowed.

6. The Applicant's advocate submitted that the Appeal should be reinstated; that the Appellant was never served with a Notice to dismiss the Appeal; that the Respondent has not denied the fact that both parties were never served with the notice of dismissal and that the law requires that before a suit is dismissed, the parties should be duly notified.

7. The Applicant filed the current Appeal vide a Memorandum of Appeal dated 6th December, 2006 on the same date. In the Memorandum of Appeal, the Applicant averred that the Minister erred in fact and in law in disregarding the objections raised by the Committee; that the Minister erred in fact and in law in finding that parcel of land known as Kithimani/1916 (*the suit property*) should be registered in the Respondent's name and that the Appeal against the decision of the Minister in Land Appeal Case No. 242 of 2004 should be allowed.

8. Since the Appeal was filed in the year 2006, the Appellant never filed a Record of Appeal. The record shows that the Appellant and the Respondent were served by the court the Notice to show cause why the suit should not be dismissed dated 11th June, 2013. The Applicant has not denied that the postal address indicated in the Notice, that is "P.O Box 333 Matuu", belongs to him.

9. Considering that the Applicant's counsel only came on record in this matter on 15th March, 2018, and the Applicant having not denied that the postal address indicated in the Notice to show cause why the suit should not be dismissed for want of prosecution is his, it is my finding that the Applicant was indeed served with the said Notice by the court.

10. In any event, the Applicant has not given any explanation why he has never filed the Record of Appeal since he filed the Memorandum of Appeal in the year 2006. Indeed, by the time the Appeal was dismissed in the year 2014, a period of more than eight (8) years had lapsed. In the absence of an explanation of why no Record of Appeal was ever filed after the filing of the Memorandum of Appeal, I find the Application to be unmeritorious.

11. For those reasons, I dismiss the Application dated 15th March, 2018 but with no order as to costs. For avoidance of doubt, the Appeal stands dismissed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE