



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 174 OF 2015

YUSUF ATHMAN HASSAN.....1ST PETITIONER

ATHUMANI KASSIM MWAWASI.....2ND PETITIONER

(Suing as beneficiaries Administrators of the

Estate of Athuman Hassan Mwaliphunzo

alias Athumani Gunia (Deceased))

AND

DISTRICT LAND REGISTRAR, KWALE.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

AND

IDDI A.M GANGUMA & 6 OTHERS.....INTERESTED PARTIES

RULING

(Application to reinstate a suit that was dismissed for non-attendance of the petitioners and their counsel; affidavit sworn by counsel stating that the petitioners were present in court and that she was unwell thus could not attend court; that affidavit being false because the petitioners were never present in court; court not keen to exercise its discretion to the petitioners given the false deposition; counsel having shredded her own credibility in the false deposition; in any event, petitioners not demonstrating any interest in the suit; suit had earlier been dismissed for want of prosecution; affidavit to reinstate suit sworn by counsel; all other affidavits save for those for the pleadings being sworn by counsel; given those circumstances respondents having a point in questioning whether petitioners are actually interested in the matter; application dismissed; suit remains dismissed for non-attendance)

1. The application before me is that dated 25 October 2019 filed by the petitioners. The application seeks orders to have the petitioners' suit, which was dismissed on 14 October 2019 for non-attendance, reinstated and the suit to be set down for hearing. The application is opposed.

2. By way of background, the petitioners commenced this suit through a constitutional petition which was filed on 29 July 2015 through the law firm of M/s Apollo Muinde & Ngonze Advocates. The petitioners, suing on behalf of the estate of Athumani Hassan Mwaliphunzo alias Athuman Gunia (deceased) claimed that the land parcel Kwale/Galu Kinondo/378, was originally allotted to the deceased in the year 1974. They claimed to have been in peaceful occupation of the suit land until the year 2014 when some persons attempted to lay claim on the land. They allege to have discovered that the 1st interested party had got title to the same land in the year 2012 and subdivided the land into 27 plots owned by the 2nd to 7th interested parties who had been issued with fresh titles with new parcel numbers. They claimed that this infringed on their constitutional right to property. In the suit, they sought orders for the surrender of the subdivided titles and consolidation into one title in their names.

3. The 3rd interested party filed a replying affidavit. He explained that the suit land was indeed in the name of Athumani Hassan Mwalugudzo until 23 January 1992 when the property was transferred to Diani Farm Limited. He deposed that on 12 December 2001, Diani Farm Limited donated a Power of Attorney to the 1st interested party. On 24 September 2002, the property was transferred to Galu Kinondo Limited after purchase. He averred that he purchased the property from Galu Kinondo Limited on 5 March 2012. The property was then transferred to him and he subdivided the land into 27 plots. He annexed to his affidavit the Green Card showing all the transactions that he

mentioned. He pleaded limitation of time and contended that if the applicants have any claim, then it is against Diani Farm Limited.

4. On 28 February 2018, the petitioners changed counsel to the law firm of M/s Mwangata Korir & Company Advocates.

5. There was an application for security for costs filed by the 3rd respondent and ruling on it was delivered on 30 April 2019 in the presence of Mr. Ondabu for the 3rd respondent and Mr. Nguyo for the 1st respondent. There was no appearance on the part of M/s Mwangata Korir & Company Advocates for the petitioners despite being duly notified of the ruling date. On the same date, the court gave the hearing date of 14 October 2019 for the hearing of the main suit, with directions that counsel for the 3rd respondent, do serve the other parties with a hearing notice.

6. The matter came before me on 14 October 2019 for hearing. There was no appearance on the part of M/s Mwangata Korir & Company Advocates for the petitioners and the petitioners were absent. Those present were Mr. Makuto for the 1st respondent, Ms. Gerald for the 2nd interested party, and Mr. Ondabu for the 3rd interested party. Mr. Ondabu did state that he had served a hearing notice and had filed an affidavit of service. He prayed for the suit to be dismissed and I duly obliged. I did observe that service had been effected upon counsel for the petitioners on 30 April 2019, close to 6 months before the hearing date, and no reason had been given for their absence. I proceeded to dismiss the suit for non-attendance and failure to prosecute, with costs to the 1st respondent and the 2nd and 3rd interested parties.

7. It is then that this application was filed. The supporting affidavit is sworn by Mary Mwangata, who is counsel representing the petitioners. She has deposed that she had diarised the case and had informed her clients to attend. However, on the morning of the hearing date, she suddenly got ill and rushed to seek medical attention. She has deposed that she informed her clerk to attend court and have someone hold her brief, but she did not make it in time as the matter had already been called out. She has deposed that the court dismissed the suit notwithstanding the fact that the petitioners were present in court.

8. The 3rd interested party filed a replying affidavit to the application. He deposed that the petitioners have never been interested in prosecuting their petition since it was filed and have never fixed it for hearing. He has referred me to the affidavits filed in support of, or in opposing, applications filed, including his application for security for costs, and pointed out that none were ever sworn by the petitioners. He has further pointed out that the petitioners were not present in court when their suit was dismissed. He has averred that even Ms. Mwangata herself has never attended court. He has deposed that his client ought not to be held at ransom forever. A supplementary affidavit was filed by Ms. Mwangata. There is not much which is new in that affidavit.

9. I invited counsel to file written submissions and I have taken note of the submissions of Ms. Sidinyu, who appeared holding brief for Ms. Mwangata for the applicants, and those of Mr. Ondabu for the 2nd and 3rd respondents. In her submissions, Ms. Sidinyu inter alia submitted that there was good reason for absence of counsel, and that mistakes of counsel ought not to be visited upon a client. Mr. Ondabu on his part reiterated that the petitioners have never shown any interest in the matter since filing it.

10. I have considered the matter. The suit was properly dismissed for non-attendance since the petitioners and their counsel were absent. In as much as counsel for the petitioners has deposed under oath that the petitioners were present in court, the fact of the matter is that the petitioners were absent. The record indeed reflects that position. It is sad that counsel would depose to a falsehood within the same application that seeks the discretion of the court. This court does not entertain persons lying under oath in order to gain an advantage, and by that alone, I have every entitlement to dismiss this application for it is not one filed with clean hands. I must admonish counsel for swearing a falsehood under oath and that falsehood makes me doubt every other deposition that counsel has made in her affidavit including the claim that she was sick. If she could lie under oath that the petitioners were present, how am I to believe that she was sick? Honesty is a virtue that we must uphold at all times, and that applies even more to counsel when they address the court. I am afraid that counsel has completely shattered her credibility and I do not believe anything in her affidavit. In fact flowing from the foregoing, counsel will personally shoulder the costs of this application.

11. Apart from the above, I must take seriously the question marks raised by Mr. Ondabu for the 2nd and 3rd respondents, on the whereabouts of the petitioners, and whether they are really interested in this suit. I have no record of them ever having appeared in court. In fact, this matter had been listed on 1 March 2018, for Notice to Show Cause why it should not be dismissed for want of prosecution. No affidavit was ever filed by the petitioners to show cause, but nevertheless, the court in its own discretion, allowed the case to remain, based on submissions of counsel from the bar.

12. I note that the petitioners, as pointed out by Mr. Ondabu, apart from the original affidavit, which they used to file suit, and the affidavit in support of the amended petition, have never sworn any affidavit, whether to oppose an application by the respondents/interested parties, or to support any of their applications. In response to the 3rd interested party's application for security for costs, the response was filed by the petitioners' advocate. The affidavits sworn in respect of this application have also been filed by the advocate. The petitioners have not featured anywhere since filing this petition. It is apparent to me that the petitioners have no interest in this suit. In fact I am starting to doubt whether the petitioners exist at all. It is strange to find persons filing suit and never featuring anywhere in it.

13. Having the foregoing in mind, I do not think that this is the sort of application where I should exercise my discretion in favour of the petitioners. I am not swayed to reinstate this suit and it remains dismissed with costs to the 1st respondent, and the 2nd and 3rd interested parties.

14. As I earlier mentioned, the costs of this application will be personally shouldered by counsel who swore the affidavits herein. I have already given my reasons why costs will be shouldered by counsel.

15. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.