



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 81 OF 2001**

JOSHUA SILU MUKUSYA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

ESTHER ITHAU.....2<sup>ND</sup> PLAINTIFF/APPLICANT

MARY NDUNGA.....3<sup>RD</sup> PLAINTIFF/APPLICANT

**VERSUS**

TITUS TALI KIOKO.....1<sup>ST</sup> DEFENDANT/RESPONDENT

PHILIP MASILA MUIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT

WILSON MAUNDA NDETO

*(Being sued on behalf of the Management Committee for*

KATANGA PRIMARY SCHOOL).....3<sup>RD</sup> DEFENDANT/RESPONDENT

BENSON KIMUNDIU MUIA.....4<sup>TH</sup> DEFENDANT/RESPONDENT

KIKOMO MWALILI.....5<sup>TH</sup> DEFENDANT/RESPONDENT

MASAKU COUNTY COUNCIL.....6<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. In the Notice of Motion dated 9<sup>th</sup> November, 2019, the Plaintiffs/Applicants have prayed for the following orders:

***a) That this Honourable Court be pleased to grant an order of reinstatement of this suit after it was dismissed on 23<sup>rd</sup> May, 2017 for want of prosecution.***

***b) That the costs be provided for.***

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Plaintiff who has deponed that she is the Coordinator of Utooni Development Project with the requisite authority to swear the Affidavit; that the Plaintiffs have been prosecuting the suit diligently over the years and that although this suit was dismissed by the court on 23<sup>rd</sup> May, 2017, the Plaintiffs only came to learn about the said dismissal on 24<sup>th</sup> January, 2019 when the matter was listed for hearing.

3. According to the Plaintiffs, they were in court on 15<sup>th</sup> May, 2017 when the matter came up for dismissal; that the matter was then listed for pre-trial on 15<sup>th</sup> June, 2017; that it is puzzling how the matter came up for dismissal on 23<sup>rd</sup> May, 2017 despite having a mention date of 15<sup>th</sup> June, 2017 and that the Plaintiffs have always been desirous of prosecuting the suit.

4. In response, the 4<sup>th</sup> Defendant/Respondent deponed that the suit was properly and lawfully dismissed by this court on 23<sup>rd</sup> May, 2017 for want of prosecution; that having dismissed the suit under the provisions of Order 17 Rule 2 of the Civil Procedure Rules, this court is *functus*

*officio* and that the Plaintiffs lost interest in prosecuting the suit in the year 2012 which prompted the Defendants to file an Application dated 25<sup>th</sup> August, 2016 for the dismissal of the suit for want of prosecution.

5. According to the Defendants, reinstating the suit will be prejudicial to them because they have been in the corridors of justice for 19 years; that the Plaintiffs are guilty of indolence and that the Application should be dismissed with costs.

6. The Plaintiffs' advocate submitted that from the provisions of Order 17 of the Civil Procedure Rules, a suit can only be dismissed when parties are not desirous to prosecute their matter; that it is apparent that this matter had been listed for dismissal on 15<sup>th</sup> May, 2017 where both parties attended court and the suit was given a mention date for 15<sup>th</sup> June, 2017 and that it is therefore quite puzzling that the suit was dismissed when there was a mention date in place.

7. Counsel submitted that although this suit has stayed in court for a while, the said delay was not occasioned by the unwillingness of the Applicants herein in prosecuting the suit; that the delay has been contributed by the normal vagaries that litigants experience in litigation and that the suit should be reinstated and determined on its merit.

8. The Plaintiffs' counsel submitted that the Applicants should not be prejudiced due to any inadvertence occasioned by their advocates on record; that it is in the interest of justice that the orders issued on 23<sup>rd</sup> May, 2017 be set aside and that there are serious weighty issues which ought to be ventilated having regard to the merits of each parties' case. Counsel relied on numerous authorities which I have considered.

9. The Defendants' advocate submitted that the delay in prosecuting this suit is inordinate and inexcusable; that the suit herein was properly and lawfully dismissed by this Honourable Court on 23<sup>rd</sup> May, 2017 for want of prosecution in accordance with Order 17 Rule 2 of the Civil Procedure Rules upon notice by the Judiciary; that the said Order neither provides for setting aside of the orders issued pursuant thereto nor does an Appeal lie therefrom as of right under the Civil Procedure Rules and that this court is *functus officio*.

10. Counsel submitted that the Applicants lost interest in prosecuting this matter since the year 2012 and that the Respondents stand to suffer prejudice in having to defend a suit dismissed for want of prosecution all over again. Counsel relied on numerous authorities which I have considered.

11. This suit was commenced by the Plaintiffs by way of an Originating Summons in the year 2001. From the typed proceedings, it would appear that the matter was partly heard by Nambuye J., (*as she was then*), in the years 2003.

12. The record shows that the Defendants herein filed an Application dated 25<sup>th</sup> August, 2016 for the dismissal of the suit for want of prosecution. When the Application came up for hearing on 20<sup>th</sup> March, 2017, the court fixed the Application for hearing on 15<sup>th</sup> May, 2017.

13. On 15<sup>th</sup> May, 2017, the record shows that the Defendants withdrew the Application dated 25<sup>th</sup> August, 2016 and agreed to have the matter listed for the hearing of the main suit. The court acceded to the request of the parties and fixed the matter for pre-trial directions before the Deputy Registrar on 15<sup>th</sup> June, 2017.

14. The matter was mentioned before the Deputy Registrar on 15<sup>th</sup> June, 2017; 5<sup>th</sup> September, 2017 and 8<sup>th</sup> November, 2017. The matter then came up for hearing on 2<sup>nd</sup> May, 2018 when the Plaintiffs' advocates applied for an adjournment, which Application was allowed by the court.

15. When the matter came up for hearing on 25<sup>th</sup> July, 2018, the Plaintiffs' advocate requested for another adjournment which the court granted him. The matter was fixed for hearing on 13<sup>th</sup> November, 2018 on which day the Plaintiffs' advocate informed the court that the Plaintiffs will not be adducing further evidence.

16. When the matter came up for Defence hearing on 24<sup>th</sup> January, 2019, the advocates informed the court that the matter had been dismissed by the court on its own motion on 23<sup>rd</sup> May, 2017 for want of prosecution.

17. I have perused the Notice to show cause why the suit should not be dismissed that was issued by the court dated 27<sup>th</sup> April, 2017. The said notice shows that the matter was to be heard on 25<sup>th</sup> May, 2017. The Notice does not have the address of the Plaintiffs' advocates.

18. Indeed, when the Notice to show cause why the suit should not be dismissed for want of prosecution came up for hearing on 23<sup>rd</sup> May, 2017, neither the Plaintiffs' nor the Defendants' advocates were in court. The court proceeded to dismiss the suit for want of prosecution.

19. It is obvious from the record that by the time the matter was dismissed by the court on its own motion on 23<sup>rd</sup> May, 2017, the matter was active in court. Indeed, from 20<sup>th</sup> March, 2017 when the Defendants withdrew their Application, the matter had been set down on numerous occasions for mention and hearing. By the time the matter was dismissed for want of prosecution on 23<sup>rd</sup> May, 2017, it had been fixed for pre-trial directions on 15<sup>th</sup> June, 2017.

20. It is therefore obvious that the court inadvertently dismissed the suit for want of prosecution when the matter was active, and had a mention date. In fact, considering that the Plaintiffs' and the Defendants' advocates continued appearing in court even after the said dismissal, it follows that there were not aware of the Notice to show cause why the suit should not be dismissed that had been issued by the court earlier on.

21. A party seeking to have the suit reinstated must demonstrate good faith and bring the Application for reinstatement without unreasonable

delay. In *Simion Waiti Kimani & Three others vs. Equity Building Society (2010) eKLR Koome J. (as she was then)* held as follows:

*“The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay ...”*

22. In the case of *Mwangi S. Kimenyi vs. Attorney General & Another (2014) eKLR, Gikonyo J.*, stated that:

*“But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable.”*

23. Although the Defendants’ advocate submitted that this court is *functus officio*, and that under the provisions of Order 17 of the Civil Procedure Rules, this court cannot set aside an order of dismissal of the court, Section 3A of the Civil Procedure Act mandates this court has to make any order in the interest of justice. Indeed, this court has the jurisdiction to set aside its own orders, on sufficient grounds.

24. Considering that this matter was dismissed by the court on its own motion for want of prosecution before hearing the Plaintiffs, and in view of the fact that the suit was dismissed for want of prosecution when in actual sense the matter was active and had a mention date, the order of this court dismissing the suit should be set aside.

25. For those reasons, the Plaintiffs’ Application dated 9<sup>th</sup> September, 2019 is allowed as follows:

- a) The order of this court dated 23<sup>rd</sup> May, 2017 is hereby set aside and the suit is reinstated for hearing on merit.***
- b) The suit to be set down for hearing within ninety (90) days of the date of this Ruling.***
- c) Each party to bear his/her own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**O.A. ANGOTE**

**JUDGE**