



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 103 OF 2015

NYAKINYUA MUGUMO TREE CO. LTD.....PLAINTIFF

VERSUS

JOSEPH MWANGI GICHUHI & 6 OTHERS.....DEFENDANTS

RULING

1. The Notice of Motion dated **25th August , 2020** seeks the following orders:

(1) ...spent

(2) That this Honourable Court be pleased to grant leave to the firm of MS KARANIGREY AND COMPANY ADVOCATES to come on Record on behalf of the applicants/plaintiff in place of the firm of MS CHEPKWONY AND COMPANY ADVOCATES.

(3) That this honourable court be pleased to stay the intended sale by way of a Public Auction of the suit land LR NO. 1803 Registered in the plaintiff's name.

(4) That this honourable court be pleased to set aside, review and/or vary the order made on 6th September 2016 which summarily dismissed the plaintiff's suit for non-attendance.

(5) That this honourable court be pleased to reinstate and set down the Plaintiff/ Applicant's suit to be heard and determined on merit res justice.

(6) That costs of this application be provided for.

2. The applicant has brought the application under **Article 159(2) (d) of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 10 Rule 11, Order 51 and Rule 1 of the Civil Procedure Rules.**

3. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant's chairlady. In brief the grounds are that the applicant instructed the firm of Chepkwony & Co. Advocates to file the instant suit; that the said firm filed the suit and the defence filed their defences; that the suit was then set down for hearing on **6/9/2016**; that when the matter came up for hearing the same was dismissed for non-attendance; that the omission on the part of the applicant was inadvertent and consists of a technicality; that the applicant has a good claim which deserves to be determined on merit; that execution of the order as to costs by way of selling the applicant's land shall infringe on its constitutional right to a fair hearing; that the applicant urgently requires an order of this court staying the intended sale forthwith; that the applicants have fallen out with their advocate who is on record and as such they need to engage another one to pursue the matter; that the applicants have all through time been kept in darkness as to the status of their case by the advocate on record hence the delay in taking the appropriate steps; that the suit land consisting of **2050** acres is now home to over **4000** people and any disposition thereof shall render a large population destitute; that the rules of natural justice demands that each party to a dispute must be accorded a chance and equal opportunity to present its case.

4. The sworn affidavit of **Mary Wangari Githu** the applicant's chairlady is on the record, having been filed on **27/8/2020** which reiterates the contents of the grounds upon which the application is based.

5. On the other hand, the **1st to 4th** respondents have opposed the application through a replying affidavit filed on the **11/9/2020** sworn by their advocate on record. Mr. Samba, counsel for the defendants averred that the application before court is *mala fides* and an abuse of the court process. He contended that the application had been filed to circumvent execution proceedings and urged the court not to be used to

stop compliance of its orders when there was no any form of appeal or other challenge pending. In essence, counsel stated that the order for dismissal was not *ex parte* as the plaintiff was fully represented by one Ms. Arunga, Advocate who was holding brief for one Mr. Chepkwony Advocate. He contended that the plaintiffs have all through been aware of the dismissal order but sought to file several applications challenging the taxation but which applications have all been dismissed with costs and the taxation order upheld. Counsel maintained that the said prayer has been overtaken by events since the land has been surveyed by officers from the Ministry of Lands, Survey Department and an area list generated which is on record and therefore there will be nothing to go to trial.

6. The application was canvassed by way of written submissions. The applicant filed its submissions on **9/9/2020** while the respondents filed theirs on **14/9/2020**.

DETERMINATION

7. After considering the application, the response and the submissions of the parties herein, I am of the view that the main issue for determination is whether the order for dismissal of the plaintiff's suit ought to be set aside and the suit reinstated for hearing.

8. In **Mwangi S. Kimenyi V Attorney General & Kenya Institute for Public Policy and Research 2014 eKLR** where in citing the case of **Utalii Transport Co & 3 Others V NIC Bank & Another (2014)eKLR** the court laid down the following principles in setting aside of an order for dismissal of a suit :

- a. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;**
- b. Whether the delay is inordinate contumelious and therefore inexcusable;**
- c. Whether the delay is an abuse of the process of the court;**
- d. Whether the delay gives rise to substantial risk to affair trial or causes serious prejudice to the defendant;**
- e. What prejudice will the dismissal occasion to the plaintiff;**
- f. Even if there has been delay what does the interest of justice dictate: lenient exercise of discretion by the court.**

9. To begin with, I observe that a party must take steps to prosecute his case expeditiously. I note that the suit was dismissed when it came up for hearing for the first time when counsel for the plaintiff did not attend court but had one Ms. Arunga Advocate holding his brief.

10. Dismissal of a case without hearing it on the merits is a draconian act which drives the plaintiff from the judgment seat. It is a matter of the court's discretion which should be exercised judiciously. However, I find it to be very disturbing that the plaintiff took no action of filing an application for reinstatement for all those years. Looking at the plaintiff's conduct in totality and applying the above principles I find that the explanation given for the delay in filing the said application is not reasonable.

11. The upshot of all the above is that I find that there has been inordinate delay by the plaintiff in filing the instant application and I therefore dismiss it with costs to the 1st - 4th respondents.

Dated, signed and delivered at Kitale via electronic mail on this 15th day of October, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.