



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 65 OF 2019

IN THE MATTER: OF AN APPLICATION FOR AN ORDER OF CERTIOTARI

IN THE MATTER: OF PROCEEDINGS AND AWARD IN LAND DISPUTE'S TRIBUNAL MUTOMO SUB-DISTRICT AND AN ORDER OF THE SENIOR PRINCIPAL MAGISTRATE KITUI IN LAND CASE NUMBER 49 AND 2003

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN, LAND DISPUTES TRIBUNAL,

MUTOMO SUB-DISTRICT.....RESPONDENT

AND

MUTUA KAVUNDUU.....INTERESTED PARTY

TITUS KITILI KINYUMU.....EX PARTE APPLICANT

RULING

1. The ex-parte Applicant approached this court by way of a Notice of Motion dated 5th August, 2019 seeking for the following orders:
 - a. Spent
 - b. That the order of the court given on 4th June, 2018 be reviewed and set aside.
 - c. That the ex-parte Applicant's Notice of Motion dated 3rd November, 2004 be reinstated for hearing and determination on merit.
 - d. That such other just orders be made.
 - e. That costs of this Application be costs in the cause.
2. The Application is premised on the grounds set out on the face of the Notice of Motion and the Affidavit of the ex parte Applicant who deponed that after his Notice of Motion dated 3rd November, 2004 was filed, he fixed it for hearing for 6th April, 2005 when the matter was adjourned and stood over generally.
3. The Applicant deponed that he fixed the matter again for hearing on the 29th March, 2006 when the hearing commenced and that a further hearing was fixed for 7th June, 2006. According to the Applicant, on 29th March, 2006, the Notice of Motion was further adjourned for hearing to 26th September, 2006 and that the Interested Party was granted leave to file and serve his Replying Affidavit within fourteen (14) days.
4. It was deponed by the Applicant that on 26th September, 2006, the hearing was stood over generally as the Interested Party's advocate who had come on record and filed a Replying Affidavit applied to be supplied with the copies of the proceedings and that he then fixed the matter

for mention on 30th October, 2007 whereupon the court fixed it for further mention on 11th December, 2007.

5. It was averred that the Court was not sitting on 11th December, 2007; that the Notice of Motion was fixed for mention on 10th April, 2008 on which date the court was not sitting and that no date was given by the registry because the court diary for the year 2008 was full.

6. The Applicant deponed that on 11th September, 2013, the hearing could not proceed because of the issue of the jurisdiction of the High Court in dealing with the Environment and Land matters; that later on, the court file could not be traced and that he made twelve (12) attempts to have a date given for the hearing of the Notice of Motion without any success.

7. According to the Applicant, the court file was eventually traced on 29th July, 2019; that he was given a copy of the Court order dated 4th June, 2018 dismissing the Notice of Motion for want of prosecution and that his advocate never received any notice to show cause why the suit should not be dismissed for want of prosecution. According to the Applicant, the notice issued by the Court dated 4th May, 2018 was not received in his advocate's office.

8. In response, the Interested Party deponed that the Applicant and all the parties to the suit were served with a notice to show cause why the suit should not be dismissed for want of prosecution on 4th June, 2018; that by the time the notice was issued by the court, the Motion had taken close to fourteen (14) years unprosecuted and that no credible cause has been shown for the delay which was clearly inordinate.

9. The Application was canvassed vide written submissions. The Applicant's counsel submitted that as gleaned from the Applicant's Supporting Affidavit, it is clear that the Applicant has always been keen to have the matter finalized, and that any form of delay was not as a result of his fault.

10. Counsel submitted that the Interested Party's Replying Affidavit sworn on 24th September, 2019, did not dispute the facts contained in the Applicant's Application regarding the efforts the Applicant made towards fixing the matter for hearing.

11. Learned counsel submitted that the reason the Applicant did not attend court on 4th June, 2018 was because the court's Notice to show cause was not served on him; that there is no evidence of service of the Notice to show cause and that the Applicant will suffer damage, irreparable loss, and prejudice unless the Application herein is allowed.

12. This suit was dismissed by the court on 4th June, 2018 under Order 17 Rule 2 of the Civil Procedure Rules for want of prosecution. Order 17 Rule 2 (1) of the Civil Procedure Rules provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

13. The record shows that on 14th October, 2004, the Applicant was granted leave to apply for Judicial Review by way of an order of certiorari, and challenge the proceedings and Awards of the Mutomo Land Dispute Tribunal in Land Case numbers 49 and 50 of 2003. After the said leave was granted, the Applicant filed the substantive Motion on 3rd November, 2004.

14. The record shows that before the matter was dismissed by the court on 4th June, 2018, the Applicant's counsel had been last in the court registry to fix the matter for hearing on 29th January, 2014. It will appear that despite being in the registry on that day, the Applicant's advocate/clerk did not fix the matter for hearing.

15. According to the Applicant's counsel, the issue of the jurisdiction of the High Court in hearing environment and land matters contributed to the delay in fixing the matter for hearing from the year 2013 and that thereafter, the file could not be traced until 29th July, 2019.

16. The Applicant has annexed on his Affidavit several letters that he authored inviting the Respondent's and the Interested Party's advocates to fix the matter for hearing. The said letters, which were all received by the Respondent's and the Interested Party's advocates and the court registry are dated 7th January, 2014; 8th September, 2014; 26th September, 2014; 22nd January, 2015; 20th February, 2015; 25th March, 2015; 20th April, 2015; 2nd February, 2017; 29th March, 2017 and 27th March, 2018.

17. The many attempts that the Applicant's advocate made to have the matter fixed for hearing as shown in the letters I have cited above confirms the Applicant's assertion that indeed the file could not be traced between the year 2014 until the year 2018 when the matter came up for dismissal.

18. Indeed, considering the efforts that the Applicant's advocate made to have the matter fixed for hearing, he would have attended court on the day the matter came up for dismissal of the suit had he been served with the Notice to show cause why the suit should not be dismissed for want of prosecution.

19. Considering that there is no evidence to show that the Applicant's counsel was served with the Notice to show cause why the suit should not be dismissed for want of prosecution, and in view of the many attempts the Applicant's counsel made to fix the matter for hearing, it is my finding that the suit should not have been dismissed in the first place. The delay in prosecuting the matter was not of the Applicant's making, but the court registry.

20. For those reasons, I allow the Applicant's Application dated 5th August, 2019 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE