



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1 OF 2010**

PETER MWAI KAGAGI.....1<sup>ST</sup> PLAINTIFF/APPLICANT

EUNICE WANJIRU MWAI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

=VERSUS=

DAVID KUNGU NG'ANG'A.....1<sup>ST</sup> DEFENDANT/RESPONDENT

ANDREW KYENGO.....2<sup>ND</sup> DEFENDANT/RESPONDENT

MESHACK MBUKA.....3<sup>RD</sup> DEFENDANT/RESPONDENT

BENARD MAINA.....4<sup>TH</sup> DEFENDANT/RESPONDENT

ARTHUR MWAURA MBURU.....5<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. This is the Notice of Motion dated 2<sup>nd</sup> July 2015 brought under Order 12 Rule 7, Order 51, Rule 1 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya).

2. It seeks orders:-

*(1) That this Honourable Court be pleased to set aside the dismissal orders granted on 28<sup>th</sup> May 2015.*

*(2) That this Honourable Court be pleased to reinstate the matter for hearing.*

*(3) That costs of this application be in the cause.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 17.

4. The application is supported by the affidavit of Peter Mwai Kagagi, the plaintiffs/applicants herein sworn on the 2<sup>nd</sup> July 2015.

5. The application is opposed. There is a replying affidavit sworn by Arthur Mwaura Mburu, the 5<sup>th</sup> defendant/respondent on the 5<sup>th</sup> May 2016.

6. On the 25<sup>th</sup> January 2016, the court directed that the Notice of Motion be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that sometimes in the year 2011, the court file could not be traced and the plaintiffs/applicants through their former advocates sought to reconstruct the same. That there after the advocate never updated them on the progress. The 1<sup>st</sup> plaintiff learnt of the dismissal but the advocate could not trace the court in time, as the list did not indicate the court which was handling the matter. They were not served with a dismissal notice under Order 17 Rule 2 of the Civil Procedure Rules.

8. The dispute herein involves ownership of land which ought to be determined in a full hearing. The plaintiffs ought to be given a chance to

prosecute their case. The defendants/respondents are not likely to suffer any prejudice if this suit is reinstated. They have put forward the cases of: **Associated Warehouse co. Ltd & Others vs Trust Bank Ltd HCCC No. 1266 of 1999 (unreported); Ibrahim Athman Siad vs Ibrahim Abdille Abdullah & Another [2014] eKLR; Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR.** They pray that the application be allowed.

9. It is the 5<sup>th</sup> defendant's/respondent's submissions that order 17 rule 2 (1) of the Civil Procedure Rules does not require service of notice. The court may give notice of dismissal through its official website or through the cause list. The plaintiffs have failed to prosecute this suit to its conclusion. He has put forward the case of **Utalii Transport Limited & 3 Others vs NIC Bank & Another [2014] eKLR.**

10. Prior to dismissal the plaintiffs had not taken any meaningful steps to have the matter heard. The application is an afterthought. The delay is inexcusable. He prays that the application be dismissed with costs.

11. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit sworn by the 5<sup>th</sup> defendant/respondent, the written submissions of counsel and the authorities cited.

The issue for determination is whether this application is merited.

12. I have gone through the court file. It is not in doubt that the file was reconstructed on 20<sup>th</sup> November 2012. It appears nothing was done until it was fixed for dismissal on 28<sup>th</sup> May 2015. The explanation given by the 1<sup>st</sup> plaintiff/applicant is that his advocates previously on record M/S Macharia, Nderitu & Co. Advocates never informed him of the progress. It was only after his son saw the notice of dismissal in the website that he instructed the firm of Ndung'u Karanja Advocates to take over the conduct of the matter. On the date of dismissal the said firm sent Miss Macheni who could not tell which court was handling the matter.

13. I have perused the attached list. The heading is "**Dismissals for 28<sup>th</sup> May 2015**". It is true that it does not state which court was doing the dismissals. For this reason it can be said that Miss Macheni got to the said court late after the matter had been dismissed. It appears to me that the plaintiffs acted upon being informed of the notice of dismissal. I find that this application has been brought without undue delay.

14. I agree with the counsel for the 5<sup>th</sup> defendant/respondent that order 17 rule 2 of the Civil Procedure Rules does not require the court to serve the plaintiff. All the court has to do is to give notice. The cause list was on the website.

15. I have taken into consideration the circumstances prevailing in this case. I find that the plaintiffs/applicants have given a reasonable explanation for the delay in prosecuting this case.

16. In the case of **Mwangi S. Kaimenyi vs Attorney General & Another [2014] eKLR** Justice F. Gikonyo held:-

*"In assessing the prejudice caused to the defendant by the delay, the court should also assess the likely prejudice the dismissal of the suit will occasion upon the plaintiff.....The prejudice to the plaintiff will be ascertained by looking at a number of varying factors which, among the major ones are: the nature of the case e.g public litigation, representative suit etc, importance of the claim or subject matter legal capacity of the parties, right of the parties in the suit and so on....."*

I am guided by the above authority in finding that no prejudice will be occasioned to the defendants if this suit is reinstated.

17. In conclusion I find merit in this application and grant the orders sought namely:-

*(a) That the orders of 28<sup>th</sup> May 2015 dismissing this suit are hereby set aside.*

*(b) That the suit herein is reinstated.*

*(c) The plaintiffs/applicants set down the suit for hearing within ninety (90) days from the date hereof in default the suit shall stand dismissed.*

*(d) That the cost of this application be borne by the plaintiffs/applicants.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 3<sup>RD</sup> day of APRIL 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant