



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 114 OF 2011 (O.S)

PHILIP MAINGI MUSYIMI.....1ST PLAINTIFF
FRANCIS K. MAINGI.....2ND PLAINTIFF
BENSON K. MAINGI.....3RD PLAINTIFF
MUSYIMI MAINGI.....4TH PLAINTIFF
DOMINIC K. MAINGI.....5TH PLAINTIFF
MUTHEMBYA MAINGI.....6TH PLAINTIFF
KAVINDYO MAINGI.....7TH PLAINTIFF
NYELE MAINGI.....8TH PLAINTIFF

VERSUS

AMOS NDUNDA NZUA &

ALICE MUMBUA NDUNDA

(personal representatives of the Estate of

MICHAEL MUTUA).....DEFENDANTS

RULING

1. In the Notice of Motion dated 20th May, 2018, the Plaintiffs are seeking to set aside the orders of this court issued on 19th February, 2018 dismissing the suit for want of prosecution. In a nutshell, the Plaintiffs are seeking to reinstate the suit.
2. The Application is premised on the grounds that the suit never took off because between the year 2013-2015, there was no Environment and Land Court Judge in Machakos; that the advocate who was previously handling the matter moved from the firm of Oundu & Associate Advocates and that Mr. Oundu advocate stopped practicing due to poor health.
3. According to the Plaintiffs, no notice of dismissal was ever served on them and that their advocate only learnt that the matter was dismissed when they sought to fix the same for pre-trial. It is the Plaintiffs' case that they continue to occupy the parcel of land in question and are desirous of pursuing their claim.
4. The current advocate for the Plaintiffs deponed that she acted for the Plaintiffs while working for the firm of Oundu & Associates advocates from the year 2008 to 2012; that she left the said firm and joined the firm of Mogeni & Co. Advocates; that after she left the firm of Oundu & Associates Advocate, the matter was never fixed for hearing and that Oundu Advocate stopped practicing due to poor health.
5. The Plaintiffs' advocate deponed that the mistakes of counsel should not be visited on the litigants and that it is in the best interest of justice that the orders of 19th February, 2018 should be set aside and the suit to be heard on merit.
6. In response, the 2nd Defendant deponed that the Plaintiffs have not put forward any plausible reason why there was delay in prosecuting

the suit; that the Plaintiffs have been indolent and only moved the court upon dismissal of the suit and that in any event, the suit has abated upon the demise of the 1st Defendant.

7. The Plaintiffs' advocate submitted that the reason why the matter was not fixed for hearing between the year 2013-2015 was because there was no Environment and Land Court Judge in Machakos; that the Plaintiffs have never received notices for the dismissal of the suit and that the Plaintiffs will be gravely prejudiced if this matter is dismissed.

8. The Plaintiffs' counsel further submitted that the advocate who was handling the matter, Oundu advocate, stopped practicing due to poor health; that the subject matter involves land and that the circumstances of the case are for the court to exercise leniency and give the Plaintiffs an opportunity to prosecute their claim.

9. The Plaintiffs' counsel finally submitted that the Defendants will not be prejudiced in any way if the suit is reinstated; that the mistake of counsel should not be visited on the Plaintiffs and that the Application for reinstatement of the suit should be allowed.

10. The Defendants' advocate submitted that since directions were given by the court on 24th February, 2012, the Plaintiffs never fixed the matter for hearing; that the Plaintiffs have never had an interest to prosecute the suit and that this court should safeguard its integrity and disallow the Plaintiffs' Application.

11. This suit was commenced by way of an Originating Summons dated 18th April, 2011. On 6th July, 2012 Makhandia J. (*as he was then*) gave directions on how the Originating Summons will be prosecuted. Since then, the matter was never fixed for mention or hearing. Indeed, when the Plaintiffs' then advocates, Oundu & Associates, were summoned by the court to appear and show cause why the suit should not be dismissed for want of prosecution, they never appeared.

12. The Plaintiffs' advocates having failed to appear in court on 19th February, 2018, the court dismissed the suit pursuant to the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules.

13. Although the Plaintiffs' current advocate has argued that the matter was never prosecuted because there was no judge between the years 2013-2015, she has not explained why the matter was never fixed for hearing between 2015-2018.

14. The Plaintiffs' counsel has also submitted that the Plaintiffs' then advocate, Mr. Oundu, was taken ill and stopped practicing. However, the said Mr. Oundu has not sworn any Affidavit to confirm that indeed he stopped practicing as an advocate after being taken ill. Considering that it was the firm of Oundu & Associate advocates which was on record for the Plaintiffs until 20th May, 2018, it is an advocate in that firm who was better placed to explain why the matter was never fixed for hearing between 2012-2018.

15. On the issue of the mistake of counsel not being visited on a litigant, it has been held by this court and the Court of Appeal that it was not only the duty of an advocate, but also a litigant, to make a follow-up on a matter that is filed in court by his advocate, and have the same prosecuted expeditiously. Having not made inquiries on the status of their case between the year 2012-2018, the Plaintiffs, just like their advocate, both the Plaintiffs and their advocate were indolent. They cannot now seek to have the court exercise its discretion in their favour.

16. For those reasons, I find that the Plaintiffs or their current advocate have not given any plausible explanation why this suit should be reinstated. The Application dated 20th May, 2018 is therefore dismissed with no order as to costs. For avoidance of doubt, the suit stands dismissed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE