



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**CIVIL SUIT NO. 122 OF 2010**

**MOSES KITHINJI MUGAMBI.....PLAINTIFF**

**-V-**

**JOSEPHINE NDUMBA RIIRIA.....1<sup>ST</sup> DEFENDANT**

**PATRICK MWENDA.....2<sup>ND</sup> DEFENDANT**

**LINUS MUTWIRI.....3<sup>RD</sup> DEFENDANT**

**LAND DISPUTES TRIBUNAL MERU CENTRAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 21<sup>st</sup> May 2018 and brought pursuant to Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law in which the plaintiff seeks reinstatement of the instant suit for hearing and determination .

2. The gist of the application is that the case was dismissed for want of prosecution on the court's own motion under *the justice @ last* initiative on 8<sup>th</sup> July 2015 and that the plaintiff who was then acting in person was not notified of the date nor was he aware that the matter had been dismissed. He has now appointed an advocate to act for him who wishes to fast track the matter to have it concluded expeditiously.

3. The application was opposed via a replying affidavit filed in court by the 1<sup>st</sup> defendant herein who deposed inter alia that the suit was lawfully and properly dismissed for want of prosecution and it would be a great injustice to have the matter reinstated because there was no valid grounds raised. Further, it is contended that many years passed without prosecution of the case necessitating the dismissal and again more years have passed since the dismissal of the case, and even the 4<sup>th</sup> defendant is now defunct.

4. It was submitted for the plaintiff that the main issue was non service of the hearing date of 8<sup>th</sup> July 2015 upon the plaintiff. Applicant urged the court to consider the principles set out in the case of *Mwangi S Kimenyi v Attorney General & Another [2014] eKLR* and proceed to exercise discretion in favour of the plaintiff and reinstate the suit for hearing on merits.

5. For the respondent, it was submitted that this suit was filed in 2010 and the plaintiff had never taken any action until 8<sup>th</sup> July 2015, when the same was dismissed. Even after dismissal, the plaintiff never bothered to fix the matter for hearing despite service.

6. I have carefully considered this application and the rival submissions by the parties. The application is brought under **Order 12 Rule 7** which orders are granted at the discretion of the court. However, the said discretion must be exercised judiciously. The plaintiff in the instant case contended that the reason why the suit was dismissed was due to non service of the hearing date of 8<sup>th</sup> July 2015. A careful perusal of the record herein however shows that a notice to show cause under order 17 Rule 2 of the Civil Procedure Act was sent to the plaintiff through the address that he provided for in the plaint. The plaintiff is not contending that he had since changed his address.

7. Even if it was to be accepted that the plaintiff was not served, the relevant rule of procedure does not state that a litigant must be served. **Order 17 rule 2 of the Civil Procedure rules** provides that;

**“In any suit in which no application or step has been taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed....”**

8. In H.C.C.C NO.720 OF 2009, NBI Commercial and Admiralty Division, the court had this to say on matters Notice to Show Cause;

**“I should think the question whether notice for dismissal of this suit was given under Order 17 rule 2 of the Civil Procedure Rules (hereafter CPR) is a matter of preliminary significance. First, there is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally, Order 17 rule 2 of the CPR uses the word “give” and not “serve”. To give notice is not the same thing as to serve notice within the context of the civil procedure. The distinction between the two terms is important because both are legal as well as technical but bear different meanings and entail different mechanisms albeit, however, both are intended to bring the matter at hand to the notice or attention of the party to be affected by the proceeding. “Give” in the context of Order 17 rule 2 of the Civil Procedure Rules denotes “to impart or confer by a formal act” whereas “serve” in the legal sense denotes “to make legal delivery of the court process”- See Black’s Law Dictionary, Ninth Edition on this. My own view, therefore, is that a notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the Court when it is placed in the official website of the Judiciary or in the cause list”.**

9. This case was listed as number 13 in the cause list of 8.7.20115, which cause list the applicant has availed as annexure “MKM1”. It is also clear that on the date of dismissal, Josephine the 1<sup>st</sup> defendant was in court and she requested for the dismissal of the suit. This is an indication that parties had been duly notified.

10. What is evident is that this matter was filed in court on 6<sup>th</sup> October 2010, and the plaintiff never took even one single step to have the same prosecuted until the case was dismissed. The plaintiff is certainly an indolent litigant who went into deep slumber after he filed this case in October 2010. Even after the matter was dismissed on 8<sup>th</sup> July 2015, he didn’t wake up until three years later when he filed this application on 30.7.2018. The plaintiff has not offered any single explanation as to why he did not cause the instant suit to be listed for hearing for a period of 5 years when the matter was pending before court. This was far way beyond the one year period envisaged by Order 17 of the civil procedure rules.

11. It is a principle tenet of law that justice delayed is justice denied. One of the cardinal principles in our constitution is **“the expeditious delivery of justice” –see Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17<sup>th</sup> century maxim of **“Justice delayed is justice denied”**. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice. The applicant is the one who dragged the defendants into this litigation since 2010 and those defendants have a legitimate expectation to have a closure of the matter.

**12. In SAVINGS AND LOANS LIMITED -VS- SUSAN WANJIRU MURITU NAIROBI (MILIMANI) ..... HCCS NO. 397 OF 2002**  
**Kimaru, J** expressed himself as follows:-

**“It is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case”.**

13. I find that it would be a travesty of justice to exercise discretion in favour of a litigant who cannot give the slightest explanation as to why he filed suit but did nothing to have the same prosecuted for the next five years. I am aware that in the above case of **Savings and Loans Limited -Vs- Susan Wanjiru Muritu (Supra)**, the issue before court was in regard to mistakes of counsel. The principles enunciated in the above case are however in my opinion applicable in the cases where a litigant has been indolent and I fully associate myself with the sentiments expressed by the Learned Judge therein.

14. Taking into totality all the circumstances in this case, I find that the plaintiff has not demonstrated to the satisfaction of this court as to why this court’s discretion should be exercised in his favour. I find that the plaintiff’s application dated 21<sup>st</sup> May 2018 is unmerited and the same is accordingly dismissed in its entirety.

15. Since the plaintiff has lost in his bid to have the matter reinstated, each party to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17<sup>TH</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Karanja holding brief for Gikunda for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Miss Njenga holding brief for Mutuma for the applicant

Plaintiff

1<sup>st</sup> defendant

2<sup>nd</sup> defendant

**HON. LUCY. N. MBUGUA**

