



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 27 OF 2008

FRANCIS NGUNGI MUTULA.....1ST PLAINTIFF

BENJAMIN MUTUA MUINDI.....2ND PLAINTIFF

BENSON MUTISYA MWIVAH.....3RD PLAINTIFF

WETRESS MUTINDA KISYULA.....4TH PLAINTIFF

VERSUS

NASON NDETO MITAMBO.....1ST DEFENDANT

JOSEPH MWANGANGI KYULU.....2ND DEFENDANT

GRACE PIUS MITAMBO.....3RD DEFENDANT

BERNARD MUTUNGI MITAMBO.....4TH DEFENDANT

JAMES SIKUKU MITAMBO.....5TH DEFENDANT

MBUVA MUNGUTA.....6TH DEFENDANT

THE REGISTRAR OF TITLES (MACHAKOS LANDS REGISTRY).....7TH DEFENDANT

RULING

1. In the Notice of Motion dated 20th May, 2019, the Plaintiffs are seeking for the following orders:

a. That this Honourable Court be pleased to vacate and/or set aside the order made on the 23rd day of May, 2017 by which this suit was dismissed with costs for want of prosecution.

b. That this Honourable Court be pleased to reinstate this suit to be determined expeditiously on merit.

c. That the statutory period of 14 days stipulated for filing an Amended Plaintiff pursuant to leave granted on 24th June, 2013 be and is hereby extended by a period of fourteen (14) days.

d. That the costs of this Application be in the cause.

2. The Application is premised on the Affidavit of the 2nd Plaintiff who has deponed that the suit was filed on 27th July, 2007 with the 1st Plaintiff as the prime mover of the suit in his capacity as the senior patriarch of the extended family who was vested with ancestral interest in the suit properties.

3. According to the 2nd Plaintiff, upon obtaining leave to file the Amended Plaintiff on 4th February, 2015, the 1st Plaintiff fell ill, which infirmity was compounded by old age; that due to the said illness, communication between the 1st Plaintiff and his advocate was hampered and that in the intervening period, he learnt that the suit had been dismissed for want of prosecution.

4. The 2nd Plaintiff finally deponed that the Notice to Show Cause was neither served on the Plaintiffs nor their advocate on record and that the orders dismissing the suit for want of prosecution should be set aside.

5. The Defendants filed Grounds of Opposition in which they averred that there has been inordinate delay in both prosecuting the suit since 13th September, 2013 as well as filing the Amended Plaint; that the matter is *res judicata* pursuant to Uaani Civil Case No. 134 of 1973 and that even if the 1st Plaintiff was ill, any of the other Plaintiffs would have moved the court.

6. The Defendants finally averred that Dismissal Notices are always posted online many days before the dismissal day and that the Notice was duly served on the advocates.

7. The Notice to Show Cause why the suit should not be dismissed for want of prosecution under Order 17 Rule (2) of the Civil Procedure Rules dated 24th April, 2017 was addressed to the 1st Plaintiff and the Defendants' advocate.

8. The record shows that when the Notice to Show Cause came up for hearing on 25th May, 2017, neither the Plaintiffs nor the Defendants were in court. The court proceeded to dismiss the suit for want of prosecution on the said date.

9. Although the 2nd Plaintiff has stated that he never received the Notice to Show Cause, he has not denied that the postal address indicated on the face of the Notice to Show Cause, that is, P.O. Box 290 Kikima is his. Furthermore, the 2nd Plaintiff has not informed the court why him, together with the other Plaintiffs, did not fix the matter for hearing between 4th February, 2015 when the matter was last in court and 25th May, 2017 when the matter was dismissed for want of prosecution.

10. Considering that the 1st Plaintiff was granted leave to enjoin the other Plaintiffs on 4th February, 2015 and never took steps to amend his Plaint accordingly, and in the absence of an explanation why the matter was never fixed for mention or hearing between 4th February, 2015 and 23rd May, 2017 when the suit was dismissed for want of prosecution, I decline to exercise my discretion in favour of the Plaintiffs.

11. The Application dated 20th May, 2019 is dismissed with no order for costs. For avoidance of doubt, the suit stands dismissed as ordered by the court on 23rd May, 2017.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE