



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 33 OF 2017

(FORMERLY NAKURU 264 OF 2012)

JULIUS GATAMBIA.....1st PLAINTIFF

AMOS KAGUAI NJOROGE.....2nd PLAINTIFF

VERSUS

JAMES MACHARIA GICHURE.....1st DEFENDANT

CHEGE MUTUA.....2nd DEFENDANT

PETER KARIMI KAMAU

PETER KARIGI GITAU

STEPHEN KIBE MWAURA

PETER KIMANI WAMBUI

CHARLES MURUNGAMI WANGUNYU (Sued as Trustees of)

NEW BEGINNING WITH GOD SELF HELP GROUP.....3rd RESPONDENTS

RULING

1. Before me for determination is the Notice of Motion dated 8th August 2019 where the Applicant seeks for orders to set aside the orders of 15th July 2019 that dismissed the Applicant's suit pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules for want of prosecution.
2. Directions were issued to the effect that the said application be conversed through viva voice evidence where Counsel sought to rely on their respective sworn affidavits.
3. The Applicant Counsel's submission and while relying on their grounds as set out on the face of the application and on the affidavit of Julius Daudi sworn on 8th August 2019 and the annexure thereto was that their suit had been unjustly dismissed for non-compliance of Court orders of 4th March 2019 as well as for want of prosecution.
4. That the orders of 4th March 2019 had granted 1st Applicant leave to substitute the 1st Defendant which orders were not capable of being complied with as there had not been any application made to substitute the 1st Defendant.
5. That if the orders sought in their application dated the 8th August 2019 were not granted, the Applicants were likely to suffer great prejudice. That they had been attending Court on each occasion and had shown their will to pursue the matter. That if at all there had been a lapse in pursuing the matter, it would be on the part of the Counsel who had failed to attend Court and to inform them of the progress of the matter.

6. That the Applicants had incurred great expense in advertising the notice of institution of suit herein annexed as 'JDG 2' in their supporting affidavit. That they had also incurred expense in pursuing Succession Cause No. 5 of 2018 as per the annexure marked as 'JDG 5'.

7. That it was clear that the Applicants were willing to pursue the matter and the Defendants would not incur any irreparable loss that could not be compensated by way of damages. That the sins of Counsel should not be visited upon the Applicants. Counsel, sought that the Court allows their application as prayed.

8. The Application was opposed by the Respondents herein who submitted while relying on the Replying affidavit dated the 9th October 2019 and sworn by Chege Mutua the 2nd Defendant herein that Counsel for the Plaintiff/Applicant had not given sufficient reasons as to why they had not followed up with their case. That Counsel for the Defendant and his clients had been attending Court for a period of over nine months in the absence of Counsel for the Plaintiff. That although the Applicants' Counsel had indicated that they had requested another Counsel to hold their brief, were they interested in prosecuting their matter, they should have inquired from the Counsel whom they had sent to hold their brief, what had transpired in Court.

9. That Counsel for the Plaintiff had filed an application on 15th July 2019 under Certificate of Urgency when he knew that there had been a Notice to Show Cause coming up for hearing on that date. That had the said Notice to Show Cause not been served, the Plaintiffs' Counsel would not have thought of coming up with the said application which was merely an afterthought

10. In rejoinder Counsel for the Applicant/Plaintiff submitted that indeed it had not been in dispute that Counsel for Applicants had not been attending Court and neither was it controverted that the Plaintiffs had not been attending Court, however despite that, they were willing to pursue the matter and prayed that their application be allowed.

Determination.

11. I have considered the proceedings on the Court's record as well as the submission by both Counsel for and against the application to reinstate the suit for hearing and determination.

12. I note that indeed this is a matter that had been filed way back on the 16th June 2006 by way of Originating summons wherein the applicants herein sought orders that they had acquired defined portions to title No. Nyandarua/Kirima/713 and 714 respectively by adverse possession.

13. That after the matter had been filed, the file went missing wherein on the 14th July 2008 there were orders for a skeleton file be reconstituted. The same was done and the matter was active in Court for the year 2009 but did not proceed for hearing of the main suit upto the 11th February 2009 when it stalled, only to be revived on the 17th June 2010 where directions were taken and parties directed to agree on the issues before fixing the matter for hearing.

14. Parties went to sleep from the 7th June 2010 upto 2nd July 2012 when they had fixed the matter for hearing but on which day Counsel for the Plaintiff had informed the Court that he had not notified his client of the hearing date and despite protest by Counsel for the Defendant that it had taken 5 years to fix the matter for hearing, the Plaintiff had been granted an adjournment.

15. The Plaintiff had gone to sleep again for 5 years upto the 9th May 2017 when the matter was before this Court for mention, having been transferred from the Nakuru EIC. On this day, none of the parties were present.

16. On the 25th July 2017, the Court was moved vide the Plaintiff/Applicants' application dated 7th July 2017 which sought orders of inhibition to be placed on parcel of land known as LR Nyandarua/Kirima/713 and LR NO Nyandarua/Kirima 714 pending the hearing of the application.

17. The Court declined to issue the said orders but directed that service be effected upon the Defendant/Respondents for inter-parties hearing during the vacation. These orders were not complied with but the next time the matter was before Court, Counsel for the Plaintiff/Applicants informed the Court that the Application had been overtaken by events as the National Land Commission who had been investigating the same, had already placed a caution on the suit land. The Court then directed parties to comply with the provisions of Order 11 of the Civil Procedure Rules so that the matter could be set down for hearing.

18. The matter was then scheduled for mention to confirm compliance on the 18th January 2018, on which day Counsel for the Plaintiff had filed an application dated 15th December 2017 seeking to amend the Originating Summons to enjoin New Beginning with God Self Help as the 3rd Respondents.

19. The application was argued wherein vide a ruling delivered on the 30th July 2018, New Beginning with God Self Help Group was enjoined in the suit. The Plaintiff was then directed to serve the enjoined party with the pleadings and leave was granted that the enjoined party do file their response within 14 days upon service. The matter was then scheduled for mention on the 17th December 2018 to confirm compliance and to take further directions thereafter.

20. On the 9th August 2018 however, after the Plaintiff had amended their plaint enjoining the New Beginning with God Self Help Group to the suit, they had sought leave to serve the 3rd Defendant/Respondent with the proceedings on 30th July 2018 or in the alternative, to serve them by way of substituted service. The matter was then rescheduled for mention for the 20th February 2019.

21. Before the said date, the Plaintiff moved the Court vide an ex-parte application dated the 21st January 2019, to effect service of their amended Originating summons upon the 3rd Respondents herein through substituted service by way of advertisement in the daily newspapers. The application was allowed. The mention date remained as earlier scheduled.
22. Come the 20th February 2019, there was no appearance for the Defendant/Respondents, the Court was informed that service by advertisement had been effected, but the 3rd Defendant was yet to enter appearance. Counsel for the Plaintiff sought for another mention date since the time frame set to enter appearance was yet to lapse. The matter was fixed for mention on the 6th March 2019 on which day the Court had been informed that there had been no evidence of proof that the 3rd Defendant had indeed been served.
23. The matter was adjourned yet again, to the 4th April 2019, to enable the Plaintiff effect service and/or file a return of service. On the said day, there was neither appearance for the Plaintiff/Applicants nor the 3rd Defendant/Respondents. There was still no evidence that the Plaintiffs had effected service upon the 3rd Defendants. The matter was set to be mentioned on the 22nd May 2019.
24. On the 22nd May 2019, although both the Plaintiff/Applicants and the 2nd Respondent were present in court, there was no appearance for their Counsel. The matter was rescheduled for mention on the 17th June 2019 wherein although both Counsel for the Defendant/Respondents and the Plaintiff/ Applicants were present, yet there was no appearance for the Plaintiff/Applicants' Counsel. The Defendant/Respondents' Counsel then sought for Notice to show cause to issue to Counsel for Plaintiff who had not been attending Court. The Court obliged her and a Notice to show cause was issued to the Plaintiff/Applicant's Counsel to show cause why the matter should not be dismissed for failure to adhere by the Court's orders of 23rd January 2019. The mention date was slated for the 15th July 2019.
25. On the said day, the 15th July 2019, Counsel for the 2nd Defendant informed the Court that although the matter was coming up to Show Cause why the suit should not be dismissed, for not complying with the Court's order, the Plaintiff/Applicant had served them yet again with another application dated the 3rd July 2019 seeking to have the 1st Deceased/Respondent substituted with his legal representative one Mary Wanjiru Macharia. Counsel then went on to point out the various occasions that the Plaintiffs' Counsel had not appeared in court and the fact that he was also in blatant disregard to the Courts orders wherein she sought for the application to be dismissed and the Notice to Show Cause be allowed.
26. Counsel holding brief for the Plaintiff's Counsel submitted that the instructions she had was that the suit had abated following the death of the 1st Respondent wherein a citation had been made on the 24th May 2018 to the deceased's wife to accept the letters of administration intestate. That the citation had not been responded to and the letters of Administration had been petitioned for the purpose of defending the current suit. That on the 27th June 2019, Counsel for Plaintiff had filed an application to have the deceased substituted with Mary Wanjiru Macharia after learning that on 1st November 2013 letters of Administration had been issued for purpose of continuing with the defence of the then HCC No. 70/2003 which was a Nakuru matter transferred to Nyahururu under the current case number. That all along, Counsel had been sending somebody to hold his brief and his clients had been attending Court. Counsel prayed that the application dated 27th June 2019 be allowed as prayed to revive the suit against the 1st Defendant.
27. In rebuttal Counsel for the Defendant submitted that Counsel for the Plaintiffs Mr. Konosi Advocate did not attend Court and the present Counsel was misguided as the notice she spoke about had not been filed and therefore did not form part of the proceedings and should be expunged. That the matter was coming up for Notice to Show cause as to why service had not been effected upon the 3rd Defendant and not about substitution of the 1st Defendant.
28. That the Court had found that on several occasions this matter had come up for mention to confirm whether the Plaintiff had complied with the order to regularize his pleadings so that the matter could be set down for hearing. On the 23rd January 2019, the Court on an application by the Plaintiff to effect service upon the 3rd Defendant through substituted service had granted leave of 21 days. Subsequently the matter had been mentioned on 5 occasions thereafter to confirm whether these orders had been complied with by the Plaintiff to the effect that on the 17th June 2019, a notice to show cause had been issued upon the Plaintiff/Applicant to show cause why they had failed to adhere to the Court's orders to effect service and why this matter should not be dismissed for want of prosecution. The said notice to show cause had not been dispensed with but instead Counsel for the Plaintiff had sought to reinstate the 1st Defendant's suit which had abated upon his death, by substituting him with his legal representative, an application which was not before Court. That it was worth noting that on the 4th March 2019, there was no application made before Court to substitute the 1st Defendant and neither were there any orders issued to granting 15 days to effect the substitution as alleged in paragraph 6 of the Plaintiffs' grounds in support of their application dated the 8th August 2019. The Notice to show cause was not addressed and neither did Counsel for the Plaintiff appear in Court to address issues as directed by the Court.
29. The Court noted the Counsel's laxity on prosecuting the Plaintiff's case and found that they were not bent on having the matter set down for hearing. To this effect thereof, since the notice to show had not been dispensed with the Court proceeded to dismiss the matter pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rule which gave rise to the present application.

Determination.

30. From the Court record, it is clear that despite the matter having been filed in the year 2008, the record speaks for itself that the Applicants herein had not been keen to prosecute the same. This may be attributed to the lack of diligence by their Counsel, but it is nevertheless a mistake for which the Applicant should not be blamed. That the conduct of the Plaintiff in not prosecuting this suit is indolent and should not excite any lenient exercise of discretion by the Court.
31. The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself; it is well settled. In the case of **Utalii Transport Company Limited & 3 Others vs NIC Bank & Another [2014] eKLR** the Court held that,

When the Applicant states and correctly so, that:

'It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to Court. Then exhorts that over one year has lapsed without the Plaintiffs taking any step to progress their case and makes a strong conclusion that the Plaintiffs' inertia runs contra to the overriding objective of the Court stipulated in section 1A, 1B and 3A of the CPA. The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a Court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the Plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the Court. See the opinions of Danckwerts, LJ in NAGLE v FIELDEN [1966] 2 QBD 633 at p 648, and Lord Diplock in BIRKET v JAMES [1978] A.C. 297. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by Court in an application for dismissal of suit for want of prosecution. These principles are:

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;
- 3) Whether the delay is an abuse of the Court process;
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
- 5) What prejudice will the dismissal occasion to the Plaintiff"
- 6) Whether the Plaintiff has offered a reasonable explanation for the delay;
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court"

32. I have weighed all the above principles and considered the Plaintiffs' sentiments at paragraph 6 of their supporting Affidavit to their application that indeed the Notice of Service by substitution had been advertised in the Standard Newspaper of the 8th February 2019 wherein their Counsel had instructed another Counsel to hold his brief and file the affidavit of service alongside copies of the Notice, which was not done. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

33. The foregoing being my view of the matter, I will allow the application dated 8th August 2018 and set aside the dismissal order of 15th July 2019 with no costs. The suit shall and is hereby reinstated for hearing and determination on the merit but on the following terms failure to which the same shall be set down for hearing nonetheless.

34. That the 3rd Defendants shall file and serve their formal application to reinstate the 1st Defendant's suit, which had abated upon his death and substitute him with his legal representative, within 14 days. The matter shall not be mentioned to confirm compliance, instead, the Application shall be set down for hearing.

Dated and delivered at Nyahururu this 19th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE