



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 91 OF 2017

FORMERLY MERU ELC CASE NO. 13 OF 2005

M'NDUBI M'NDAKA..... PLAINTIFF

VERSUS

EUSTACE M'MIRITI.....DEFENDANT

RULING

A. This application is declared to have been brought to court under Order 12, Rule 7 of the Civil Procedure Rules. It seeks the following orders:

1. That this honourable court be pleased to set aside dismissal order dated 29.09.2017 and reinstate this suit for hearing.
2. That costs be provided for.

B. The application has the following grounds:

1. The plaintiff was in court on the material date but the matter was called when he was entering court and dismissed.
2. That the counsel for the plaintiff was on the way to Chuka for hearing but the matter was called before he reached.
3. That the defendant not his advocate were (sic) not in court and in fact never came to court on that material date.

C. The application is supported by the affidavit of M'Ndubi M'Ndaka, the plaintiff, sworn on the 2nd October, 2017. The affidavit states as follows:

“I, M'NDUBI M'NDAKA of Maara Location, Tharaka Nithi County do make oath and state as follows:

1. That I am the plaintiff herein hence competent to make this oath.
2. That I have filed this case against my brother claiming family land.
3. That this matter was previously Meru HCCC No. 13 of 2005 but was transferred to this court when E & L court judge was posted to Chuka Law Courts.

4. That this matter had come for hearing in Meru High Court many times but could not proceed as the defendant kept adjourning it.
5. That on the 29.9.2016 the defendant was condemned to pay Kshs.5,000/= to the plaintiff being costs of adjournment which the defendant has never paid to date.
6. That the case was fixed for hearing on the 11.7.2017 and the court on its own motion adjourned the same due to official engagements.
7. That the same was fixed on 25.09.2017 by consent.
8. That on the 25.09.2017, I came to court at 8.30am ready to proceed with my case.
9. That I entered the court room at around 8.40am and met the court had not started and went out and stood on the staircase together with my witnesses.
10. That I entered the court a few minutes after 9 and met that my matter was being put aside after having been called since it was the first in the cause list.
11. That I had called my advocate on record who confirmed to me that he was on the way coming to proceed.
12. That my advocate on record told me to inform the court that he was on the way to court and coming ready to proceed.
13. That I stayed in court and after the court was through, enquired and was informed that my case was dismissed.
14. That this is a very sensitive land dispute and hence I pray to be given a chance to be heard.
15. That the defendant was also not in court nor his advocate on record and in fact the defendant did not come to court at all.
16. That I called my advocate on record and informed him what happened and he informed me that he has gone back to Meru.
17. That I urge this court to set aside the dismissal order and grant me a chance to proceed with my case.
18. That what is stated herein is true to the best of my knowledge, information and belief.

Sworn by the said M'NDUBI M'NDAKA AT Meru this 2nd day of October, 2017

D. The application is also supported by the further supporting affidavit sworn by Mr. Ayup K. Anampiu, the plaintiff's advocate, sworn on 2nd October, 2017. The further affidavit states as follows:

“I AYUB K. ANAMPIU OF P. O. BOX 1633 MERU do make oath and state as follows:

1. That I am an advocate of the high court of Kenya in the conduct of this matter for the plaintiff herein.
2. That this matter was fixed for hearing on the 25.09.2017 by consent.
3. That on the said date, I started coming to Chuka by 8.20am
4. That my client called me and informed me that they were also proceeding to court.

5. That I informed the plaintiff that they should be in court in time so that if the court reaches the matter before I arrive, they should tell the court that I am on the way and ready to proceed and ask the court to place matter aside.
6. That on reaching Chogoria, my client called me and informed me that as he was entering the court the matter was being put aside after it had been called being the first one in the list.
7. That the plaintiff informed me that the matter had been dismissed.
8. That defendant nor his counsel was not in court also and my client informed me later that the defendant never attended that day at all.
9. That this matter had come for hearing in Meru several times and adjourned at the instance of the defendant and in fact had been condemned to pay costs on 29.9.2016 which he has never paid to date.
10. That I urge this court not to condemn the plaintiff unheard.
11. That what is stated here is true to the best of my knowledge, information and belief.

Sworn by the said **AYUB KABULI ANAMPIU AT MERU THIS 2ND DAY OF OCTOBER, 2017**

E. To put matters into proper perspective, I deem it necessary to reproduce as a whole my ruling dated 25th September, 2017 which dismissed this suit and spawned this application. The Ruling reads as follows:

RULING

1. This suit was filed on 7th February, 2005 about 12 years and 8 months ago. The record shows that the plaintiff appeared before the court one year and five months later on 18th July, 2006.
2. A perusal of the court file shows that what followed were adjournments galore. I note that I got seized of this matter on 5th December, 2012. On that day, the court was told that advocate Mwanzia, for the defendant, was not ready to have the case heard as he had rushed a sick relative to Nairobi. The parties were given time to comply with order 11 of the Civil Procedure Rules and to come back to court for directions on 29th January, 2013.
3. On 29th July, 2013, advocate Ogoti holding brief for advocate Anampiu for the plaintiff informed the court that the parties had complied with order 11, CPR. This position was countered by advocate Muthomi, holding brief for advocate Mwanzia. At their request the parties were granted 14 days to comply with order 11, CPR.
4. The matter was to be mentioned on 18th March, 2013. For whatever reason the mention for directions slated for 18th March, 2013 did not take place. By consent, the parties obtained a mention date from the registry. The matter was to be mentioned on 22nd July, 2013. Surprisingly, although the date had been obtained by consent of both parties, they both failed to come to court.
5. On 11th November, 2014, advocate Mwanzia, for the defendant, informed the court that the parties had only partially complied with Order 11, CPR. He asked the court to give the parties two weeks to fully comply with Order 11, CPR. Advocate Leekona holding brief for advocate Anampiu for the plaintiff supported this prayer. The prayer was granted. The parties were required to come back to court for directions on 27th November, 2014. On that day advocate Muthomi holding brief for advocate Anampiu, for the plaintiff, sought 21 days to fully comply with order 11, CPR.

6. The parties came back to court on 11th May, 2015. Mr. Mwanzia, for the defendant, told the court that the parties had fully complied with order 11, CPR. This assertion was promptly controverted by Mr. Ndubi who was holding brief for Mr. Anampiu for the plaintiff. He told the court that the plaintiff had been directed to file his case summary. He went on to tell the court that the plaintiff had not done so. He told the court that Order 11, CPR having not been fully complied, the suit was not ripe for hearing. He sought 7 days to fully comply. One notes that this was the plaintiff's advocate seeking to justify delay of the hearing of the suit by using his indolence as the reason for the adjournment he sought. The court gave the plaintiff 7 days to fully comply with order 11, CPR. The parties were directed to come back to court on 16th June, 2015.

7. On 16th June, 2015, the plaintiff's advocate told the court the parties had not complied. This, despite the fact that the parties had on 11th May, 2015 requested the court to give them 7 days to fully comply with Order 11, CPR. Advocate Mutunga holding brief for advocate Mwanzia for the defendant, informed the court that the parties had not fully complied. He asked the court to grant them 60 days to fully comply. His prayer was supported by advocate Anampiu, the plaintiff's advocate.

8. The court granted 60 days for the parties to fully comply with Order 11 CPR. The matter was stood over generally and the parties, once they achieved compliance, were directed to obtain a mutually convenient date for directions from the registry.

9. The 16th of September, 2015 was the date obtained by the parties for directions. On this day advocate Kirimi Mbogo, holding brief for advocate Mwanzia for the defendant informed the court that the parties had fully complied with Order 11, CPR. He asked the court to grant the parties a hearing date. Advocate Mutuma, holding brief for Mr. Mwanzia for the defendant, concurred. The 7th of October, 2015 was the date fixed for hearing of the suit. Both parties were represented in court when this hearing date was fixed.

10. On 7th October, 2015, the parties and their advocates were not in court. Precious judicial time was wasted.

11. On 13th July, 2016, the parties came back to court. They asked the court to give the matter a hearing date. Mr. Anampiu, the plaintiff's advocate told the court that he was ready to proceed with the hearing. However, advocate Miss Nyaga, holding brief for Mr. Mwanzia for the defendant, told the court that Mr. Mwanzia was seeking an adjournment as he was engaged elsewhere. No other explanation for Mr. Mwanzia's absence was given.

12. Mr. Anampiu, the plaintiff's advocate, prayed for costs for himself and for 2 witnesses which the court granted at the assessed amount of Kshs.5,000/=. The court frowned at the defendant's advocate's conduct and also deprecated the unnecessary waste of precious judicial time arising thereof. The court fixed the 29th of July, 2016 as the suit's next hearing date.

13. For reasons not fathomable from the court file, hearing did not take place on 29th July, 2016.

14. On 13th February, 2017 notice was given for parties to come to court for directions on 15th March, 2017. By this time the file relating to this suit had been transferred from Meru to Chuka where an Environment and Land Court had been established.

15. In the morning of 15th March, 2017, advocate Miss Njenga, holding brief for Mr. Mwanzia for the defendant, asked the court to fix a hearing date for the suit. As the plaintiff and his advocate were not in court, despite the fact that they were aware of this mention date for directions having been properly given notice by the court, Miss Njenga undertook to serve the hearing date upon the plaintiff.

16. On 3rd April, 2017, advocate Miss Njenga holding brief for advocate Mwanzia for the defendant, informed the court that he had only served advocate Anampiu, the plaintiff's advocate, that morning. She proffered that advocate Anampiu had received the apposite hearing notice under protest. She wished to leave the issue of how the matter should be moved forward to the court.

17. The plaintiff told the court that he was in court and that his advocate was on his way to the court. He asked that the suit be allocated time for hearing. At this point, Miss Njenga changed tack. She told the court that she was not ready to proceed with the hearing of the suit. The reason she proffered was that advocate Mwanzia was the one seized of the personal conduct of the case. The court fixed a new hearing date. The court directed the parties to come to court for the hearing of the case on 11th July, 2017.

18. In the morning of 11th July, 2017, both advocates representing the parties were not in court. Both the plaintiff and the defendant, however, indicated that they were ready to proceed with the hearing of the case. Hearing of the suit was allocated time at 11.00am.

19. At 11.00am when hearing of the suit was to commence both advocates representing the parties turned up. The defendant's advocate, Mr. Mwanzia, told the court that he had another hearing before the Hon. Justice Limo in the High Court and further told the court that he had agreed with Mr. Anampiu, the plaintiff's advocate, to have the hearing of the suit take place on 25th September, 2017. Mr. Anampiu told the court that they had agreed to have the hearing of the suit take place on 25th September, 2017. They agreed upon this date by their own consent. The court obliged them. Hearing of the suit was fixed to take place on 25th September, 2017.

20. Wonder of wonders. For the umpteenth time parties ensured that hearing as fixed by the consent of parties did not take place. The litigants' advocates did not turn up. When the suit was called on outside the court neither the plaintiff nor the defendant was in court.

21. I do opine that the way this suit has been conducted by the litigants would constitute a veritably classic case of how to procrastinate cases. It seems to me that the two parties have colluded and contrived effective means of adjourning hearings. Indeed the shenanigans that can be gleaned from the way this suit has been conducted can form a valuable chapter in a tome that can be called; "Tips on how to successfully and inordinately procrastinate hearing and determination of suits." Indeed, I dare opine that judges who have handled this matter since it was filed in 2005 can be accused of having been too lenient on the parties. This indictment may not escape this judge himself. But choices have consequences.

22. Order 12 subrule 1 of the Civil Procedure Rules decrees as follows: "If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit."

23. This suit has been called on for hearing outside the court and neither party attended the hearing slated for 25th September, 2017.

24. The consequence is that I find that this suit merits dismissal.

25. This suit is dismissed.

26. Costs except those that may have been granted before this dismissal of this suit are not awarded to any of the two parties.

27. It is so ordered. (END OF RULING DATED 25/9/2017).

F. When this application came up for hearing on 16th January, 2018, the plaintiff's advocate told the court that he had talked to Mr. Mwanzia, the defendant's advocate, who had intimated that he was not opposed

to the application. On that ground, he asked the court to have the suit reinstated.

G. I do note that though a hearing date was obtained on 20th December, 2017, about one month ago, there is no evidence that the defendant's advocate had been served with the application and the hearing date obtained by the applicant.

H. From the court's record, the parties had, by consent, agreed to have the suit heard on 25th September, 2017. When the suit was called on, both parties were not in court. The court set aside the file until 10.00am to give the parties time to come to court. At 10.00am the suit was called on in and outside court and once again the parties were not in court to facilitate hearing of this suit. The defendant in his sworn affidavit dated 2nd October, 2017 is not truthful when he states at paragraph 9 that "the court on its motion" adjourned the hearing slated for 11.7.2017. It is not true that the court had other official engagements.

I. I opine that the plaintiff is economical with the truth when he avers in his supporting affidavit that he was in court from around 9.00am. If he was in court, he would have acknowledged his presence when the suit was called on for a second time at 10.00am. Indeed, it is pellucid from the court's record that the ruling which dismissed the suit was delivered at 11.30am.

J. I opine that the further supporting affidavit filed by Mr. Ayub K. Anampiu, the plaintiff's advocate confirms that he never turned up in court on the day slated for the hearing. The absence of the defendant and his advocate during the date fixed for hearing does not affect the merit of the court's decision to dismiss the suit. Indeed had the defendant been present in court, the suit would still have been dismissed and if he had a counter claim, he would have gone ahead to prove his claim ex-parte.

K. I find that this application has no merit.

L. In the circumstances, the application is dismissed with no order as to costs in view of the fact that the defendant and/or his advocate had not taken part during the prosecution of the application.

M. For avoidance of doubt, it is restated that this suit remains dismissed as was ordered by this court vide its ruling delivered on 25th September, 2017.

N. It is so ordered.

Delivered in open court at Chuka this **1st day of February, 2018** in the presence of:

CA: Ndegwa

Wilfred Mburia Mbiuki claiming to represent the plaintiff's son

Other parties absent

P. M. NJOROGE

JUDGE