



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 130 OF 2017

FORMERLY MERU ELC CIVIL APPEAL CASE NO. 14 OF 2017

NGACARA IGOJI.....APPELLANT

VERSUS

JOHN KIMANI MWENDWA.....RESPONDENT

RULING

1. This application is dated **2nd January, 2018**. It was canvassed by way of written submissions.
2. The applicant's submissions are reproduced herebelow in full and in the exact words it uses:

APPLICANT'S SUBMISSIONS IN RESPECT OF THE APPLICATION DATED 2ND JANUARY, 2018

1. Your lordship by way of a notice of motion dated **2nd January, 2018** the applicant presented the following prayers for consideration by the court;

- i. That the application dated **10th September, 2014** be dismissed for want of prosecution.
- ii. That cost of this application be provided for.

2. The applicant's application was supported by a supporting affidavit sworn by **JOHN KIMAMA** and dated **2nd January, 2018**. The applicant in the supporting affidavit deposed that;

- i. That the application dated **10th September, 2014** and filed in court on **11th September, 2014** seeking to set aside the dismissal orders of **20.8.2010** be dismissed for want of prosecution. That between **1st December, 2016** and **19th June, 2017** the suit appeared before **JUSTICE MAKAU, JUSTICE GIKONYO** and **JUSTICE MABEYA** who are not **ELC JUDGES** and various orders were made. That in (sic) the orders of **JUSTICE MAKAU, JUSTICE GIKONYO** and **JUSTICE MABEYA** aforesaid were null and void for want of jurisdiction (the judges were not **ELC JUDGES**).
- ii. That the appellant took no initiative to move the **E & L COURT** to have the application heard and disposed with effect from **11th December, 2014** to date which is a period in excess of three years. That a period in excess of three years has elapsed without the appellant taking any initiative to have the application prosecuted before a court of competent jurisdiction that is the **E & L COURT**. That **Order 17 Rule 2 (iii)** of the **Civil Procedure Rules** demand that this application be dismissed for want of prosecution granted the prevailing circumstances in this case. That litigation must come to an end. That substantive justice of this case demand (sic) that the application dated **10th September, 2014** and filed in court on **11th September, 2014** be dismissed for want of prosecution.

3. The applicant's application is opposed vide the appellant/respondent's replying affidavit sworn by **NGACARA NGOJI** and dated **23rd January, 2018**. In the replying affidavit the respondent deposes inter alia that;

- i) That the applicant's application is full of dishonesty as far as the prosecution of the application dated **10th September, 2014** is concerned. That the applicant and his counsel attended courts that had no jurisdiction and went ahead to file written submission under the orders issued with a court with no jurisdiction. That **JUSTICE MABEYA** made a ruling on **19th**

June, 2017 and therefore the prosecution of the matter was alive and kicking. That the matter was transferred to **ELC COURT MERU** which court then transferred this matter to **CHUKA ELC COURT**.

ii) That on **7th December, 2017**, this matter was before the learned judge **JUSTICE NJOROGE** of **E & L COURT CHUKA** on **7th December, 2017** in which the learned judge acknowledged (sic) that the matter was before the court in respect of Chamber summons that I filed dated **10th September, 2014** and that all the parties have filed their submissions but the matter was heard by a court that lacked jurisdiction and directed that this matter be placed before this court on **24th January, 2018** for directions, but the respondent took a completely different direction by filing the application dated **2nd January, 2018**.

iii) That it is in the interest of justice this honourable court hears the application dated **10th September, 2014** and have (sic) determined on merit and in satisfaction of **Article 50** coupled with **Article 159 (d) of the constitution**. That the applicant will not in any way be prejudiced if the application dated **10th September, 2014** is heard and determined on its merits. That there has not been any disobedience of any peremptory order of the court in so far as the application dated **10th September, 2014** is concerned, save as for this matter was filed in court without jurisdiction to hear and determine it.

4. Your lordship in our humble view the issues of determination in this application include but are not limited to the following;

i) When was the application dated **10th September, 2014** last before court and at whose instance?

ii) Does the application dated **10th September, 2014** qualify to be dismissed under order 17 rule 2 (3) of the Civil Procedure Rules?

iii. Has the appellant given a satisfactory and plausible explanation through his replying affidavit as to why the application dated **10th September, 2014** should not be dismissed for want of prosecution?

iv. Is the omission by the respondent to prosecute his application dated **10th September, 2014** a technicality that can be cured by article 159 of the Constitution?

5.

i) Your Lordship from the onset we wish to submit that it does not matter even if parties subject themselves and act on the directions of a court without jurisdiction. Such proceedings are null and void for want of jurisdiction. A court without jurisdiction has no jurisdiction and no party can benefit from orders issued by a court without jurisdiction. Save for **JUSTICE MABEYA's** order of **19th June, 2017** when he transferred the same to E & L Court all the other orders by **JUSTICE GIKONYO, JUSTICE MAKAU AND JUSTICE MABEYA** himself were null and void for want of jurisdiction. The submissions by the parties could not and cannot confer jurisdiction to a judge where the same is wanting.

ii) The application dated **10th September, 2014** was filed on **11th September, 2014**. By this time E & L Court had been constituted. That the appellant took no initiative to move the E & L Court to have the application heard and disposed with effect from **11th December, 2014** to date which is a period in excess of three years. Three years are far beyond the demands of order 17 rule 2 of the Civil Procedure Rules that either on court's own motion or through an application by a litigant a suit can be dismissed for want of prosecution if a period of one year has elapsed from the last time the matter was in court and no initiative have (sic) been taken to move the court. The application dated **10th September, 2014** qualified to be dismissed under order 17 Rule 2 of the Civil Procedure Rules. We urge the court to move swiftly and dismiss the same and more so noting that this is an application that seeks to have a dismissal order of **20th August, 2010** dismissing the appeal reinstated. Equity will not assist the indolent. He who comes to equity must come with clean hands. Litigation must come to an end.

iii) Your lordship we submit that the respondent/appellant has not given a plausible explanation as to why the application dated **10th September, 2017** should not be dismissed for want of prosecution. In the respondent's replying affidavit he gives the sequence of events of what happened after filing the application dated **10th September, 2014** which the respondent admit was filed in a court without jurisdiction. Upon detecting if at all they did that he had filed the application in a court without jurisdiction the appellant/respondent ought to have moved swiftly to withdraw the application and file it in a court of competent jurisdiction. The applicant took the initiative most of the times to see that the respondent's application dated **10th September, 2014** was prosecuted and the respondent took a wait and see approach. Your lordship one may note that it is the court on its own motion that gave the parties **7th December, 2017** as a date for mention for directions. This should have been the move and initiative of the respondent.

iv) That your lordship the issues raised by the respondent are not issues of technicalities that can be cured by article 159 of the constitution of Kenya 2010. Order 17 rule 2 gives the court power to dismiss a suit for want of prosecution. If the person to show cause why the suit should not be dismissed actually shows cause the court can exercise its discretion in favour of such person. If on the other hand such person expected to show cause does not show cause (as in this case) the court has no business in exercising its discretion in his favour. That justice is two way edged. The applicant has the right to have the suit between him and the respondent adjudicated expeditiously. It has been hanging over the applicant since 2002 when the parties to this suit were before the now defunct land dispute tribunal. These are approximately 16 years down the line.

6. In light of the foregoing your lordship, we pray that the applicant's application dated **2nd January, 2018** be allowed with cost to

the applicant.

7. We rest our submissions and pray.

DATED AT CHUKA THIS 31ST DAY OF JANUARY, 2018

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I.C MUGO & CO. ADVOCATES,

FOR THE APPLICANT

3. The respondent who is also the applicant in the application dated **10th September, 2014** has also filed and exchanged his written submissions. The submissions are reproduced herebelow and in the exact words used by the respondent's advocates;

SUBMISSIONS

Your lordship, before the seat of justice is an application dated **22nd January, 2018** filed by the applicant under the provisions of **Order 17 Rule 2(3)** and **Order 51 Rule 1** of the Civil Procedure Rules seeking Orders inter alia that:-

1. The application dated **10th September, 2014** be dismissed for want of prosecution.
2. The cost of this application be provided for.

On the grounds that;

- a. That the application dated **10th September, 2014** and filed in court on **11th September, 2014** seeking to set aside the dismissal orders of **20.8.2010** be dismissed for want of prosecution.
- b. That this matter was in court on **11th December, 2014** before Justice Makau who gave orders that the application dated **10th September, 2014** and received in court on **11th September, 2014** be disposed by way of written submissions.
- c. That on **1st December, 2016** this matter was before **Justice Gikonyo** whereupon the said judge directed that there be a mention on **11th May, 2017**.
- d. That on the **11th May, 2017** this matter was before **Justice Mabeya** where the said justice ordered that a ruling would be delivered on **15th June, 2017** but the file was never placed before the judge. However, it was placed before the judge on **19th June, 2017** where it was ordered that the matter be transferred to the **E & L Court at Meru**.
- e. That the orders of **Justice Gikonyo** and **Justice Mabeya** were null and void for want of jurisdiction.
- f. That the appellant/applicant took no initiative to move the E & L Court to have the application heard and disposed with effect from **11th December, 2014** to date which is a period in excess of three years.
- g. That a period in excess of two years has lapsed without the appellant taking any initiative to have the application prosecuted before a court of competent jurisdiction that is the E & L Court.
- h. That **order 17 Rule 2(3)** of the Civil Procedure Rules demands that this application be dismissed for want of prosecution.
- i. That litigation must come to an end
- j. That substantive justice of this case demand (sic) that the application dated **10th September, 2014** and filed in court on **11th September, 2014** be dismissed for want of prosecution.

The main purpose (sic) applicant's application against the appellant is that the appellant filed the application dated **10th September, 2014** seeking to set aside the dismissal orders of **20.8.2010** (sic) be dismissed for want of prosecution.

Your Lordship, it is apparent from the applicant's application that the said application dated **10th September, 2014** was before various judges being **Justice Makau, Justice Gikonyo** and **Justice Mabeya** on various dates until the **19th day of June, 2017** when this matter was placed before **Justice Mabeya** for **Ruling** on the application dated **10th September, 2014** in which **Justice Mabeya** in his **Ruling** directed that since this matter concerns land, it should be placed before the E & L Court at Meru for hearing and determination.

Your Lordship, this matter was transferred to E & L Court at Meru for hearing and determination of the application dated **10th September,**

2014 and the said court transpired (sic) that the subject parcel of land is within the jurisdiction of Chuka E & L Court and therefore the matter was transferred to the Chuka E & L Court.

Your Lordship, upon this matter being transferred to this honourable court, it was placed before Justice Njoroge on the **7th day of December, 2017** in which the court appreciated the fact that this matter was before the court for the hearing and determination of the application dated **10th September, 2014**, and the court also appreciated the fact that both parties had filed their respective responses and submissions in regard to the application dated **10th September, 2014**, (sic) the court upon acknowledging the aforementioned facts directed that this case be mentioned for directions on the **24th day of January, 2018** for directions but before the directions could be given the applicant filed this application that we are now addressing.

Your Lordship, it is clear from the court's record that both the applicant and the appellant participated in the proceedings of the high court in Meru in so far as the application dated **10th September, 2014** is concerned and it is therefore not in good faith for the applicant to tell this court that the appellant took no initiative to move to the E & L Court and have the same application heard and disposed with effect from **11th December, 2014**.

Your Lordship, order 17 Rule (1) of the Civil Procedure Rules grants court the power (sic) dismiss suits in only instances which no step has been taken for a year, and the same order also requires the court to give notice to a party concerned to show cause why the suit should not be dismissed for want of prosecution and the same order is also permissive and allows a significant room for (sic) exercise its discretion to sustain a suit and more so section 159 of the constitution and the overriding objective which demands of courts to strive to serve substantive justice since in legal reality dismissal of a suit without hearing is such a draconian and comparable to the proverbial "sword of the Damocles".

Your Lordship, the test for dismissal of suits was well stated in the case of *Mwangi S. Kimenyi v attorney general & another [2014] eKLR* in which the court stated that;

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

1. Whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and excusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

Your lordship, having in mind the fact that the applicant disobeyed this courts peremptory order that he should file his responses and submissions and serve within **14 days**, demonstrates that the applicant is abusing the court process, therefore it is our submission that the plaintiff has not in any way satisfied this honourable court that he will be prejudiced if the application he seeks to be dismissed is heard on merit. The requirement for the applicant to demonstrate the same was well pronounced in the case of *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* when the court in explaining the same quoted the case of *IVITA V KYUMBU [1984] KLR, Chesoni, J.* (as he then was) that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

Your Lordship, this matter concerns a parcel of land which the appellant's father and the appellant has been in occupation since 1937 and therefore dismissing the application as sought by the applicant will occasion great hardship to the appellant since they will be rendered homeless yet the subject parcel of land is rightfully theirs.

We therefore submit that the applicant has not raised a proper case for dismissal of the application dated **10th September, 2014** and we humbly urge this honourable court to dismiss the applicant's application with costs.

DATED AT MERU THIS 7TH DAY OF FEBRUARY, 2018

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WAMBUGU & MURIUKI

ADVOCATES FOR THE PLAINTIFF

4. I have considered the pleadings and the submissions proffered by the parties in support of their assertions. I have also considered the one authority proffered by the respondent who is the applicant in the application dated **10th September, 2014**. That authority is Professor **Mwangi Kimenyi versus the AG and Another, Civil Suit Misc No. 720 of 2009, eKLR**. I opine that this case is a good authority in its circumstances. However, no two cases are congruent to mathematical exactitude. Facts and circumstances invariably defer.

5. In the Mwangi Kimenyi Case, op. cit, the suit had been dismissed on **29th February, 2013**. The application that spawned the apposite ruling was filed on **30th July, 2013**, months later. In the present case, the impugned application is dated **10th September, 2014**. The order dismissing the suit had been issued on **20th August, 2010** over **4 years** before the application was filed. A delay of 4 years before an application of this nature is filed is veritably inordinate under whatever circumstances. An applicant who does not know that his or her suit has remained dismissed for over 4 years is unlikely to persuade a court of law to exercise its discretion to reinstate a suit. I opine that the explanation proffered by the petitioner/applicant is not satisfactory. It is clear that the facts and circumstances in the Mwangi Kimenyi Case (op.cit) are distinguishable from the facts and circumstances of this suit.

6. Having carefully considered the submissions filed by the parties in support of their diametrically opposed assertions, I am inclined to find that the submissions proffered by the applicant herein, who was a respondent in the appeal that was dismissed on 20th August, 2010 are more persuasive. I find that the application merits dismissal for non-prosecution.

7. The issue of non-prosecution aside, this court would nevertheless dismiss the appellants application dated 10th September, 2010. Filing such an application four years after a suit had been dismissed, is coming to court too late. I opine that unless there are extremely extenuating circumstances, such applications should not be allowed. The reasons proffered by the appellant in his pleadings in that application do not evince any extreme and special circumstances warranting the apposite application to be allowed. Litigation must come to an end at some time. This suit was dismissed on **20th August, 2010**, over **7 years ago**. The application dated **10th September, 2014**, was filed over **4 years** after the apposite appeal had been dismissed.

8. In the circumstances, the applicant's/respondent's application dated **22nd January, 2018** is allowed. The effect is that the apposite suit remains dismissed in accordance with the dismissal order issued by the court on **20th August, 2010**.

9. Costs shall follow the event and are awarded to the Respondent/ Applicant

10. It is so ordered.

Delivered in open court at Chuka this **14th day of March, 2018** in the presence of:

CA: Ndegwa

I.C. Mugo present for the Respondent/Applicant

Firm of Wambugu & Muriuki absent for Appellant/Respondent

P.M. NJORGE

JUDGE