



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC NO. 20 OF 2018

OMAR IFIRE)

JOSEPH MUSULA MSIMBA

OSUNDWA YOHANA.....PLAINTIFFS/APPLICANTS

AMIDA MUKASA SAKASA

SHEBA MAKOKHA

VERSUS

THE TOWN CLERK MUMIAS

MUNICIPAL COUNCIL.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 18th January 2018 and is brought under order 1 rule 10, order 40 rule 1 & 2 and order 17 rule 2 of the Civil Procedure Rules section 3, 3A of the Civil Procedure seeking the following orders;

1. That the present application be and is certified urgent and be heard on priority basis.
2. That the county government of Kakamega be and is hereby made party to this suit.
3. That pending the hearing and final disposal of this petition/suit there be an order of injunction restraining the respondents, their agents and/or servants from alienating and/or in any other manner interfering with the petitioners use of all that parcel of land known as Mumias triangle.
4. That the orders of this court made on 13th July 2015 dismissing this petition be and are hereby set aside.

The applicant submitted that, this suit was initially against the defunct local authority, Mumias Town Council and the Attorney General. That the local authority was disbanded and functions taken over by the County Government of Kakamega. That the agents of County Government of Kakamega have issued notices stopping them from farming the parcels of land in issue. (Annexed hereto and marked "OIK-1" is a copy of the notice). That upon receipt of the notice they rushed to check this file only to discover that it

was dismissed for want of prosecution. That he is aware that they have always been keen on prosecuting this matter. That failure to prosecute the suit was not their making as there was no court. That no notice was served upon them before dismissal of this suit. That they are faced with illegal eviction from the County Government of Kakamega. That the suit raises serious legal issues that ought to be determined on merit. That most of the applicants who are of old age have all along stayed and worked the suit parcels of land. That it is in the interest of justice that the issues raised be determined upon full hearing. That they stand to suffer irreparable loss unless the orders sought are given. That it is equally in the interest of justice that the present status be preserved pending determination of the issues herein. That the applicants are ready to abide by the orders of the court that shall be made upon full hearing of this case. That they may lose their property without due process of law which is the main contention in this matter. That this suit affects over 50 families who stand to lose their parcels of land without due process of law.

They submit that during the said time there was no judge for Environmental and Land cases at Kakamega. The dismissal was equally not made by a judge for the court. No other court is mandated to dismiss a land matter and therefore this petition was thus dismissed illegally.

The 1st Respondent filed grounds of opposition dated 12th March 2018 opposing the application on grounds that the application lacks merit and that it is an abuse of the court process and bad in law. The applicant's suit was filed in 2012 and was dismissed in 2015. Since 2015 to 2018 when this instant application was filed the applicants did not move the court at all to have the matter reinstated. The applicants' grounds for taking a long time in moving the court is that there was no land court in the station.

The applicants allege that no notice was issued to the parties before the suit was dismissed. However the Applicants have not demonstrated to the court that before the dismissal they were keen to have the matter proceed. As earlier stated the suit was dismissed in 2015 yet it had been filed in 2011 that is a four year difference that goes to show the indolence of the applicants to have the suit heard and determined. Order 11 rule 2 is not coached in mandatory terms such that the court must give notice the Order says the court may give notice thus giving the court the discretion to give notice or not. The Applicants' application and the supporting affidavit of Omari Ifire does not in any way explain why the plaintiff took too long to prosecute their case and to file the instant application. In his affidavit the deponent only states that there was no court but they were keen on prosecuting the matter.

This application was filed after notices were issued by the County Government of Kakamega this year to the Applicants to stop farming in the said parcel. That had the said notices not been issued the Applicants would not have found out that their suit had been dismissed. There are eighteen (18) Applicants suit the fact that none of them has sworn an affidavit with a clear indication of how they were following up on the case and what steps they took to ensure the suit is dispensed with which is a clear indication that they lost interest in the suit. They referred to the cases of Utali Transport Company Limited and 3 Others vs NIC Bank Ltd and Another 2014 eKLR and Ivita vs Kyumba 1984 KLR 441.

The 2nd respondent submitted that, this petition was dismissed on 13th July, 2015. That the applicants have not shown any good reason why it should be reinstated 2 ½ years later. The suit having been dismissed this court cannot issue any orders of injunction against any party. The court cannot issue an order to enjoin the County Government of Kakamega as there is no suit. The application herein is an afterthought, it lacks merit and is an abuse of the court process. The applicants slept on their rights. They failed to exercise due diligence in ensuring that the case is heard and determined within reasonable time. From the pleadings on record the applicants do not reside on the suit land the same having been acquired by the government.

The 1st applicant herein filed High Court Case No. 220 of 1995 seeking similar orders. The same was dismissed on 13th May, 2003. He did not file an appeal but instead he filed this suit in company of others. They submit that orders of injunction cannot issue against the respondents as the applicants have not demonstrated that they have a prima facie case with a chance of success. This case was dismissed. They submit that the applicants have been invading the suit land for no justified cause. They

insist on tilling the land and they have been served with a notice not to utilize the land they decided to file this application. They submit that no good reason has been given why the orders sought should be granted.

This court has carefully considered both the applicants' and the respondent's submissions. The application is grounded on the annexed affidavit of OMARI IFIRE KIMWAGA, the applicant and the grounds that this suit was dismissed. That the dismissal was not done by the land court as established. That the dismissal was without notice to the parties herein. That the delay in prosecuting the suit was beyond the applicants control as there was no land court. That there are serious issues of law and fact raised in the petition. That the applicants are owners and beneficial owners of the suit parcels of land. That it is in the interest of justice that the issues raised be determined on merit. That the applicants stand to lose the suit parcels of land without due process of law. That the applicants have all along stayed on the suit parcels and do not know other place to call home. That the County government has issued notice stopping the applicants from doing farming. That the applicants stand to suffer irreparable loss as the county government intends to take over the parcels of land unconstitutionally. That the applicants have a good case with high chances of success.

Order 17 rule (2) CPR provides as follows:

1. "In any suit in which no application has been made or step 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 and if cause is not shown to its satisfaction, may dismiss the suit.
2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fits to obtain expeditious hearing of the suit".

The applicant's suit was filed in 2012 and was dismissed in 2015. Since 2015 to 2018 when this instant application was filed the applicants did not move the court at all to have the matter reinstated. The applicants grounds for taking a long time in moving the court is that there was no land court in the station. This is not true. From 2013 land matters were heard in the other land courts in the region and a Land Court judge was posted to Kakamega in February 2017.

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held 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. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant.

The delay in prosecuting the main suit and the Application is prolonged. It took four (4) years for the suit to be dismissed and a further three (3) years after dismissal for the application for reinstatement to be filed. The delay has not been well explained therefore the application for reinstatement cannot be granted. The Applicants are guilty of laches they slept on their rights on their rights by failing to move the court in a timely manner. Equity aids the vigilant not the indolent. I find this application has no merit and I dismiss it with costs. The suit/application having been dismissed this court cannot issue any orders of injunction against any party. The court cannot issue an order to enjoin the County Government of Kakamega as there is no suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE