



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC 635 OF 2011**

**1. JUMA BAKARI GATO**

**2. JUMA GAATU.....PLAINTIFFS**

**-VS-**

**MWARUWA RUWA MWANGOLO & 21 OTHERS....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> January 2018 the Plaintiffs seek to have the order made by the Court on 13<sup>th</sup> October 2017 dismissing the Plaintiffs' Suit vacated and/or set aside and have the Suit reinstated for hearing. The Application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules.

2. The Application is based on the grounds set out in the Motion and supported by the Affidavit of Juma Bakari Gato sworn on 16<sup>th</sup> February 2018 and is premised on the grounds that by a consent dated 18<sup>th</sup> February 2015, the parties mandated the County Surveyor, Kwale County to *inter alia* carry out survey of the Suit Land and file a report before Court. That the surveyor's report has never been filed to date but on 17<sup>th</sup> October 2017 the Suit was dismissed for want of prosecution. The Plaintiffs aver that they were served with two notices to show cause on 3<sup>rd</sup> October 2017 indicating that the Suit would be coming up for hearing of the Notice to show cause why the case should not be dismissed for want of prosecution on 11<sup>th</sup> October 2017 and on 12<sup>th</sup> October 2017. The Plaintiffs further aver that their Advocate was in Court on both days but the matter was not listed in either of the two dates. The Plaintiffs state that they are ready and willing to have the case heard and concluded. The Plaintiffs further state that they stand to suffer substantial loss, prejudice and harm if the Suit is not reinstated as their legally acquired land would be taken over by trespassers and that the Defendants will not suffer any prejudice if the Suit is reinstated as they will get an opportunity to have the issues ventilated on merit. It is the plaintiffs' contention that it is in the interest of justice that they be given a chance to be heard on merit.

3. The Application is opposed by the Defendants through a Replying Affidavit sworn by Suleiman Ali Mwango'embe on 18<sup>th</sup> April 2018. It is the Defendants contention that the Application is incompetent and bad in law. The Defendants aver that the Plaintiffs have not demonstrated to the Court why the matter should be reinstated and that the Plaintiffs have for a long time not shown interest in prosecuting the Suit which was filed in 2012. The Defendants further aver that there has been no action on the matter by the Plaintiffs since the year 2015 and that prior to the dismissal, the parties received a notice to show cause why the matter should not be dismissed for want of prosecution. The Defendants state that the delay by the Plaintiffs to prosecute the case is prolonged and inexcusable and if allowed to persist it will result in grave injustice to the Defendants. That the Plaintiffs have not demonstrated how their matter has merit yet they have been indolent and guilty of inexcusable and inordinate delay thereby disentitling themselves to the courts exercise of its unfettered discretion in their favour. According to the Defendants, the Application is devoid of any merit whatsoever.

4. When the Application came up for hearing on 19<sup>th</sup> April 2018, Mr. Kirui Advocate who appeared for the Plaintiffs on behalf of Mr. Omwenga relied on the grounds in support of the Application as well as the supporting affidavit. He submitted that the Defendants in their replying affidavit have not raised any substantial issue on the Application as it does not address the issue of the consent mentioned in the Application which was entered into by the parties. The Plaintiffs relied on the cases of **Ivita-v- Kyumbu (1984) KLR 441; Floriculture International Limited -v- Central Kenya Limited & 3 Others (1995) eKLR** and **Harrison Wanjohi Wambugu -v- Felista Wairimu Chege & Another (2013) eKLR**. Mr. Manguro Advocate who held brief for Mrs. Kipsang, Counsel for the Defendants relied entirely on the contents in the Replying Affidavit.

5. I have considered the Application. Order 17 Rule 2(1) of the Civil Procedure Rules provided as follows:

***“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.”***

6. The record shows that this matter was last in court on 7<sup>th</sup> April 2015 when the parties recorded a consent pursuant to the direction of the Court to have the County Surveyor, Kwale County carry out survey of all that parcel of land known as **Kwale/Kundutsi/1618** and file his report. By 13<sup>th</sup> October 2017 when the suit came up for dismissal, no report had been filed. The Plaintiffs have stated that although they were served with two notices, one for 11<sup>th</sup> October 2017 and the other for 12<sup>th</sup> October 2017, the matter was not listed on either of the days, though the Court went ahead and dismissed the Suit on 13<sup>th</sup> October 2017. The Court record shows that the matter came up on 13<sup>th</sup> October 2017 when only the Defendants Counsel was present. The Court, having satisfied itself that there was no cause shown, dismissed the Suit for want of prosecution.

7. I have looked at the notices attached to the Affidavit in support of the Application. One notice indicated that the matter would be heard on 11<sup>th</sup> October 2017 while the other showed that it was to be heard on 12<sup>th</sup> October 2017. In their Replying Affidavit, the material facts as stated by the Plaintiffs have not been controverted by the Defendants. If indeed two notices bearing different dates were served on the Plaintiffs, then that is good reason to grant the orders sought in the application. The overriding objectives of the Court would also come to the aid of the Plaintiffs.

8. For the foregoing reasons, I am satisfied that the Plaintiffs' Application dated 16<sup>th</sup> February 2018 has merit. The Defendants have not demonstrated how they will suffer prejudice if the orders sought are granted and the suit heard and decided on merit.

9. The upshot is that the Application is allowed. The order made herein on 13<sup>th</sup> October 2017 dismissing the Plaintiffs' Suit is set aside and the case is reinstated. The parties to comply with Order 11 within 30 days from the date hereof and set down the suit for hearing. Costs of the Application shall be in the cause.

**Ruling dated, signed and delivered at Mombasa this 24<sup>th</sup> day of July 2018.**

\_\_\_\_\_

**C. YANO**

**JUDGE**