



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
MISC. ELC CASE NO. 6 OF 2018

REPUBLIC (through PASTOR SETH

OKUYU & REV. SIMON OCHIENG.....APPLICANTS

VERSUS

KHWISERO LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

HURONE IMBUNI.....INTERESTED PARTY

EMIKALA E. WEOKOKO.....INTERESTED PARTY

MICHAEL SANDE.....INTERESTED PARTY

AND

PASTOR SETH OKUYU & REV. SIMON OCHIENG

FOR MWIHILA MISSION.....EX PARTE APPLICANTS.

RULING

The application is dated 20th March 2018 and is brought under order 17 rule 2 (2), order 12 rule 7 and order 45 rule 1 of the Civil Procedure Rules 2010 under section 1A& 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. This honourable court be pleased to review, vary and or set aside the orders issued on 7th July, 2015 dismissing this matter for want of prosecution and the substantive application by way of notice of motion dated 16th October, 2003 be reinstated for hearing and determination on merit.
2. Costs of this application be in the cause.

It is based on the annexed affidavit of REV. SIMON OCHIENG and on the following principal grounds. The substantive motion dated 16/10/2003 seeking orders of CERTIORARI and PROHIBITION has overwhelming chances of success as it challenges the proceedings and verdict of the Khwisero Land dispute Tribunal which proceeded to handle a claim it had no jurisdiction to entertain and which claim

was statute-barred, in-competent and was instituted by parties who had no locus standi to sue and the claim was also against parties who had no locus standi to be sued. The substantive motion was instituted through M/s. Azangalala & Co. Advocates and when the sole proprietor of the said firm, Mr. Festus Azangalala was appointed a judge, he could no longer represent the ex parte applicants who were never served with proceedings or any notice herein and only recently learnt of the order of dismissal herein made on 7/7/2015. No notice of dismissal of this matter for 7/7/2015 was served upon the ex parte applicants nor the interested parties nor the respondent and this matter proceeded ex parte on 7/7/2015 prematurely, unprocedurally and irregularly and without the knowledge of or notice to any of the parties and the ex parte applicants were condemned unheard against the basic of tenets of natural justice. It is only proper, just and fair that the ex parte orders of dismissal herein be set aside and the substantive motion herein be reinstated so that it is heard interparties and determined on merit otherwise the ex parte applicants will stand condemned unheard for errors which were not of their making.

The applicant submitted that, in 2003 the interested parties herein sued him alongside Pastor Seth Okuyu at the Khwisero Land disputes Tribunal claiming land parcel No. KISA/MUNDOBELWA/1450 which is registered in the name of The Registered Trustees – Church of God – East Africa-Kenya, yet they were not registered trustees of the said church and the claim was filed 40 years after creation of the said title. That Khwisero Land Dispute Tribunal entertained the interested parties claim and made an award in their favour and being aggrieved they instructed M/s. Azangalala & Co. Advocates to challenge the said proceedings and verdict which they did by obtaining leave and stay of execution before filing the substantive notice of motion dated 16th October, 2003 seeking inter alia orders of CERTIORARI and PROHIBITION. That they were advised by Mr. Festus Azangalala advocate, as he then was, that the interested parties' claim was statute or time-barred, they had no locus standi to sue and neither did they have the locus standi to be sued and that the Khwisero Land Dispute Tribunal had no jurisdiction to entertain the interested parties' claim nor could it in law interfere with title No. KISA/MUNDOBELWA/1450 as it purported to do and they thus had a very good claim with overwhelming chances of success. That Mr. Azangalala advocate then advised them, that being an application, our presence was not necessary or mandatory and that he would handle the matter without them the ex parte applicants and advise them of the outcome. That they went home and subsequently retired from service of the Church of God. That it was only recently when he made inquiries as to what became of the matter that he was informed that Mr. Festus Azangalala, advocate was appointed a judge of the High court in 2003 and he could therefore not proceed to conduct this or any case as an advocate a fact he did not inform them and neither did the court nor the interested parties' advocate and he went to the court registry to make inquiries, the result of which startled him. That this matter came up on a few occasions such as 4/5/2004 and 21/9/2004 when Ms. P. Osotsi, advocate for the interested parties undertook to serve them personally now that they had no advocate which she did not do and this matter was then dismissed for want of prosecution on 7/7/2015 in the absence of all the parties notwithstanding the absence of an affidavit of or any evidence of service upon any of the parties for that date and he immediately instructed M/s. Akwala & Co. Advocates to take up this matter. That they, the ex parte applicants, were never served for 7/7/2015 when this matter was dismissed.

The respondent opposed the application on the following grounds that the application is misplaced and an abuse of the court process by the ex parte applicants. That the ex parte applicants were indolent in prosecuting their application. That the delay in prosecuting the application was inordinate, unexplained and therefore inexcusable. That the ex parte applicants have not satisfied the conditions for the grant of the orders sought.

This court has considered the application and the submissions herein. I have carefully perused the court file. This matter was dismissed way back on the 7th July 2015. This application has been filed on the 22nd May 2018 almost three years later. This delay is inexcusable and inordinate and the reasons given unacceptable. I find that the applicant was indolent in prosecuting his application.

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. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE