



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 302 OF 2017**

**KAKUZI LIMITED.....APPLICANT**

**VS**

**SAMUEL MUNGAL.....1<sup>ST</sup> RESPONDENT**

**JULIUS KARANJA.....2<sup>ND</sup> RESPONDENT**

**JOYCE NYOKABI.....3<sup>RD</sup> RESPONDENT**

**(all sued in their capacities as officials And Representatives of**

**GATHUNGURURU SUBLOCATIONS ROAD DEVELOPMENT**

**& REHABILITATION COMMITTEE/SELF HELP GROUP)**

**RULING**

1. The Applicant filed the Notice of Motion dated 27/4/18 under Order 51 rule 1(1), Order 50 rule 6 of the Civil Procedure Rules, Section 3A and 63e of the Civil Procedure Act and Article 159(2)(d) of the Constitution of Kenya seeking the following orders;

- a. That the Court do review and set aside the orders made /direction given on 25/1/2018 in the matter and reinstate the suit to proceed to hearing.
- b. In the alternative the Court does extend the time within which to set down and prosecute the suit beyond the time set on the 6/3/12 and the orders of 6/3/12 be set aside
- c. Costs of the application.

2. The application is based on the grounds *inter alia* that the Court on 6/3/12 ordered that the matter be prosecuted within 60 days in default it stands dismissed. That in pursuance of compliance with the said order the plaintiff filed documents in compliance with Order 11 on the 3/5/12 which was within the 60 days given by the Court. Thereafter the plaintiff took steps to invite the defendants to take hearing dates in vain. That subsequently the matter came up on several dates to with the 6/3/12, 29/11/12, 9/7/13, 29/7/14 and 23/1/17 and the issue of the suit having been dismissed was never raised by the Court. The plaintiff urged the Court to set aside its orders of 25/1/2018 and or in the alternative extend the orders of 6/3/12 and allow the matter to be heard on its merits.

3. The application is supported by the supporting affidavit of one Charles Mwathi Njagi, counsel for the Plaintiff who has deponed that he is seized of the conduct of the matter. He reiterated the grounds set out in para 2 above and gave a chronology of the matter from the 6/3/12 when the orders were issued by the honorable Court. In summary he emphasized the plaintiff's willingness to have the matter heard on its merits and urged the Court to grant it the opportunity to so prosecute the case to conclusion and on its merits.

4. The Plaintiff has filed written submissions which I have read and carefully considered. The Respondents though served have not filed any response to the application. It is therefore undefended.

5. The background leading to the application is important as the starting point. This suit was filed in Court in 2005. According to the record the Court issued a Notice to show cause on the 3/2/12 as to why the suit should not be dismissed. On the 6/3/12 the Plaintiff tendered an explanation to the effect that the delay in prosecuting the matter arose from the delay in tracing the file which at that time had been found. The Applicant undertook to prosecute the matter without any further delay. The Court ordered that the suit be set down for hearing within 60 days from the 6/3/12 in default the same stood dismissed. On the 3/5/12 the Applicant filed documents in compliance of order 11. Thereafter

two attempts to invite the Respondents to fix a hearing were made in vain; this was on the 18/5/12 and 29/1/13. Ultimately on the 9/7/13 the matter came up before the Court when it was certified ready for hearing and the parties were directed to take dates at the Registry for hearing. No action would take place until the 23/12/16 when the Court ordered personal service on the Respondents of the hearing notice. Finally, it was transferred to this Court on the 13/3/17 and on the 25/1/18 when on perusal of the file it was noted that the orders of the 6/3/12 were still in force and the Court observed that the matter stood dismissed in accordance with those orders.

6. From the chronology of the case it is clear that by the 6/5/12 within which time the matter should have been set down for hearing no hearing date had been fixed. It is also clear that the Applicant did not bring to the attention of the Court subsequently the orders of the 6/3/12 and it would appear that the matter proceeded as though the orders of 6/3/12 did not exist.

7. The Applicant has sought review of the orders of 25/1/2018 on the ground that it was made on the basis of an error apparent on the record. Review of orders and decrees is governed by section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Going by those provisions I am satisfied that review is not available to the Applicant as no new material has been placed before this Court nor any error on the face of the record was pointed out. The order of the Court of 6/3/12 was clear; set down the case for hearing within 60 days in default of which the case stood dismissed. This Court just pointed out to the parties an existing order on record. My interpretation of this order is that setting down the matter for hearing is to fix a hearing date. None was fixed by the 60<sup>th</sup> day which was the 6/5/12. The 60 days window was to allow the parties to attend to the preliminaries towards the fixing of the matter for hearing so much so that filing of documents in compliance with Order 11 nor inviting the Respondents to fix the hearing date does not amount to fixing the date for hearing.

8. Is the application for setting aside the orders of the 6/3/12 merited? The Applicant has given the reasons as to why the delay in setting down this matter for hearing and has appealed to the Court to set aside the said dismissal orders and/or extend the time for setting down the matter for hearing. The Court in exercise of its powers under Article 159 (2) (d) of the Constitution and in upholding its role to do substantive justice to the parties is inclined to grant the application. The Court has considered that this case was filed in 2005 and it is in the interest of justice that the parties have their day in Court. The application has not been opposed by the Respondents and the Court is satisfied that no prejudice will be visited on them if the matter is heard on its merits.

9. The application is allowed subject to payment of costs of the application by the Applicant.

10. The Court hereby directs the Applicant to fix the matter for hearing within the next 30 days failure to which this matter shall stand dismissed.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29<sup>TH</sup> DAY OF NOVEMBER 2018.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff/Applicant – Absent

Respondents/Defendants; 1

2 Absent

3

Irene and Njeri, Court Assistants