



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC [CIVIL APPEAL] CASE NO 75 OF 2017

FORMERLY MERU ELC [CIVIL APPEAL] CASE NO. 111 OF 2013

JOSEPH MIIRU KIRUMPU.....1ST APPELLANT

KITHINJI MUTITHI.....2ND APPELLANT

MURITHI MUTITHI.....3RD APPELLANT

VERSUS

VERONICA GATARU GERRALD.....RESPONDENT

RULING

1. This application which is dated **22.8.2018** states that it has been brought to court under Sections 1A, 1B and 3A of the Civil Procedure Act and under Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:-

1. That this honourable court be pleased to set aside the order for dismissal of the appeal dated 25th July, 2017 and reinstate the appeal for hearing on merit.

2. That the costs of this application be in the cause.

2. The application is supported by the affidavits of KITHINJI MUTITHI AND MURITHI MUTITHI and has the following grounds:

1. That the appeal filed herein was dismissed on 25th July, 2017 for want of prosecution.

2. That the 2nd & 3rd appellants were not in court on 25th July, 2017 when the appeal was dismissed for want of prosecution.

3. That the 2nd & 3rd appellants were aggrieved with the orders issued on 25th July, 2017 dismissing the appeal for want of prosecution.

4. That the 2nd appellant was indisposed and admitted in hospital at Gatunga Mission Health Centre on 25th July, 2017 when the appeal was dismissed for want of prosecution.

5. That the 3rd appellant did not attend court on 25th July, 2017 when the appeal was dismissed for want of prosecution as he had gone to check/visit his brother, the 2nd appellant who was seriously sick and admitted at Gatunga Mission Hospital Centre.

6. That the 2nd & 3rd appellants had a good reason/cause as to why they had not prosecuted the appeal since the year 2011 when it was filed.

7. That the 2nd & 3rd appellant were not notified and/or were not aware when the appeal was transferred from Provincial Appeals Committee to Meru ELC Court and thereafter to Chuka ELC Court and was therefore unable to expeditiously prosecute the appeal.

8. That the 2nd & 3rd appellants are desirous of having the appeal heard and determined.

9. That the 2nd & 3rd appellants will expeditiously prosecute the appeal incase the same is reinstated for hearing on merit.

10. That the 2nd & 3rd appellants stand to suffer substantial and irreparable loss unless the appeal herein is reinstated for hearing on merits. The appeal herein relates to 2nd & 3rd appellants' parcel of land where they reside with their family and which they rely on for their livelihood.

11. That it is proper and in the interest of justice that the orders sought herein be granted so that the appeal can be heard on merits in order for the parties to obtain substantive justice.

12. That the appeal has high chances of success.

13. That the respondent shall not be prejudiced in any manner.

3. The supporting affidavit filed by 1st Appellant states:

I, KITHINJI MUTITHI of P. O. BOX 4 Gatunga in the Republic of Kenya do hereby make oath and state as follows:

1. That I am the 2nd appellant herein, well versed with facts deponed to herein below, hence competent to swear this affidavit.

2. That the appeal filed herein was dismissed on 25th July, 2017 for want of prosecution.

3. That I was not in court on 25th July, 2017 when the appeal was dismissed for (sic) as I was indisposed and admitted at Gatunga Mission Health Centre (Annexed hereto and marked KM1 as annexure KM1 is a copy discharge of summary sheet)

4. That I was aggrieved with order issued on 25th July, 2017 dismissing the appeal for want of prosecution.

5. That the appeal herein was initially filed at Eastern Provincial Appeals Committee.

6. That the Provincial Appeals Committee was disbanded before the appeal could be heard after repeal of the Land Dispute Tribunal Act, 1990.

7. That after disbandment of the Provincial Appeals Committee I visited the office of Provincial Commissioner Eastern Province and was told the appeal file was going to be taken to Meru ELC Court for hearing and determination and that I would be informed when the appeal file is transmitted to Meru ELC Court.

8. That I was not notified when the appeal file was transmitted to Meru ELC Court from the office of Provincial Commissioner Eastern Province.

9. That I was also not notified when the appeal was transferred from Meru ELC Court to Chuka ELC Court.

10. That I did not expeditiously prosecute the appeal herein as I was not notified when the appeal file was transmitted from the office of Provincial Commissioner Eastern Province to Meru ELC Court and thereafter to Chuka ELC Court.

11. That had I been notified that the appeal had been transferred to Meru ELC Court and thereafter to Chuka ELC Court I would have expeditiously set down the appeal for hearing and determination.

12. That I will expeditiously prosecute the appeal in case the same is reinstated for hearing on merits.

13. That I am desirous of having the appeal heard and determined.

14. That sometimes in August, 2017 I was misled/misinformed by the 1st appellant herein that our appeal was allowed on 25th July, 2017.

15. That I came to learn that the appeal was dismissed for want of prosecution on 28th July, 2018 when Land Adjudication Officer from Marimanti visited the parcels of land in issue and the respondent showed us a copy of the court order dismissing the appeal (annexed hereto and marked as annexure KM2 is a copy of the court order dated 25th July, 2017).

16. That unless the orders sought herein are granted, I stand to suffer substantial and irreparable loss as the appeal relates to a parcel of land where I reside with my family and which I rely on for my livelihood.

17. That the appeal has high chances of success.

18. That it is in the interest of justice the orders sought herein be granted so that the appeal can be heard on merits in order for the parties herein to obtain substantive justice.

19. That this application has been filed without unreasonable delay.

20. That the respondent will not be prejudiced in any manner if the orders sought herein are granted.

21. That I swear this affidavit in support of the application to which it is annexed.

22. That what is deponed to herein is true to the best of my knowledge, information and belief.

4. The supporting affidavit filed by the 3rd appellant states:

I, MURITHI MUTITHI OF P. O. BOX 4 Gatunga in the Republic of Kenya do hereby make Oath and states as follows:

1. That I am the 3rd appellant herein, well versed with facts deponed to herein below, hence competent to swear this affidavit.

2. That the appeal filed herein was dismissed on 25th July, 2017 for want of prosecution.

3. That I was not in court on 25th July, 2017 when the appeal was dismissed as I had gone to visit and take some medicine to the 2nd appellant who is my brother and who was seriously sick and admitted in hospital at Gatunga Mission Health Centre.

4. That I had told the 1st appellant herein to inform the court on 25th July, 2017 that I could not attend court as I had gone to visit and take medicine to the 2nd appellant who is my brother and who was indisposed and admitted at Gatunga Mission Health Centre.

5. That I had also told the 1st appellant herein to inform the court on 25th July, 2017 that the 2nd appellant could not attend court on 25th July, 2017 as he was indisposed and admitted in hospital at Gatunga Mission Health Centre.

6. That I was aggrieved with order issued on 25th July, 2017 dismissing the appeal for want of prosecution.

7. That the appeal herein was initially filed at Eastern Provincial Appeals Committee.

8. That the Provincial Appeals Committee was disbanded before the appeal could be heard after repeal of the Land Dispute Tribunal Act, 1990.

9. That after disbandment of the Provincial Appeals Committee I visited the office of Provincial Commissioner Eastern Province and was told the appeal file was going to be taken to Meru ELC Court for hearing and determination and that I would be informed when the appeal file is transmitted to Meru ELC Court.

10. That I was not notified when the appeal file was transmitted to Meru ELC Court from the office of Provincial Commissioner Eastern Province.

11. That I was also not notified when the appeal was transferred from Meru ELC Court to Chuka ELC Court.

12. That I did not prosecute the appeal expeditiously herein as I was not notified when the appeal file was transmitted from the office of Provincial Commissioner Eastern Province to Meru ELC Court and thereafter to Chuka ELC Court.

13. That had I been notified that the appeal had been transferred to Meru ELC Court and thereafter to Chuka ELC Court I would have expeditiously set down the appeal for hearing and determination.

14. That I am desirous of having the appeal heard and determined.

15. That I will expeditiously prosecute the appeal in case the same appeal is reinstated for hearing on merits.

16. That sometimes in August, 2017 I was misled/misinformed by the 1st appellant herein that our appeal was allowed on 25th July, 2017.

17. That I came to learn that the appeal was dismissed for want of prosecution on 28th July, 2018 when Land Adjudication Officer from Marimanti visited the parcels of land in issue and the respondent showed us a copy of the court ruling dismissing the appeal (Annexed hereto and marked as annexure MM1 is a copy of the court ruling dated 25th July, 2017).

18. That unless the orders sought herein are granted, I stand to suffer substantial and irreparable loss as the appeal relates to a parcel of land where I reside with my family and which I rely on for my livelihood.

19. That the appeal has high chances of success.

20. That it is in the interest of justice that the orders sought herein be granted so that the appeal can be heard on merits in order for the parties herein to obtain substantive justice.

21. That the respondent will not be prejudiced in any manner if the orders sought herein are granted.

22. That I swear this affidavit in support of the application to which it is annexed.

23. That what is deponed to herein is true to the best of my knowledge, information and belief.

5. The application was heard on 25th October, 2018 when the 2nd and 3rd appellants' advocate, Mr. Gitonga, told the court that the 2nd Appellant was hospitalized on the day the suit was dismissed. He then told the court that the 3rd Appellant did not come to court because he had gone to the hospital to see his hospitalized brother. He then went on to tell the court that the 2nd and 3rd Appellants were never informed when the appeal was moved from the Provincial APPEALS Committee at Embu to Meru and when it was eventually transferred from Meru to Chuka.

6. The respondent opposed reinstatement of the suit. She told the court that she had won all previous disputes. She told the court that the applicants were punishing her because she was a poor old lady.

7. I have considered the parties diametrically opposed positions.

8. I dismiss the applicants' assertion that they were not informed when this suit was transferred from Embu to Meru and eventually from Meru to Chuka. It is always the appellants' or plaintiffs' duty to prosecute their suits diligently. It was the duty of the applicants to follow up developments in their appeal.

9. The appellants have not satisfactorily explained why they did not come to court to show cause why the suit should not be dismissed on 25th July, 2017. One says that he was in hospital. The other one says that he could not come to court because he had gone to visit the hospitalized one. The 2nd appellant should have come to court to give this explanation. I find that this is not a satisfactory reason regarding why this suit should be reinstated.

10. I have had a look at the 1st applicant's photocopy of a Discharge Summary Sheet dated 23.7.2017 said to have been issued by Gatunga Mission Health Centre. Although the discharge summary is dated 23rd July, 2018, it shows that he was discharged on 8th August, 2017, thus suggesting that it was issued at least two weeks before he was discharged.

11. The explanation in the applicants' affidavit that they were misled by the 1st Appellant that their appeal had been allowed on 25th July, 2017 is veritably tendentious. If indeed, the 1st appellant had told them that they had won their appeal, the normal thing to do would have been for them to joyously rush to court to extract the orders issued in their favour. They would not have waited for over one year to learn that their suit had been dismissed. I find the explanations offered by the applicants unsatisfactory and hereby dismiss this application.

12. On account of two important issues, this suit merits dismissal. Section 8 subsection 9 of the Lands Disputes Tribunals Act states as follows:-

a) Subsection 9: Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved."

13. It is pellucid that no judge had certified that an issue of law, other than customary law, was involved. It is clear that this appeal had not been heard and concluded by the Appeals Committee. This means that this appeal was not properly before this court. As the Supreme Court of Kenya opined in the case of Samuel Kamau & Another versus Kenya Commercial Bank & Another, Supreme Court Civil Application No. 2 of 2011:

"A court's jurisdiction follows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings".

14. In the circumstance, I find that this application lacks merit and is hereby dismissed.

15. It is so ordered.

Delivered in open court at Chuka this 20th day of November, 2018 in the presence of:

CA: Ndegwa

Joseph Miiro Kirumpu – 1st Appellant

Kithinji Mitithi – 2nd Appellant

Murithi Mutithi – 3rd Appellant

Veronica Gataru Gerald - Respondent

P.M. NJORGE

JUDGE