



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 05 OF 2018

JULIUS MBAKA.....APPLICANT

VERSUS

NAIVASHA KUREIYA.....1ST RESPONDENT

JANE CIANJOKA GANCENGU MWIANDI

ALIAS JANE CIANJOKA MWIANDI...2ND RESPONDENT

DOROTHY KAGENDO MWINDI (BEING SUED AS

LEGAL REPRESENTATIVE IN THEIR CAPACITY AS

WIDOWS OF THE DECEASED).....3RD RESPONDENT

RULING

1. This application states that it has been brought to court under order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedures Rules; Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of The law. It is dated **23rd October, 2018** and seeks the following orders:

1. That the court be pleased to set aside or vary the order made herein on 2nd October, 2018 dismissing this suit for non-attendance of parties.
2. That the suit be re-instated and set down for hearing.
3. That costs of this application be provided for.

2. The application has the following grounds:

1. That the applicant was in the wrong court (in the High Court) and his advocate was at the registry filing affidavit of service when the matter was called out by this honourable court.
2. That the applicant has been vigilant in prosecuting this matter and the matter was at one time partly-heard before Justice Makau in Meru High Court, who transferred it to ELC Court in Meru because it is a land matter.
3. That the matter was transferred to Chief Magistrate Court in Chuka at the instance of the 1st respondent's counsel on record.
4. That my advocate applied for transfer of the matter to this court from the lower court with concurrence of counsel of the other parties after they realized that the lower court did not have jurisdiction over a suit involving adverse possession.
5. That the applicant is still interested in the suit and he will suffer injustice if the suit is not re-instated.
6. That the applicant has never failed to attend court since he matter was filed.
7. That the applicant has not contributed to the delay in hearing and conclusion of the matter.

3. The application is supported by the affidavit of Julius Mbaka, the applicant, sworn on **30th October , 2018** which states:

I, JULIUS MBAKA a resident of Chuka do hereby make oath and state as follows:

1. That I am the applicant in this suit and competent to swear this affidavit.
2. That this suit concerns adverse possession of a piece of land that I have occupied since 1960.
3. That the matter was filed in the High Court at Nairobi but was transferred to the High Court in Meru at the instance of the counsel for the 1st Respondent, Mr. A. Riungu since the land is in Chuka.
4. That the matter delayed in Meru due to the work load and backlog of cases.
5. That on 20th September, 2018, I was in the wrong court (in the High Court, which is next to this court) and my advocate was at the registry to file affidavit of service when the matter was called out by this honourable court.
6. That I went to the wrong court because I saw Mr. A. Riungu, advocate and his client Mr. Naivasha Kureiya, the 1st Respondent, and the 2nd and 3rd Respondents all in that court and I thought the matter was being heard there.
7. That I am semi-illiterate and that is the reason why I got confused and went to that court.
8. That my advocate, Mr. Ochieng' Ogotu had travelled from Nairobi, where his office is based, that morning and he arrived here in Chuka some minutes to 9 am. We met and he advised me to go to court and wait for him there as he went to file affidavit of service at the registry but unfortunately I went to the wrong court.
9. That my advocate has informed me, which information I verify believe to be true that the affidavit of service he went to file was in respect of the service that had been effected on the 2nd and 3rd Respondents' advocate, Mr. Mtwiri.
10. That my advocate has further informed me, which information I verify believe to be true that he talked to Mr. Mtwiri, advocate that morning and Mr. Mtwiri informed him that he was sending his clerk to court as he could not attend in person.
11. That after my advocate had realized that the matter had already been called out in our absence, he looked for the court clerk who informed us that the matter had been given a ruling date for 2nd October, 2018 and we should just wait for the date.
12. That I then applied for copy of ruling on 3rd October, 2018 on the advice of my advocate and the same was supplied to me on 4th October, 2018. Annexed hereto and marked as exhibit JM – 1 (a), (b) and (c) are the request letter, copy of Ruling and payment receipt respectively.
13. That I thereafter travelled to Nairobi to discuss the matter with my advocate and he advised me that this application be filed. And the application has been filed without undue delay.
14. That I have been vigilant in prosecuting this matter and the matter was at one time part-heard before Justice Makau in Meru High Court but the honourable Judge transferred it to ELC Court in Meru because it is a land matter.
15. That the matter was transferred to the Chief Magistrate Court in Chuka at the instance of the 1st Respondent's counsel on record in the absence of my advocate. I did not apply for transfer of the matter to the Chief Magistrate's Court in Chuka.
16. That my advocate applied for transfer of the matter to this court from the lower court with concurrence of counsel of the other parties after they realized that the lower court did not have jurisdiction over a suit involving adverse possession.
17. That I am still interested in the suit and I will suffer injustice if the suit is not re-instated and disposed of on the merits.
18. That I have never failed to attend court since I filed this matter sixteen (16) years ago, and I was present in court on 20th September, 2018 though in the wrong court room as already explained.
19. That my failure and the failure of my advocate to be in court when the matter was called out was not deliberate.
20. That I have not contributed to the delay in hearing of the matter.
21. That I have waited for justice for sixteen (16) years and I plead with the court to allow me prosecute the matter to conclusion.
22. That for the above reasons I pray that the matter be reinstated so that I can get justice.
23. That what I have deponed hereto is true to the best of my knowledge, information and belief.

4. The application was opposed through the replying affidavit sworn by Dorothy Kagendo, the 3rd defendant, on 11th November, 2018. It states:

I, DOROTHY KAGENDO of P. O. Box 44 Chuka do hereby swear and state as follows:

1. That I am the 3rd respondent duly authorized by the 2nd respondent to swear this affidavit.
2. That the applicant has not offered sufficient reasons for orders sought.
3. That the applicant has not made a reasonable explanation for his absence in court on the material day.
4. That the judge exercised his discretion appropriately and judiciously and there is no justification for setting aside the orders made.
5. That the matter is very old having passed through the hands of several judges both at Meru and Chuka courts.
6. That my co-respondent and I are very elderly widows of the deceased to whom these proceedings relate.
7. That actually we are wrongly sued since we are not administrators (administratrix) of the estate of the deceased Mwiandi Muruu.
8. That I swear this affidavit in opposition to the application dated 23rd October, 2018.
9. That the facts herein above are true to the best of my knowledge, belief and information.
5. The application was heard interpartes on **20th November, 2018**.
6. Mr. Ogutu, the applicant's advocate told the court that he relied on the grounds on the face of the application and on its supporting affidavit. He told the court that the main reason why the plaintiff was not in court was because he had gone to the wrong court where he had found Mr. Riungu, the 1st respondents advocate with his client and the 2nd and 3rd respondents. He told the court that this matter has over time been transferred from Meru ELC to Chuka magistrates courts and eventually to Chuka ELC Court since this suit involved a claim for adverse possession. He told the court that the plaintiff was desirous to have the suit prosecuted timeously.
7. Advocates representing the 1st and 2nd respondents asked the court to exercise its discretion to make its decision.
8. I note that in the applicant's supporting affidavit at paragraph 5 he avers that he went to the wrong court whereas his advocate was at the registry to file an affidavit of service when this matter was called out. At paragraph 8 he avers that his advocate had arrived in Chuka some minutes to 9.00am and that he advised him to go to court and wait while he was filing the aforementioned affidavit of service.
9. I have considered the pleadings filed by the applicant and by the 3rd respondent. I also note that the advocates representing the 1st, 2nd and 3rd respondents left it to the discretion of the court to make its decision. I also note that the applicant's advocate has told the court that because the 1st and 2nd defendants had not filed replying affidavits, his application, had therefore, not been opposed.
10. I do not agree with the assertions made by the applicant in his supporting affidavit that he had gone to the wrong court. The court he is referring to is next to the ELC Court. As such when the suit was called on outside court, he could have heard his name being called out. It also appears to me rather phasmagoric that Mr. Riungu who frequently appears before the ELC Court could have taken his client, the 1st Respondent to the wrong court.
11. There is also the issue of the applicant's advocate. If he was at the registry as he and his clients claim, then at one point he would have come to court. Advocates know that courts normally commence business at 9.00am. There is no excuse why he was not in COURT AT 9.00AM. If he came to court later, as an officer of the court, he should have alerted the court concerning the dismissal and moved it accordingly. I find the facts as narrated by the applicant and his advocate unconvincing and veritably unsatisfactory.
12. In the circumstances, I decline to set aside or vary this court's dismissal order issued on **2nd October, 2018**.
13. The application is dismissed with no order as to costs.
14. It is so ordered.

Delivered in open court at Chuka this **19th day of December, 2018** in the presence of:

CA: Ndegwa

Applicant/Plaintiff and Advocate Absent

Linus Ndung'u, h/b Riungu for 1st Defendant

P.M. NJORGE

JUDGE