



**Shiroya v Luka & 2 others (Environment & Land Case E004 of 2023)
[2024] KEELC 1057 (KLR) (29 February 2024) (Ruling) (with dissent)**

Neutral citation: [2024] KEELC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E004 OF 2023
DO OHUNGO, J
FEBRUARY 29, 2024**

BETWEEN

ERNEST MILIKAO SHIROYA PLAINTIFF

AND

TOMAZ MUONGO LUKA 1ST DEFENDANT

RICHARD MUSEBE ONYANGO 2ND DEFENDANT

LAETITIA MULAMULA 3RD DEFENDANT

RULING

1. This suit was filed in the High Court at Kakamega 3rd April 2000, as Kakamega HCC No. 60 of 2000. It was later dismissed by the said court on 20th April 2015, for want of prosecution. Subsequently, the plaintiff filed Notice of Motion dated 15th April 2021, seeking setting aside of the order of dismissal. The matter was transferred to this court on 6th July 2023, pursuant to an order made by S Chirchir, J. The reason for the transfer was that the High Court lacked jurisdiction since the suit concerns cancellation of title to land.
2. Notice of Motion dated 15th April 2021 is supported by an affidavit sworn by the Plaintiff. He deposed that neither him nor his advocate was aware of the dismissal of 20th April 2015 and that he was condemned unheard. He added that the delay in prosecuting the matter was occasioned by the Defendants who constantly evaded service.
3. The defendants opposed the application through a replying affidavit sworn by the Second Defendant. He deposed that the present application was filed six years after the dismissal and that there was a delay of fifteen years in prosecuting the suit besides a delay in prosecuting the present application. He added that reinstatement of the suit would be prejudicial to the Defendants.



4. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits, and the submissions. The sole issue for determination is whether the orders sought should issue.
5. When considering an application such as the present one, the court exercises discretion pursuant to the principles laid down in *Mbogob & Another v. Shah* [1968] EA 93 and reiterated in *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to prosecute the suit, the length of time that has elapsed since the order sought to be set aside was made, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
6. A perusal of the record shows that prior to dismissal of the suit, the last step taken in the matter by the Plaintiff was on 12th October 2009 when his advocate fixed an application dated 10th July 2009 for hearing on 4th March 2010. No other step was taken by the Plaintiff until the suit was dismissed on 20th April 2015, over five years later. Even after the dismissal, the Plaintiff took no step until 20th September 2021, when he filed the present application over six years later. The application itself is dated 15th April 2021, an indication that even after its preparation, it was not filed until after over five months later. The delay between 12th October 2009 and 20th September 2021 is a staggering twelve years, hence inordinate. The explanation given is unacceptable and does not aid the Plaintiff. If indeed the Defendants were constantly evading service personal service, the Plaintiff should have immediately moved the court for an order allowing substituted service. That he did not do so is testimony that such allegations are but afterthoughts.
7. I find no merit in Notice of Motion dated 15th April 2021 and I therefore dismiss it with costs to the Defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff/Applicant

Ms Wambani for the Defendants/Respondents

Court Assistant: E. Juma

