



**Ndwiga v Mwaniki & another (Environment & Land Case
177 of 2014) [2025] KEELC 3079 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 3079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 177 OF 2014
AK BOR, J
FEBRUARY 26, 2025**

BETWEEN

PAUL NDWIGA PLAINTIFF

AND

KIBOI MWANIKI 1ST DEFENDANT

MURIGO MINARI 2ND DEFENDANT

RULING

1. The Plaintiff brought the application dated 31/10/2024 seeking to have the orders issued on 15/10/2021 set aside or reviewed. From the court record, there does not seem to be any order issued on that date. The court notes that an order was issued on 25/10/2021 which from the substance of the application, is presumably what the Plaintiff is referring to in his application. The order of 25/10/2021 dismissed the suit for want of prosecution.
2. The present application was made on the grounds that the Plaintiff was not aware that the matter was in court that day and that his advocate failed to continue with the matter and so he should not be punished for his advocate's mistakes. The Plaintiff swore the affidavit in support of the application.
3. The issue for determination is whether the court should set aside or review the order issued on 25/10/2021. Order 12 Rule 7 of the Civil Procedure Rules provides that where under that Order judgment has been entered or a suit has been dismissed, the court may set aside or vary the judgment or order upon such terms as may be just.
4. It is necessary to give a background of the events which led to dismissal of the suit for want of prosecution. The suit was initially filed in Kerugoya on 11/8/2014 but was transferred to Embu on 5/11/2014. It came up for mention on 21/1/2016 and the court directed that the application dated 8/10/2014 to substitute the dead 2nd Defendant would be heard on 29/3/2016. On that day, the court allowed the application which was unopposed. Since then, no action was taken until the court issued



a notice parties were to show cause on 14/4/2021 why the suit should not be dismissed for want of prosecution.

5. On 14/4/2021 the Plaintiff's advocate was present and sought time to comply with Order 11 which was granted by the court. The matter was set down for mention on 7/6/2021 but none of the parties appeared in court. The court issued another mention date for 8/6/2021 and again no party attended court. Another mention date for 25/10/2021 was given and the court directed that both sides were to be served by the court registry and yet again, no party was present in court. The court dismissed the suit for want of prosecution after noting that both parties were notified of the mention date. This is what prompted the Plaintiff to file the present application in person.
6. The grounds relied on by the Plaintiff are that he was not aware that the matter was in court on the day the suit was dismissed. He also blames his advocate for failing to follow up on the matter leading to its dismissal. However, it is clear from the court record that the Plaintiff's claim is not true as both parties were notified through their advocates of the mention date.
7. The Plaintiff cannot be heard to blame his advocate for failing to follow up on his matter for the case belongs to the litigant and not the advocate. It is the duty of the litigant to follow up on the progress of his case and not simply blame his advocate. In *Neeta Gohil v Fidelity Commercial Bank Limited* [2019] KEHC 9133 (KLR), Kimaru J. (as he then was) stated that whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her advocate's failure to attend court on the date when the application was fixed for hearing, it was trite that a case belonged to a litigant and not to her advocate. That a litigant had the duty to pursue the prosecution of her case. Further, that the court could not set aside the dismissal of a suit on the solely on the ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. The court went on to state that it was the duty of the litigant to constantly check with her advocate the progress of her case.
8. The Plaintiff has been indolent as can be seen in the proceedings of this case and his past conduct in prosecuting his case. His suit was dismissed on 25/10/2021 but it took him three years to realise that the suit had been dismissed and for him to bring the present application. The delay is inordinate more so because the suit was filed in 2014. No steps were ever taken to set down the suit for hearing.
9. The duty of the court is to do justice between the parties, Section 1B of *Civil Procedure Act* enjoins the court to ensure that there is just determination, effective and timely disposal of proceedings and effective use of judicial time and resources.
10. The Plaintiff has not explained why he failed to take steps to prosecute his case. This is not a case where the court ought to exercise its discretion in favour of the Plaintiff.
11. On the prayer for orders of review, this would be granted if there was discovery of new matter or compelling evidence that was not available at the time of the order, when there is an apparent error or mistake on the face of the record or for any other sufficient reason. The Plaintiff has not demonstrated any of the above grounds to warrant a review of the court's decision.
12. The other relevant point is that the Plaintiff's claim for adverse possession was doomed to fail from the outset since the 1st Defendant died in 1992 while the 2nd Defendant died in 1995. A suit cannot be filed and sustained against a dead person.

The application dated 31/10/2024 is hereby dismissed.

The court makes no orders as to costs.

DELIVERED VIRTUALLY AT EMBU THIS 26TH DAY OF FEBRUARY 2025.



K. BOR

JUDGE

In the presence of: -

Mr. Paul Ndwiga- Plaintiff in person

No appearance for the Defendants

