



Nyamwaya (Suing for and on Behalf of the Estate of the Late Catherine Kwamboka Nyamwaya) v Mokuia (Environment & Land Case 11 of 2021) [2024] KEELC 7162 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 11 OF 2021
JM KAMAU, J
OCTOBER 31, 2024**

BETWEEN

**LAMECK MAGOMA NYAMWAYA PLAINTIFF
SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE CATHERINE
KWAMBOKA NYAMWAYA**

AND

PAUL NYANGARESI MOKUA DEFENDANT

RULING

1. This suit was filed on 21/6/2010 at Kisii before it was transferred to this Court vide the order of Lady Justice Jane M. Onyango dated 25/8/2021. The Plaintiff sued for and on behalf of the Estate of Catherine Kwamboka Nyamwaya, the registered owner of the parcel of land known as L.R. No. Matutu Settlement Scheme/304. Prior to filing the suit, the Petitioner had been granted the Letters of Administration Ad Litem in respect to the Estate of on 25/5/2010 in Kisii High Court Succession Cause No. 231 of 2010, almost a month earlier. It is the Plaintiff's contention that the Defendant, a neighbour owning Matutu Settlement Scheme/305 has encroached onto the Plaintiff's parcel of land aforesaid and thereby destroyed the fence, demolished shop, a rental house, toilets, a store, a kitchen, plants and also started ploughing the land belonging to the deceased and also erected a fence deep inside the said land. The Plaintiff therefore came to Court for orders against the Defendant for:-
 - a. Eviction of the Defendant from Matutu Settlement Scheme/304.
 - b. Compensation for the losses incurred by the Estate.
 - c. A permanent injunction restraining the Defendant from interfering with Matutu Settlement Scheme/304 in any manner whatsoever.



- d. Costs of the suit.
2. On 9/10/2023, the firm of Rogito Isaboke and Co. Advocates was appointed to act for Paul Nyangaresi Mokusia, the Defendant herein.
 3. On 11/11/2015, the suit was dismissed for want of prosecution following the issue of a Notice under Order 17 Rule 2(1) of the Civil Procedure Rules. Later on, on 19/7/2017 the Plaintiff filed an Application asking the Court to reinstate the dismissed suit under Order 10 Rule 11 of the Civil Procedure Rules. The grounds advanced are that at one time, the file went missing and after futile efforts to trace it the Plaintiff realized that the suit had been dismissed and that the Plaintiff is desirous to concede the suit expeditiously. As he alleged, neither the Plaintiff nor his Advocate had been served with the Notice prior to the dismissal of the suit hence he was condemned unheard. The same was reinstated on 26/9/2017 on condition that the Plaintiff pays to the Defendant as thrown away costs of kshs.5,000/= within 45 days.
 4. On 16/11/2021 the case was once again dismissed with costs for non-attendance. This followed failure to attend Court by the Plaintiff and his Advocate on 28/11/2019 having taken a date in the Registry on 28/3/2019, on 8/6/2020, on 5/11/2020, on 9/2/2021, on 21/9/2021, on 4/10/2021 and lastly on 16/11/2021 when none of the parties turned up and the matter was dismissed for non-attendance. 2 years 4 months later, on 16/2/2024 the Plaintiff filed an Application dated 15/2/2024 asking the Court to discharge its orders of 16/11/2021 and reinstate the suit. He pleaded that the hearing date had been given in Court in the presence of the Donee of the Plaintiff's Power of Attorney but in the absence of his Counsel and that the Plaintiff did not inform his Advocate as he was hospitalized soon thereafter. He attached documents to show that he was indeed admitted in hospital from time to time. By this time, Evans Nyagwoi Nyakinda had been given the Power of Attorney by the Plaintiff, registered in the Lands Office on 26/11/2019. This was brought to the attention of the Court on 28/11/2019 and the reason given for the donation of the Power of Attorney was that the Plaintiff was out of the country. It was not indicated he was to be there for how long.

This Application was not opposed.

5. Mr. Okenye has urged the Court to follow the case of Mbogo and Another vs. Shah EALR 1908 to show that the Court has a wide discretion to set aside ex parte orders of dismissal in order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. But this discretion has a rider. The discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the cause of justice. The Court regrets that the Plaintiff's Donee of Power of Attorney in this case fell sick immediately after leaving Court on 16/11/2021. But no explanation is given as to why he had failed to turn up in Court on a number of times prior to this date. Secondly, the Donee, Evans Nyagwoi Nyakinda has no interest in the suit property. The person who has the interest is the Plaintiff Mr. Lameck Magoma Nyamwaya and although he is said to be out of the country, the Court cannot understand how he can entrust the Donee of the Power of Attorney everything to do with the case without asking for a feedback or update. He also has an Advocate. While the said Evans Nyagwoi Nyakinda the Advocates for the Plaintiff should have visited the Court Registry to find out the status of the matter. It ought to be recalled that this is the second time that this case has been dismissed for inaction on the part of the Plaintiff. Earlier on, the Plaintiff claimed that the file had gone missing. He did not show the efforts he made to look for the file. And although that is now water under the bridge, when going through the file I came across the letter dated 10/11/2017 from the Deputy Registrar, High Court Kisii with the following remarks: -

“Your letter referenced 2MOK/RM/NO.17 dated 9/11/2017 refers.



Please be informed that the file is available in our registry for your further necessary action. You are also advised that the same did not take 2 minutes before its retrieved from the archives.”

6. What is the import of the above letter from the Court? That the Plaintiff is lethargic. But when the case is dismissed he wants to play victim. An Application to have the Plaint amended to include Jared Omingo Ombgoi as 2nd Defendant had been made on 4/8/2017 but nowhere is it shown in the file that this Application was ever prosecuted. What will the Plaintiff say about the fact that the amendment Application is still pending in Court? This cannot be attributed to the sickness of the Plaintiff's Donee of Power of Attorney. The Advocate did not require the Donne's presence to prosecute the same. It has been pending in Court for over 7 years now.
7. When all is said and done, the Plaintiff doesn't seem a serious person in as far as prosecuting this case is concerned. The case is now 24 years old from the date it was filed. The Court has for a long time been treated to a ground of shedding tears that “.....in the interest of justice, the Applicant should not be condemned unheard.....” As the Court is watching tears flow down the Applicant's cheeks, should it close its eyes or turn its eyes to the opposite side of the Respondent who is helplessly asking the Court why he should be in court corridors forever? 24 years waiting in the corridors of Court is not a short time. A child who was born when this case was filed in Court is now a University Graduate. We cannot afford this luxury. This case has even been further compounded by the fact brought up by the Plaintiff that during the pendency of the suit, the Defendant proceeded to transfer the suit property to a third party. Who knows the status of the suit land today? It may even have been complicated further. This case falls squarely on the rider in Mbogo & Another vs. Shah that the discretion is not indeed to assist a litigant who deliberately seeks to delay the course of justice and I add that it doesn't matter whether the delay of the course of justice is to the Applicant or to the adverse party. But more importantly, I take cognizance of the fact that the Application before Court to reinstate the dismissed suit was made on 16/2/2024 to reinstate a suit that was dismissed on 16/11/2021 – 2 and half years. The delay is not only inordinate but also inexcusable. The Application is accordingly dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF OCTOBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Okenye holding brief for Mr. Mokuu.

Defendants' Counsel: Ms. Chepkorir.

