



**Gatheru v Kisii County Government & another; National Land Commission (Interested Party) (Environment & Land Case 74 of 2015) [2023] KEELC 187 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 187 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 74 OF 2015**

**M SILA, J  
JANUARY 25, 2023**

**BETWEEN**

**JOHN KAHANYA GATHERU ..... PLAINTIFF**

**AND**

**KISII COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**EXECUTIVE COMMITTEE MEMBER, LANDS, KISII COUNTY  
GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

*(Application to set aside an order of dismissal of suit for want of prosecution; notice not served upon the plaintiff's counsel; application allowed and suit reinstated)*

**RULING**

1. Before me is an application dated February 4, 2022 filed by the plaintiff. The application seeks to set aside the order of January 13, 2018 which dismissed the case of the applicant for want of prosecution. The application is supported by the affidavit of the applicant. He avers that he filed this suit through the law firm of M/s Oguttu Mboya & Company Advocates. He then changed counsel to M/s N.E Mogusu & Company Advocates. He deposes that the notice to show cause why the suit should not be dismissed was not served on M/s N.E Mogusu & Company Advocates, who were then on record, but instead was served upon M/s Oguttu Mboya & Company Advocates who were no longer on record. He states that he has been heavily prejudiced by the order of dismissal.
2. The defendants did not file anything to oppose the motion, though when the matter came up for *inter partes* hearing, Mr Oirere, learned counsel for the defendants, asked me to look into a ruling of September 18, 2015 made by predecessor, Mutungi J. I have gone through that ruling. I can see that it



was a ruling in respect of an application for injunction, dated February 23, 2015, that the applicant had filed contemporaneously with the plaint. The judge dismissed the application as he was not satisfied that the plaintiff had demonstrated a *prima facie* case. The applicant had contended that he held a lease from the respondent, but despite this, the respondent had moved in and taken over the premises. The respondent disputed the lease and further averred that it took over possession because the applicant had not developed the suit land as agreed. The judge held the opinion that the land had not been developed within the time stipulated in the lease. He added that even if the applicant had satisfied the conditions for grant of an injunction, he would not have given it, as he found evidence of tampered documents filed alongside the application. I am not sure if this is what the respondent wants me to consider.

3. Whatever the case, from the record, I can see that on November 16, 2015, the law firm of M/s N.E Mogusu & Company Advocates filed a notice of change of advocates, taking over the suit on behalf of the applicant from the law firm of M/s Oguttu Mboya & Company Advocates. The notice to show cause was issued on August 14, 2018, and indeed, it was addressed to the law firm of M/s Oguttu Mboya & Company Advocates, and served upon this firm on September 19, 2018. The notice was canvassed on November 13, 2018, without there being any appearance on behalf of the applicant, with only Mr Oirere being present for the defendants. In those circumstances, it cannot be said that the applicant was properly served with the notice to show cause. His counsel on record was not served meaning that he was not given an opportunity of being heard before the suit was dismissed. I am thus persuaded to set aside the order dismissing the suit for want of prosecution and reinstate the applicant's suit. The applicant is at liberty to take steps to have the case heard.
4. I make no orders as to the costs of this application.
5. It is so ordered.

DATED AND DELIVERED AT KISII THIS 25 DAY OF JANUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

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