



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 92 OF 2018

NZUVE MATHEKA

MAUNDU MATHEKA

MUOKI MATHEKA.....PLAINTIFFS/APPLICANTS

VERSUS

JOSEPHINE YULA ONESMUS.....DEFENDANT/RESPONDENT

RULING

1. On **22nd October, 2019** this matter came up before court for hearing. The same was dismissed for want of prosecution and non-attendance.

2. The plaintiffs subsequently lodged the application dated 13th August, 2020 and filed on 19th August, 2020 seeking the following orders:-

a) That this honourable court be pleased to set aside and or review its orders made on 22.10.2019 dismissing the plaintiff's suit for want of prosecution and the suit be reinstated for hearing and final determination.

b) Any other and or further order the court may deem fit and just to grant in the circumstances.

c) Costs of this application be in the cause.

3. In the supporting affidavit and the grounds at the base of the application, the 1st plaintiff/applicant averred that their suit was dismissed for want of prosecution, that the plaintiffs'/applicants' suit had very high chances of success, that they are apprehensive that the defendant may dispose of a parcel of land she held in trust for them hence deprive them of their rightful inheritance and that the mistake caused by the clerk at their advocate's office should not be visited upon them.

4. In her response to the application, the defendant/respondent filed a replying affidavit dated **11th September, 2020**. She deposed that after filing the suit and the defendant/respondent filing her defence, no pretrial directions were ever taken owing to reluctance on the part of the plaintiff/applicant, the application is dated 13th August, 2019 yet the orders sought to be reviewed or set aside were made on 22nd October, 2019 that there was inordinate delay between the time the application was drawn in 2019 and the filing in 2020, that the plaintiffs/applicants admit service of the hearing notice but do not name the clerk at the advocates' office or have him swear affidavit on what transpired, that the plaintiffs'/applicants' advocate has also not sworn any affidavit to confirm the truth of the allegation, that there is no explanation for failure to prosecute the case before its dismissal and or the delay in seeking to have the dismissal orders set aside, that the plaintiffs/applicants are bent on dragging the defendant/respondent through costly, time consuming litigation and she urged this court to bring litigation to an end by dismissing the application and let the main suit remain dismissed. She prayed for costs of the application and the main suit.

5. The plaintiffs/applicants filed submissions on the instant application on 13th July, 2021 while the defendant/respondent filed her on 2nd August, 2021. I have considered those submissions.

6. The plaintiffs'/ applicants' submissions were that the mistake of the plaintiffs'/applicants' counsel should be visited upon an innocent client. That their advocates on record were unaware that the suit was coming up for hearing in court on 22nd October, 2019 when the same was dismissed for want of prosecution. That failure to attend court was not intentional but due to misplacement of the mention/ hearing notice served upon the clerk of the firm of J.K. KIMEU & CO. ADVOCATES. That upon perusal of the court file, they discovered that the suit had been dismissed for non-attendance and want of prosecution.

7. The plaintiffs/applicants submitted that the matter had not gone to full hearing and hence the dismissal meant they were condemned unheard which violates the principles of natural justice. That considering the circumstances of the case and its emotive nature, this court should exercise its discretion and allow the application. They cited the case of *Bilhangonyoissac V Kembu Farm Limited & Another [2018] Eklr Civil Appeal No. 145 of 2014.*

8. In conclusion, the plaintiffs/applicants submitted that they have demonstrated sufficient cause to warrant grant of the orders sought. They have demonstrated good faith and interest in prosecuting the suit. They urged the court to allow the application herein in order for the parties to ventilate their issues at the full hearing.

9. The defendant's/respondent's submissions were that there is serious issue of the date when the application for review was drawn prior to the dismissal orders has not been explained by the plaintiffs/applicants in their submissions or filed a further affidavit.

10. The defendant/respondent submitted that the plaintiffs/applicants will not be condemned unheard since a chance was granted to them but they did not appear or give a satisfactory explanation.

11. The defendant/respondent submitted that the inordinate delay in filing the application to review or set aside the orders of 22nd October, 2019 was not explained.

12. The defendant/respondent submitted that there ought to be an end to litigation. This matter resulted from earlier litigation in **Makueni H.C.P.A & A NO. 66 OF 2017** formerly **Machakos H.C.P. & A. NO 204 of 1998**. Land is an emotive matter but the plaintiffs/applicants should have acted prudently and expeditiously. She therefore urged this court that the application be dismissed with costs to the respondent.

13. The main issue for determination in this application is whether the court should set aside the dismissal order and reinstate the plaintiff's suit for hearing on its merits.

14. The application dated 13th August, 2020 is brought under **Order 45 and 51** of the **Civil Procedure Rules and Sections 3A and 80** of the **Civil Procedure Act**.

15. **Order 12 Rule 3** of the **Civil Procedure Rules** allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside the order and reinstate the suit.

16. In the case of *Shah -v- Mbogo (1967) EA 116*, it was stated that:

“the exercise of discretion of the court to set aside ex-parte Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.”

17. I have perused the grounds on which the application is made and I find that the main ground was that the plaintiff's/applicants' advocate was not aware the matter was coming up in court on 22nd October, 2019.

18. Ten months later, the plaintiffs/applicants are seeking to reinstate the suit on the ground that their advocate was not aware the matter was coming up for hearing. The advocate on record has not sworn an affidavit to narrate the events.

19. The reasons given by the plaintiffs/applicants for the reinstatement of the suit are not only unconvincing, but are also not valid. It is trite that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. The plaintiffs/applicants want this court to reinstate the suit as a matter of course. That is unacceptable, because doing so will mean that the business of the court is subservient to the whims of litigants and their advocates.

20. Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter, or when the matter is dismissed because it has not been prosecuted or fixed for prosecution within one (1) year.

21. Having failed to make a follow-up on their matter since August 2018 when the plaint was filed, until the year 2019 when the suit was dismissed, shows that the plaintiffs/applicants were not interested in pursuing their claim within a reasonable period. It does not therefore matter that their advocate was not aware that the matter was coming up for notice to show cause why the suit could not be dismissed. Litigation must come to an end. In the instant case, litigation came to an end when the suit was dismissed on 22nd October, 2019.

22. Clearly, a litigant remains the driver of his case and whether the advocate was not aware the matter was due in court is no explanation on why there was no action from 22nd October, 2019 when the case was due for hearing. It was only in mid-August 2020, 19th August to be precise that the plaintiffs/applicants moved the Court to reinstate the suit which had been dismissed in October 2019. The applicant had done nothing since 22nd October, 2019 which was in excess of ten months since the matter was last in Court. In my considered view, the plaintiffs/applicants have lost interest in the case which in any event had remained pending and not concluded over 1 year since its inception. They were not diligent in the prosecution of their case and the inevitable result of the motion to reinstate is that the suit must lie where it is – concluded by way of dismissal. Motion is dismissed albeit with no order as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT NAROK ON THIS 28TH DAY OF OCTOBER, 2021.

MBOGO C.G

JUDGE

28/10/2021

IN THE PRESENCE OF: -

MR. TIMOTHY CHUMA – COURT ASSISTANT



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