



Case Number:	Environment and Land Case 192 of 2016
Date Delivered:	13 Nov 2020
Case Class:	Civil
Court:	Environment and Land Court at Malindi
Case Action:	Ruling
Judge:	James Otieno Olola
Citation:	Patrick Mwarua Malidzo & 2 others v Nyenyo Tembo Mwavuma & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Motion partly allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 192 OF 2016**

**1. PATRICK MWARUA MALIDZO**

**2. STEPHEN OGONY ASANYO**

**3. HELLEN JUMWA KARISA.....PLAINTIFFS**

**VERSUS**

**NYENYO TEMBO MWAVUMA**

**CHARLES NDERITU KARISA.....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated 10<sup>th</sup> June 2019, the three Plaintiffs/Applicants urge this Court to be pleased to review and set aside the orders made herein on 30<sup>th</sup> May 2019 in respect of the Notice to Show Cause issued by the Court on 20<sup>th</sup> March 2019. They further urge the Court to review and set aside the orders made on 11<sup>th</sup> April 2018 in respect of the Notice of Motion dated 9<sup>th</sup> March 2018.

2. The application is expressed to be provided on a number of grounds listed inter alia, as follows:

*i) That the order of 30<sup>th</sup> May 2019 was made on account of a mistake or error apparent on the face of the record, to wit, that the suit had not been prosecuted since the year 2017;*

*ii) That one year had not lapsed since the last action taken in the matter by the time the Notice to Show Cause was issued on 20<sup>th</sup> March 2019 as it had last been in Court on 11<sup>th</sup> April 2018 for the hearing of an application by the 2<sup>nd</sup> Defendant;*

*iii) That the effect of the order made on 11<sup>th</sup> April 2018 was to set aside the orders of 22/9/2016 and 22/2/2018 in legally dubious circumstances and to allow the 2<sup>nd</sup> Defendant leave to reply to the Plaintiffs application dated 26/7/2016 and 3/11/2016 and to file his defence unconditionally;*

*iv) That the ambiguous nature of the order made on 11<sup>th</sup> April 2018 appeared to reopen the said applications to which the 2<sup>nd</sup> Defendant was granted leave to reply;*

*v) That it is therefore unclear what was the next step the Plaintiffs were to take in the circumstances as they awaited the 2<sup>nd</sup> Defendant's replies to the applications which were never filed;*

*vi) That in any case there was never a great delay as to warrant dismissal of the suit as a mention date was taken on 27<sup>th</sup> November 2018 for 20<sup>th</sup> March 2019, less than a year after the previous hearing on 11/4/2018.*

3. The 2<sup>nd</sup> Defendant/Respondents is opposed to the application. In Grounds of Opposition dated and filed herein on 7<sup>th</sup> October 2019, the 2<sup>nd</sup> Defendant asserts:

*1. That there is no mistake/error apparent on the face of the record and none has been approved by the Applicant because the*

*last action to be taken by the parties was on 11/4/2018 while the order dismissing the suit was made on 30/5/2019 by which time one year had lapsed.*

**2. That Court Orders of 11/4/2018 cannot be a subject of review in the application because the Applicants were served with the application and they never opposed it. In any event there is delay of more than a year from the date the orders were issued which unreasonable delay has not been explained.**

**3. That the applicants have not met the other conditions required as they have not shown discovery of a new and important matter which after the exercise of due diligence was not within their knowledge at the time the order was passed and the Applicants have not offered any sufficient reason to have the Court grant the orders of review.**

4. In addition to the Grounds of Opposition, Charles Nderitu Theuri (the 2<sup>nd</sup> Defendant) has also sworn a Replying Affidavit filed herein on the same 7<sup>th</sup> day of October 2019 wherein he reiterates the issues stated in the Grounds of Opposition and further discloses that the 1<sup>st</sup> Defendant has since died. It is his case that since a year has lapsed since the death of the 1<sup>st</sup> Defendant, the suit against him has abated and the orders sought herein are not useful and ought not to be issued in vain.

5. I have perused and considered the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. Order 45 Rule 1 of the Civil Procedure Rules set out the requirements for an application for review as follows:

*“Any person considering himself aggrieved*

*a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any sufficient reason, desires to obtain a review of the decree or order;*

*May apply for review of the Judgment to the Court which passed the decree or made the order without unreasonable delay.*

7. In the matter before me, the Applicants fault the dismissal of their case for want of prosecution on 30<sup>th</sup> May 2019 on the ground that the same was made on account of an error apparent on the face of the record. It is the Plaintiffs case that contrary to the decision of this Court that no action had been taken to prosecute the case since the year 2017, one year had not lapsed as at the time when this Court issued a Notice to the Plaintiffs on 20<sup>th</sup> March 2019 calling upon them to show Cause why their suit should not be dismissed for want of prosecution.

8. From a perusal of the record herein, it is evident that by a Notice dated 10<sup>th</sup> April 2019 (and not 20<sup>th</sup> March 2019 as stated by the Plaintiffs/Applicants), the Honourable Deputy Registrar of this Court did give notice to all parties in this dispute requiring them to attend Court and to show cause why their suit should not be dismissed for want of prosecution.

9. That said notice was issued to the parties pursuant to Order 17 Rule 2 of the Civil Procedure Rules which allows the Court to regulate the prosecution of cases filed before it as follows:

*“2. (1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.*

*(2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*(3).....”*

10. From a further perusal of the record, it is evident that this matter was in Court on 11<sup>th</sup> April 2018 when the 2<sup>nd</sup> Defendant's application dated 9<sup>th</sup> March 2018 was allowed. That being the case, it was clear to me that one year had not in actual fact lapsed as at the time the Honourable Deputy Registrar issued the Notice to show cause on 10<sup>th</sup> April 2019.

11. That being the case, it follows that my subsequent orders issued on 30<sup>th</sup> May 2019 dismissing the suit for want of prosecution were issued in error and must be revised as the minimum period envisaged under Order 17 Rule 2 prior to the issuance of such notice had not crystallised when the notice was given. It follows then that prayer No. 2 of the Motion must be allowed in the interest of justice.

12. As regards prayer No. 3 of the Motion on the orders allowing the 2<sup>nd</sup> Defendant's Motion dated 9<sup>th</sup> March 2018, it was clear again, from a perusal of the record, that none of the parties had opposed the same when it came up for hearing. While the Plaintiffs contend that the application was res judicata, the Plaintiffs have not shown how the application was res judicata and why they failed to oppose the same despite service.

13. The issue of res judicata ought to have been raised as a response to the application when it came for hearing. The Plaintiffs have not supported their current application with any affidavit and there is absolutely no explanation placed before me why they or their Advocates on record failed to attend Court or to respond to the application when or before it came up for hearing on 11<sup>th</sup> April 2018. Accordingly, there is no basis upon which this Court can exercise its discretion in their favour.

14. In the result, the Motion dated 10<sup>th</sup> June 2019 only partially succeeds. I allow the same in terms of Prayer No. 2 with costs to be in the suit.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of November, 2020.**

**J.O. OLOLA**

**JUDGE**



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