



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 1000 OF 2003**

**FIDELITY HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**GEORGE KIBUE.....1<sup>ST</sup> DEFENDANT**

**FRANK KARENGE.....2<sup>ND</sup> DEFENDANT**

**NJUGUNA T/A THIKA TEX SUPERMARKET.....3<sup>RD</sup> DEFENDANT**

**MBURU NDUNGU T/A JOPHY HARDWARE.....4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's undated Notice of Motion application was filed on 30<sup>th</sup> November 2018 pursuant to the provisions of Section 1A, 1B,3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 9 Rules 5,9 and Order 61 Rule 1 of the Civil Procedure Rules and Section 13(1) and (2) and all enabling provisions of the Law. Prayer No (1) was spent. It sought the following orders:-

**1. Spent.**

**2. THAT leave be granted to the Director Mr. Peter K. Mwaura to come on record for the Plaintiff.**

**3. THAT this Honourable Court be pleased to review and set aside its order given on the 3<sup>rd</sup> July 2014 by Hon Mr. Justice Onyancha dismissing the case.**

**4. THAT costs of this application be borne by the Defendants**

2. On 6<sup>th</sup> December 2019, the Plaintiff filed a Notice of Motion application dated 5<sup>th</sup> February 2019 seeking to have Eric Kinyua Advocate come on record on its behalf. The said application was allowed.

3. The court had by this time already given the directions on the filing of written submissions. The Plaintiff's Written Submissions were dated 21<sup>st</sup> January 2019 and filed on 23<sup>rd</sup> January 2019 while those of the 1<sup>st</sup> to 4<sup>th</sup> Defendants were dated and filed on 31<sup>st</sup> January 2019. The 5<sup>th</sup> Defendant did not participate in the proceedings herein despite having been served with a Mention Notice as was evidenced in the Affidavit of Service of David Kihia Muraya that was sworn on 21<sup>st</sup> February 2019 and filed on 23<sup>rd</sup> January 2019.

4. Parties asked this court to deliver its decision based on Written Submissions that they fully relied upon. The said Ruling is therefore based on the said Written Submissions.

**THE PLAINTIFF'S CASE**

5. The Plaintiff's affidavit in support of his present application was sworn on 29<sup>th</sup> November 2018.

6. He stated that he was a Director of the Plaintiff Company. He attached copies of documents to prove the Plaintiff's ownership of R/M Parcel Nos 867 to 876

7. He contended that his advocates at the time M/S Mutembei Chabari & Co Advocates never once contacted him during the hearing of the case until the suit was dismissed on 3<sup>rd</sup> July 2014 by Onyancha J (as he then was).

8. He averred that the mistakes of his counsel should not be visited on him. He explained that he filed the present application four(4) years after the suit had been dismissed because the file could not be traced.

9. He therefore urged this court to review and/or set aside the order of Onyancha J to give him an opportunity to prosecute the matter even under strict timelines as he had an arguable case.

### **THE 1<sup>ST</sup> – 4<sup>TH</sup> DEFENDANTS' CASE**

10. In opposition to the said application, on 19<sup>th</sup> December 2018, the 1<sup>st</sup> Defendant swore a Replying Affidavit on his own behalf and on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants. It was filed on 20<sup>th</sup> December 2018.

11. The 1<sup>st</sup> to 4<sup>th</sup> Defendants contended that the Plaintiff had displayed a lack of interest in prosecuting its claim as it did not take any steps to prosecute the same even after the court had given time lines within which it was to be prosecuted.

12. They were categorical that the Plaintiff had failed to demonstrate any grounds for review of the case and that its assertions that its advocates had acted in a manner that amounted to professional negligence was a matter between it and his advocates.

13. They pointed out that litigation had to come to an end and thus asked this court to dismiss his application for lack of merit.

### **LEGAL ANALYSIS**

14. In its Plaintiff dated 29<sup>th</sup> September 2003 filed on even date, the Plaintiff stated that it was the registered owner of the subject property as it had a valid Certificate of Lease for the same.

15. It averred that when it enquired from the Town Clerk of Thika Municipal Council, he informed it that the said plot had been sub-divided and allocated to new owners, which it contended was illegal, unlawful, high handed and in total regard of its proprietary right and interest.

16. On 28<sup>th</sup> January 2004, the Plaintiff filed an Amended Plaintiff dated 28<sup>th</sup> January 2004 in which it joined the Defendants herein as parties to the suit. In addition to the reliefs it had sought in its original Plaintiff, he sought the following additional relief against the Defendant (sic):-

**“An order that the Defendants do deliver vacant possession of Thika Municipality Block II/873 and in default the Defendants be evicted from the same”**

17. On 26<sup>th</sup> October 2015, the Plaintiff filed a Notice of Motion application of even date seeking to have the suit transferred from the High Court to the Environment and Land Court for hearing and final determination.

18. However, in his decision delivered on 3<sup>rd</sup> November 2015, Serگون J struck out the Defendant's Notice of Motion application dated 9<sup>th</sup> September 2015 and filed on 17<sup>th</sup> September 2015 seeking that the Plaintiff's suit be dismissed for want of prosecution and the Plaintiff's aforesaid Notice of Motion application dated and filed on 26<sup>th</sup> October 2015 on the ground that there was no pending suit, the same having been automatically dismissed after the Plaintiff failed to comply with the order of Onyancha J (as he then was) made on 3<sup>rd</sup> July 2014. The order was to the effect that if the Plaintiff did not prosecute its case within twelve (12) months, it would stand as dismissed unless it persuaded the court otherwise.

19. This court carefully considered the parties' Written Submissions. However, it noted that the dispute herein touched on the ownership and title of all that parcel of land known as Thika Municipality Block II/873 (herein referred to as “the subject property”)

20. Article 162 (2) (b) of the Constitution of Kenya, 2010 provides that:-

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.”**

21. Section 13 of the Environment and Land Act No 19 of 2011 states that:-

**1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and other dispute relating to environment and land.**

22. It therefore appeared to this court that this was a matter that ought to be heard and determined by the Environment and Land Court, despite the order of 3<sup>rd</sup> July 2014 having been made by Onyancha J (as he then was). It noted that at the time he delivered his Ruling, there was no Environment and Land Court, the same having been established after the promulgation of the Constitution of Kenya in 2010.

23. As this court lacked jurisdiction to deal with this case, it must down its tools immediately as was held in the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) eKLR**

#### **DISPOSITION**

24. For the foregoing reasons, this court did not consider the Plaintiff's application filed on 30<sup>th</sup> November 2018 on merit and/or analyse the parties' Written Submissions due to a jurisdictional challenge. It is therefore hereby directed:-

**1. THAT this file be and is hereby transferred to the Environment and Land Court for the hearing and determination of the Plaintiff's aforesaid application and/or for further orders and/or directions.**

**2. THAT the file be placed before the Presiding Judge of the Environment and Land Court for mention on 8<sup>th</sup> July 2019 for his further orders and/or directions.**

25. It is so ordered.

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of June 2019**

**J. KAMAU**

**JUDGE**