

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 999 OF 2003

MARY NJERI WAINAINA.....PLAINTIFF

VERSUS

MESHACK KANGA GATHERU.....1ST DEFENDANT

MESHACK KANGA GATHERU.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

This is an application by way of Notice of Motion brought by the plaintiff under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 4, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules for leave to act in person and also review and set aside of the orders given by this court on 9th December, 2014. The reasons for seeking those orders appear on the face of the application alongside an affidavit sworn by the plaintiff.

Going by the record, this suit was filed on 29th September, 2003. The plaint was subsequently amended on 18th February, 2004. The defendants filed their respective defences but since then this matter has not been determined. There is an application on record dated 30th October, and filed on 1st November, 2012 by the then advocate for the plaintiff seeking leave to cease from acting for the plaintiff for reasons that the plaintiff had failed and or refused to give the said advocate full, proper and further instructions in the matter.

The record does not show whether or not the said application was ever heard but there is a Notice of Change of advocate dated 5th March, 2014 and filed on 5th March 2014 by C.M. Ngugi Rebero & Co. Advocates, taking over from Wachira Nderitu & Ngugi Advocates, who were until then the advocates for the plaintiff. This was followed by yet another Notice of Change of advocate filed on 4th July, 2014 by Mutembei Chabari and Co. Advocates taking over the matter on behalf of the plaintiff.

The record shows that a hearing notice was served upon the firm of Mutembei Chabari & Co. Advocates on 16th July, 2014 showing that the application seeking dismissal of the plaintiff's case would come up for hearing on 9th December, 2014.

On the date the application called out for hearing, only the advocate for the 2nd defendant appeared. The court observed that the plaintiff had been served and noted further this is an old matter, and whereas courts should be inclined to sustaining the suit, no adequate reason had been placed before it to explain the delay. The suit was then dismissed for want of prosecution with costs to the 2nd defendant.

There is already a notice by the plaintiff to act in person filed on 9th November, 2018 and served upon Mutembei Chabari & Company Advocates who were on record for the plaintiff. In the present application, the plaintiff depones that she was neglected by her advocates, who also refused to hand over the file to her hence all the delay. Although her advocate was served with the hearing notice, he did not appear during the hearing. When she learnt of the dismissal of the case, she moved with haste and realised the mistake of her advocate. She depones further that she should not be penalised for the negligence of her advocate.

A replying affidavit has been sworn by the 2nd defendant in opposing the application. I have considered all the material on record. It is true that the hearing notice was served upon the then advocate for the plaintiff. She however, did not exercise due diligence to find out the progress of her case and instead relied on her said advocates.

That notwithstanding, considering the subject matter involved which is land, I am inclined to exercise my discretion in favour of the plaintiff and set aside the dismissal order aforesaid, which I hereby do. The suit is therefore reinstated but the plaintiff shall pay to the 2nd defendant the costs occasioned by this application.

I have observed this is an old case, but beyond that I am unable to give any directions as to its transfer, hearing and completion because it is a land dispute. Having said so, this file shall be forwarded to the Presiding Judge of the Environment and Land Court Division for appropriate directions.

Dated, signed and delivered at Nairobi this 19th Day of December, 2018.

A.MBOGHOLI MSAGHA

JUDGE