



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO. 208 OF 2017

HANNAH WANJIRU NYONGO.....1ST PLAINTIFF

SAMUEL KAGICA NYONGO.....2ND PLAINTIFF

MONICAH MURUGI NYONGO.....3RD PLAINTIFF

VS

FRANCIS NGAMAU WANYUGI.....1ST DEFENDANT

THE TRUSTEES OF URUMWE WA AKOMBORI SELF HELD GROUP

(Martine Thumbi Muchai, Philip Wachira Ngatia and Muchiri Kanyagia Boithi).....2ND DEFENDANT

RULING

1. The Application before Court is dated 29/7/2021 by the 1ST Defendant seeking Orders that the suit be dismissed for want of prosecution and an award of costs.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of **Francis Ngamau Wanyugi**, the 1ST Defendant of even date. He deponed that despite filing her suit in 2017, the Plaintiff has not set it down for hearing for over two years. That the said inaction is prejudicial to him and thus urges this Court to dismiss the suit.
3. The Application is opposed by the Replying Affidavit of Learned Counsel **Margaret Wanjiku Mwaura** dated 1/11/2021 on behalf of the Plaintiff. Conceding the application, she avowed that it was an oversight on the part of her filing clerk who archived the file with other closed files. That it was not until they were served with the instant Application that prompted a search and tracing of the file and now seek Court's indulgence to prosecute the case on merit.
4. The application was argued orally before Court on 3/11/2021. The Defendant submitted that the matter was last in Court on 25/7/2017 and after an order for status quo was granted, the Plaintiff went into a long slumber. That the Plaintiffs counsel's indolence should not be excused by this Court.
5. On the other hand, the Plaintiff's counsel maintained that the 1ST Plaintiff passed on and she was not informed. That the misfiling in her chambers was not deliberate and her clients ought not be condemned unheard.
6. The germane issue for determination is whether the application is merited. This suit was filed on 27/2/2017 vide a plaint dated 23/2/2017. Contemporaneously, the Plaintiff sought temporary injunction against the Defendant vide a notice of motion of even date. On 25/7/2017, by consent, parties agreed to compromise the application by maintaining status quo over the suit property pending determination of the suit. Indeed no action took place for over a year prompting the Defendant to file the first application dated 28/9/2019 for dismissal of the suit for non-prosecution. On 16/10/2018, the Honourable Court directed the Defendant to abandon the said application and ordered parties to comply with Order 11 Civil Procedure Rules to pave way for hearing. What followed were a series of mentions before the Deputy Registrar until the Defendant filed the instant application.
7. Order 17 Rule (2)(3) of the Civil Procedure Rules allows any party in any suit in which no application has been made or step taken by either party for one year, without any satisfactory cause to apply for dismissal of such suit. It is not disputed that this is the second application seeking to dismiss this suit for want of prosecution. The Plaintiff's counsel deposed that the failure to prosecute was due to misfiling of this file with concluded matters of 2018. There is no evidence by way of affidavit of the alleged clerk to augment that averment.

Be that as it may the first application dated 28/9/2018 was served upon the Plaintiff on 5/10/2018 and was never responded to. See Return of Service sworn by David Njoroge Mburu on 12/10/2018 and filed on 15/10/2018.

8. It is trite that the mistake of counsel ought not be visited on an innocent litigant. However when no plausible explanation has been given then Counsel cannot take shield under the said principle. It would appear to the Court that even the Plaintiff never took any interest to follow up on her case. It is only at the hearing, that the Plaintiff's counsel submitted that the 1st Plaintiff had since passed on without her knowledge. Had the Plaintiff actively pursued her matter, the impugned misfiling of the file would have been detected and dealt with. The Plaintiff has continued to enjoy status quo orders for almost five years and the Defendant has lamented the prejudice occasioned on him.

9. Under Section 1 of the Civil Procedure Act the Court is enjoined inter alia to ensure the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources and timely disposal of the proceedings. In my opinion, the Plaintiff has not satisfactorily explained the inaction on her part for the Court to exercise discretion in her favour.

10. However, purely in the interests of justice and promoting the right to a fair hearing as espoused in Article 50 of the Constitution, I reject the application and make the following orders;

a. The Plaintiff to pay Kshs. 30,000/- as throw away costs to the Defendant within the next 30 days from the date of this Ruling.

b. The Plaintiff to set down this suit for hearing within thirty (30) days from the date of this Ruling.

c. In default of (a) and (b) the suit shall stand dismissed with no further orders from this Court.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mrs. Mwaura for 1st, 2nd and 3rd Plaintiffs

Ms. Kanja for 1st Defendant

2nd Defendant – absent

Ms. Phyllis – Court Assistant