

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

CIVIL CASE NO.198 OF 2011(O.S)

AGNES WANGUI THEURI.....PLAINTIFF

VERSUS

PETER THEURI MUNDIA.....DEFENDANT

RULING

On the 15/12/2011, the plaintiff filed an Originating Summons under Order 37 of the Civil Procedure Rules 2010 and Section 17 of the Married Women's Property Act 1882. The Originating Summons was accompanied with an application for temporary injunction filed under certificate of urgency and dated the same day. The application was certified urgent and interim orders of injunction were granted pending inter-parte hearing on 16/1/2012. This orders were issued on the 15/12/2011.

The defendant filed a memorandum of Appearance on the 5/11/2012 followed by a replying affidavit on the 3/2/2012. Another replying affidavit titled, "replying affidavit to the Originating Summons" dated 16/12/2011 was filed on 21/2/2012.

On the 4/5/2012, the Notice of Motion dated 15/12/2011 was marked as withdrawn, costs in the cause. However, another Notice of Motion was filed on the 31/7/2012 seeking to join one Elias Maina Theuri as interested party and to restrain the defendant from evicting Elias Maina Theuri, David Mwai Theiru and James Mundia Theuri inter alia who are sons of the plaintiff and defendant.

The application was certified urgent and the same was to be given an inter-parte hearing date o priority basis.

No action was taken by the plaintiff from the 31/7/2012 until the defendant filed an application to dismiss the suit on 28/4/2014 for want of prosecution. The application is based on the grounds that the plaintiff herein filed a suit against the defendant on 15th December 2011 seeking a declaration from the Honourable Court that she was entitled to some of the defendant's properties. The plaintiff subsequently filed an application on the same day seeking a temporary injunction against the defendant from dealing with parcel of land reference number MUHITO/GATURIA/944 but withdrew the said application on 4th May 2012 with no orders as to costs. Thereafter the main suit has never been heard as it has never been listed for hearing and has been pending before this Honourable Court for over two years without the plaintiff taking any action to prosecute it.

In the supporting affidavit by Peter Theuri Mundia, he depones that the plaintiff herein filed a suit against him on 15th December 2011 seeking a declaration from the Honourable Court that she was entitled to some of his properties. The plaintiff subsequently filed an application on the same day seeking a temporary injunction against him from dealing with the parcel of land reference **No.MUHITO/GATURIA/944**. That he filed a Memorandum of Appearance, a reply to the said application and the Originating Summons. That when the application came up for hearing on 4th May 2012 the same was withdrawn with no orders as to costs by the plaintiff. That for over two years the main suit has been pending before this Honorable Court. The plaintiff has never taken any action to prosecute this suit as it has never been listed for hearing. The plaintiff is not keen on prosecuting this suit hence the same should be dismissed with costs for want of prosecution. That there is no justifiable reason why a suit should be kept pending in court for this long as it is against the rules of procedure. In the

interest of justice and fairness this application should be allowed so that this matter can come to an end.

This application jolted Mr. Muthoni into action hence he filed an application for directions as to how the Originating Summons should be dealt with. Moreover, a replying affidavit sworn by the defendant was filed on 22/5/2014 whose gist is that the case cannot be heard before directions are taken.

I do agree with Mr. Muthoni that directions in this case had not been taken. Order 37 rule 16 provides that the Registrar shall within 30 days of filing of the Originating Summons and with Notice to the parties list it for directions before a judge in chambers. This rule has not been complied with. Though the plaintiff has rested on her laurels, she cannot be punished for the failure of the Registrar to comply with order 37 rule 16. The parties have concentrated on side shows but failed to address the main issues in the Originating Summons. In exercise of my judicial authority as conferred by Article 159 of the Constitution of Kenya, guided by the principles that justice shall not be delayed I do give directions that the originating summons dated 16th December, 2011 be and are hereby treated as a plaint whilst the replying affidavit sworn on 20th February, 2012 be, and is hereby, treated as defence Hearing through viva voce evidence.

The upshot of the above is that the application is dismissed with no order as to costs.

Dated, signed and delivered at Nyeri this 20th day of June 2014.

A. OMBWAYO

JUDGE