



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 35 'A' OF 2012**

**SHADRACK KINYUA MBOGO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ESTON NGARI MBOGO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BENSON MBOGO GACHAU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SOLOMON PAUL MUCHIRI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

On 29<sup>th</sup> July 2013 when this case came up for hearing, the plaintiff's advocate, though served, was absent and at the application of Mr. Kahiga advocate for the 2<sup>nd</sup> defendant, this Court dismissed the plaintiff's suit for want of prosecution and also vacated an injunction issued on 25<sup>th</sup> March 2009.

On 31<sup>st</sup> October 2013, Mr. Ngangah advocate for the plaintiffs/applicants filed an application dated 30<sup>th</sup> October 2013 seeking the following orders:-

- 1. That the order of 29<sup>th</sup> July 2013 be set aside and the trial do proceed to hearing***
- 2. That the injunction orders in force before the said date be reinstated.***

The application is based on the grounds, inter alia, that the plaintiffs/applicants previous advocate did not keep them informed of the true position of the case and that they only learnt about the orders of 29<sup>th</sup> July 2013 from the area chief. The same is supported by the affidavit of SHADRACK KINYUA MBOGO the 1<sup>st</sup> plaintiff/applicant herein.

The application is opposed and in his replying affidavit, the 2<sup>nd</sup> defendant/respondent has depend, inter alia, that no good reasons have been advanced as to why the orders of 29<sup>th</sup> July 2013 should be set aside yet the plaintiffs/applicants' advocates had been duly served and in any event, he has since acquired the land subject matter of this suit and granting the orders sought will amount to evicting him.

Both parties have filed submissions which I have considered together with the application herein.

It is the discretionary power of the Court to dismiss a suit for want of prosecution particularly where the defendant demonstrates that the plaintiff's default in pursuing his claim has been intentional or irresponsible. A Court should be slow to dismiss a suit for want of prosecution unless it can be shown that there has been flagrant and culpable inactivity on the part of the plaintiff. At this point in time, the

Court will normally not go into the merits or otherwise of the case.

In seeking to persuade this Court to reinstate his case and reinstate the injunction orders, the plaintiff/applicant has laid blame on his previous advocate who he says did not keep him informed about the progress of the suit. It is of course true that an advocate's mistake should not be visited on the client especially if the said client is a layman – **SOLOMON NJUGUNA VS KENYA SAVINGS AND MORTGAGES AND ANOTHER C.A CIVIL APPEAL NO. 53 OF 1996 (NBI)** and also **SHABIR DIN VS RARI PARKASH ANAND (1955) 22 EACA 48**. There is however no evidence placed before me to suggest that infact it was the plaintiff/applicant's advocate who was in the wrong. If the advocate then on record had inadvertently or otherwise failed to keep the plaintiffs/applicants informed about the progress of their case, nothing would have been easier than for the said advocate to depone as much. As matters stand now, the Court is not certain whether infact the failure to attend Court by the plaintiffs/applicants or their advocate was due to an excusable mistake.

Having said so, however, I notice from the record that when the parties appeared before Justice W. Karanja in High Court Embu on 17<sup>th</sup> October 2010, the Judge made the following orders:-

***“Directions given that to the effect that the Originating Summons will be treated as the plaint. The Replying Affidavit as the Defence. Matter to proceed by way of viva voce evidence. Parties to do discovery and file the statements of agreed issues before the matter can be set down for hearing”***

That appears not to have been done from the record and indeed when the matter was listed before me on 9<sup>th</sup> May 2013. I made the following orders:-

***“The agreed issues have not been filed. Let them be filed before the hearing which is on 18<sup>th</sup> June 2013. 1<sup>st</sup> defendant be served”***

From my perusal of the file, it is clear that infact the order of Wanjiru J. dated 17<sup>th</sup> October 2010 and my order dated 9<sup>th</sup> May 2013 had not been complied with. In his affidavit in support of this application, the 1<sup>st</sup> plaintiff/applicant has deponed in paragraph 13 as follows:-

***“That our advocate on record inform us that the matter was dismissed even before the suit was ready for hearing as per our perusal of the court file”***

From what I have stated above, that averment by the 1<sup>st</sup> plaintiff/applicant that the suit was not ready for trial is true. The suit could therefore not properly be dismissed as the Court purported to do on 29<sup>th</sup> July 2013. It was an error on the part the 2<sup>nd</sup> defendant's advocate to move the Court to dismiss the suit under the circumstances and also an error on the part of the Court to accede to that request. Therefore, the orders of this Court dated 29<sup>th</sup> July 2013 must be set aside.

The 2<sup>nd</sup> defendant's advocate has taken issue with the fact that the application ought to have come under **Order 12 Rule 7 of the Civil Procedure Rules** and not under **Order 10 Rule 11 of the Civil Procedure Rules**. That is of course correct because there is a defence (replying affidavit) filed in response to the Originating Summons herein. However, that is a procedural technicality that can be cured by Article 159 of the Constitution and in any event, no prejudice was caused to the 2<sup>nd</sup> defendant/respondent. I therefore allow the plaintiffs/applicants Notice of Motion and set aside the orders dated 29<sup>th</sup> July 2013.

With regard to the reinstatement of the injunctive orders in force before that day, the 2<sup>nd</sup> defendant/respondent has deponed that he since acquired title to the land, taken possession of it and done developments thereon. That has not been disputed. However, in view of my findings above, the order that commends itself to me to make in the circumstances of this case is that defendants should not transfer, charge or in any other manner part with the suit property or carry out any other development thereon until this case is heard and determined.

The parties should also move with speed, file their agreed issues and have this matter listed for hearing expeditiously.

The 2<sup>nd</sup> defendant shall have the costs of this application.

Ultimately therefore, having considered the plaintiffs/applicants' application dated 30<sup>th</sup> October 2013 and filed herein on 31<sup>st</sup> October 2013, I make the following orders:-

***1. The orders issued on 29<sup>th</sup> July 2013 dismissing the plaintiffs suit is set aside and the suit to proceed to full trial***

***2. The 2<sup>nd</sup> defendant/respondent, his servants, agents, employees or anyone claiming under him is hereby restrained from transferring, charging or in any other manner partying with the property or carrying out any further development thereon until the case is heard and determined.***

***3. The parties should expedite the filing of agreed issues and fix the case for trial.***

***4. The 2<sup>nd</sup> defendant/respondent shall have the costs of this application.***

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> JULY, 2014**

31/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Ngangah for Plaintiff/Applicant – present

Mr. Kahiga for 2<sup>nd</sup> Defendant/ Respondent - present

COURT: Ruling delivered this 31<sup>st</sup> day of July 2014 in open Court.

Mr. Ngangah for Applicant present

Mr. Kahiga for 2<sup>nd</sup> Respondent present.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> JULY, 2014**